WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

NATIVIDAD SANCHEZ on behalf of LEONCIO TREJO (deceased), ***Applicant***

vs.

AGSER CONTRACTING; ZENITH INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ14970948
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the September 12, 2024 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) excluded from evidence the report of Bruce Gillis, M.D., and determined that applicant failed to sustain her burden of proof that Leoncio Trejo (decedent) sustained an industrial injury arising out of and in the course of employment causing his death.

Applicant contends that the WCJ erred in excluding the report of Dr. Gillis from evidence, and the evidentiary record establishes that decedent's death arose in part out of employment exposures.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report with respect thereto. Based on our review of the record, we will grant reconsideration and amend the WCJ's decision to admit into evidence the February 17, 2022 report of Bruce Gillis, M.D., but otherwise affirm the decision of September 12, 2024.

FACTS

Applicant claimed that decedent sustained injury arising out of and in the course of employment resulting in death while employed as a farm laborer by defendant Agser Contracting on June 29, 2021. Defendant has denied all liability for the injury.

Applicant retained Bruce Gillis, M.D., in the specialty of internal medicine to review the medical records of decedent and issue reporting relevant to the issue of injury arising out of and in the course of employment. On February 17, 2022, Dr. Gillis issued a five-page report concluding that decedent's work exposures contributed to his death. (Ex. 3, Report of Bruce Gillis, M.D., dated February 17, 2022.)

Thereafter, the parties selected Thomas Allems, M.D., as the Qualified Medical Evaluator (QME) in toxicology. Dr. Allems issued a report dated July 13, 2023 in which he opined that decedent's sudden collapse and death at work was due to cardiac arrhythmia due to his underlying coronary artery disease and hypertensive cardiomyopathy, triggered by alcohol intoxication. (Ex. B, Report of Thomas Allems, M.D., dated July 13, 2023.) Dr. Allems further provided deposition testimony on October 16, 2023. (Ex. XX, Transcript of the Deposition of Thomas Allems, M.D., dated October 16, 2023.)

On February 26, 2024, the parties proceeded to trial on the primary issue of injury AOE/COE. The parties also placed in issue applicant's alleged dependency, and the admissibility of the reporting of Dr. Gillis. (Minutes of Hearing and Summary of Evidence (Minutes), dated February 26, 2024.) The WCJ heard testimony from decedent's son Mr. Sanchez and continued the hearing for additional testimony.

On June 10, 2024, the WCJ heard testimony from applicant and ordered the matter submitted for decision.

On September 12, 2024, the WCJ issued the F&O, finding in relevant part that applicant "failed to sustain her burden of proof that [decedent] sustained an industrial injury on June 29, 2021 arising out of and occurring in the course of employment causing death." (Finding of Fact No. 1.) The WCJ ordered the report of Bruce Gillis, M.D., excluded from evidence, and ordered that applicant take nothing further in this case. (Order No. 1; Other Order No. 1.) The WCJ's Opinion on Decision explained that the reporting of Dr. Gillis was obtained outside the statutory

procedures set forth in Labor Code[1] sections 4060, 4061 and 4062, and was thus inadmissible. (Opinion on Decision, at p. 6.) The WCJ expressly relied on the reporting of Dr. Allems, who deemed decedent's death to be wholly nonindustrial. (*Id.* at p. 4.)

Applicant's Petition contends the reporting of Dr. Gillis was admissible and constitutes substantial evidence that decedent's industrial exposures contributed to his death. (Petition, at p. 7.)

Defendant's Answer avers the reporting of Dr. Gillis was inadmissible because irrespective of when it was obtained, it was offered into evidence solely to rebut the QME reporting of Dr. Allems. (Answer, at p. 5:2.) Defendant further contends applicant did not meet her burden of establishing a causal relationship between decedent's work exposures and his death. (*Id.* at p. 7:15.)

The WCJ's Report asserts that applicant was precluded from obtaining a medical report pursuant to section 4605 because the language of the statute is limited to "employees," and because applicant is not the injured worker, but rather an alleged dependent thereof. Accordingly, applicant was precluded from obtaining a consulting physician at her own expense. (Report, at p. 8.)

II.
DISCUSSION

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
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> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All further references are to the Labor Code unless otherwise noted.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 17, 2024, and 60 days from the date of transmission is December 16, 2024. This decision is issued by or on December 16, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 17, 2024, and the case was transmitted to the Appeals Board on October 17, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 16, 2024.

II.

The WCJ ordered the February 17, 2022 report of Dr. Gillis excluded from evidence as obtained outside the dispute resolution requirements set forth in sections 4060, 4061 and 4062. Applicant's Petition contends the WCJ erred in excluding the reporting of Dr. Gillis from evidence, and that applicant was permitted pursuant to section 4605 to self-procure consultative reporting at her own expense.

Section 4605 provides:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.
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> (Lab. Code, § 4605.)

The California Supreme Court has discussed the admissibility of medical reports in workers' compensation proceedings, in pertinent part, as follows:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports … Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board …" except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
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> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal. 4th 1231, 1239 [78 Cal.Comp.Cases 1209] (*Valdez*).)

As to the issue of the admissibility of reports privately obtained from doctors by the employee pursuant to section 4605, the Court stated:

> … [W]hen we consider the reforms enacted by Senate Bill 863 … [t]he Legislature did not … narrow employees' right to seek treatment from doctors of their choice at their own expense, or bar those doctors' report admissibility in disability hearings. Rather, it provided that privately retained doctors' reports "shall not be the sole basis of an award of compensation." (§ 4605.) The clear import of this language is that such reports may provide some basis for an award, but not standing alone.
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> (*Id.* at 1239.)

Thus, the limiting language in section 4605 concerns the use of such reports as evidentiary support of an award but does not necessarily limit the admissibility of those reports as evidence.

The Court further recognized that "[s]ection 4605 has long permitted employees to consult privately retained doctors at their own expense, and the amendments enacted by Senate Bill 863 maintain that right." (*Id.* at p. 1240.)

In 2015, the California Court of Appeal further addressed the operation of section 4605 in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1016 [80 Cal.Comp.Cases 1256] (*Batten*), observing:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible.
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> …
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> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.
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> (*Id.* at p. 1016.)

Thus, the reporting of a consulting or attending physician is specifically permitted under both *Valdez, supra*, and *Batten, supra*, so long as the reporting expert was not retained solely for the purpose of rebutting the opinion of the QME. Here, the WCJ acknowledges that the "report of Dr. Bruce Gillis dated 2/17/2022 was obtained before the AME/QME process had begun," but because the report was obtained "outside the statutory process of Labor Code Sections 4060, 4061 and 4062 process and without agreement by defendant," the report was deemed inadmissible. (Opinion on Decision, at p. 6.) However, because the February 17, 2022 reporting of Dr. Gillis predated the July 13, 2023 reporting of QME Dr. Allems, it is axiomatic that Dr. Gillis could not have been "retained solely for the purpose of rebutting the opinion" as expressed in a QME report that had not yet issued.

The WCJ further asserts that section 4605 only provides for the "employee" to obtain reporting and his/her own expense, and because applicant herein is not the injured worker and was not an employee of defendant, the report of Dr. Gillis is inadmissible. However, in *Banuelos v. Time Warner, Inc.* (2020) 86 Cal.Comp.Cases 50 [2020 Cal. Wrk. Comp. P.D. LEXIS 283][2] we held that "[t]o the extent that the definition of a consulting physician outlined in *Batten* would preclude applicant from obtaining a report under section 4605, this violates her due process right to obtain and present evidence." (*Id.* at p. 65.) Here, we are similarly concerned that a determination that an alleged dependent of a deceased employee was barred from obtaining medical-legal evidence relevant to her claim because she was not the original employee would abrogate the claimant's due process rights. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] ["due process requires notice and a meaningful opportunity to present evidence in regards to the issues"]; see also *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312] ["due process requires notice and a meaningful opportunity to present evidence in regards to the issues"].) Thus, we are not persuaded that applicant herein was precluded from obtaining reporting pursuant to 4605 in the same manner as an originally injured employee.

We similarly find unpersuasive defendant's contention that the timing of the retention of the consulting physician is irrelevant, "because per the relevant law it is still being introduced into evidence for the purpose of rebutting a QME's opinion." (Answer, at p. 5:20.) The salient inquiry as outlined in *Batten* focuses on the circumstances surrounding the *retention* of the expert, not the circumstances at the time a report is offered into evidence. (*Batten, supra*, at pp. 1015-1016.) And while section 4605 makes it clear that a report prepared by consulting or attending physicians shall not be the *sole* basis of an *award* of compensation, section 4605 does not bar the admissibility of the reporting.

Accordingly, we grant reconsideration and amend Other Order No. 1 to admit the February 17, 2022 reporting of Dr. Gillis into evidence.

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[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

Turning to the merits of the F&O, the parties have framed for decision the issue of whether decedent sustained industrial injury arising out of and in the course of employment resulting in his death. "The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation.'" (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660]; Lab. Code, § 5705.) However, "[d]eath attributable to both industrial and nonindustrial causes may support a death claim, and industrial causation has been shown in an array of scenarios where a work injury contributes to a subsequent nonindustrial injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 300 [80 Cal.Comp.Cases 489].) In order to meet that burden, '"[a]ll that is required is that the employment be one of the contributing causes without which the injury would not have occurred.'" (*Id.* at pp. 297-298.)

Reporting in his capacity as a consulting physician, Dr. Gillis opines that decedent had several comorbidities that contributed to his early death. These factors included obesity, a longstanding medical history of hypertension, secondary cardiovascular complications, noncompliance with anti-hypertensive medication, and evidence of "hepatic steatosis, pulmonary congestion and pulmonary edema." (Ex. 3, Report of Bruce Gillis, M.D., dated February 17, 2022, at p. 4.) However, Dr. Gillis opines that "[t]he findings of pulmonary congestion and pulmonary edema indicate that [decedent], at the time of his death, was suffering the effects of extreme environmental heat." (*Ibid*.) Dr. Gillis notes that "[h]eatstroke is also exacerbated by physical exertion in hot weather," and that "[t]he available occupational materials prove that [decedent] was indeed doing extreme physical exertion in such a hot environment." (*Id.* at p. 5.) Thus, Dr. Gillis concludes that "the combination of the strenuous work he was engaged in and the environmental temperature he was enduring were intolerable for his cardiovascular system and thus they triggered the inexorable and inescapable factors that led to this gentleman's demise." (*Ibid*.)

QME Dr. Allems, however, reached a different conclusion. Dr. Allems' report of July 13, 2023 observed that decedent's medical history included a prior single vessel coronary artery disease that was treated with angioplasty and stent placement in June 2016, and posited that decedent was not consistently using his prescribed antihypertensive medications. (Ex. A, Report of Thomas Allems, M.D., dated July 13, 2023, at p. 8.) Dr. Allems noted that "the temperature was 87-91 degrees F that morning around the time of his collapse and death with humidity in the 30s

percent," and that the "cause of death at autopsy was attributed to hypertensive and advanced atherosclerotic heart disease - he had not had an acute myocardial infarction/MI/heart attack." (*Ibid*.) The QME offered statistical research regarding the relationship between coronary artery disease and sudden cardiac death. (*Id.* at p. 9.) Post-mortem toxicology analysis further revealed that decedent's blood alcohol concentration was 0.197 percent, more than twice the legal limit for intoxication. (*Id.* at p. 10.) Dr. Allems noted that alcohol intoxication is a known trigger for lethal cardiac arrhythmias and alcoholic cardiomyopathy. (*Ibid*.) The QME also noted that decedent did not appear to exhibit symptoms consistent with a heat-based illness, as the decedent's symptoms were acute, rather than progressive, and were not consistent with known symptoms of heat-related illness. (*Id.* at p. 11.) Based on these factors, the QME concluded that decedent's "sudden collapse and death at work on the morning of 06/29/21 shortly after his return to the field from a meal break was due to a lethal cardiac arrhythmia due to his underlying coronary artery disease and hypertensive cardiomyopathy, triggered by his alcohol intoxication." (*Id.* at p. 13.) Moreover, decedent's "autopsy findings were not consistent with heat stroke and the environmental circumstances and the facts as presented would not implicate heat related illness as a factor." (*Ibid*.)

The WCJ's Report observes that Dr. Gillis was never provided with video evidence relevant to the decedent's work activities on the date of injury. (Report, at p. 9.) As such, it is unclear whether Dr. Gillis's opinions are based on a complete medical history, including relevant information as to the decedent's work activities and environment on the date of injury. We also note that several of Dr. Gillis's statements regarding the probative value of post-mortem findings of pulmonary edema are conclusory, offer no citation to the evidentiary record, and do not adequately explain the basis for the physician's conclusions. Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) Accordingly, and following our independent review of the record occasioned by applicant's Petition, we decline to disturb the WCJ's express reliance on the reporting of Dr. Allems.

In summary, we agree with applicant that Dr. Gillis was not retained for the sole purpose of rebutting the opinions of a QME who had not yet issued a report. We therefore grant reconsideration and amend the F&O to admit the February 17, 2022 report of Dr. Gillis into evidence. However, having weighed the reporting of consulting physician Dr. Gillis against that of QME Dr. Allems, we decline to disturb the WCJ's reliance on the reporting of QME Dr. Allems as the more thorough and persuasive. Thus, we affirm the WCJ's determination that applicant did not sustain the burden of establishing that decedent sustained injury arising out of and in the course of employment.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of September 12, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of September 12, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

OTHER ORDERS

1. The report of Bruce Gillis, M.D., dated February 17, 2022, is admitted in evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 16, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

NATIVIDAD SANCHEZ
LAW OFFICES OF RICHARD A. TORRES
CHERNOW PINE & WILLIAMS

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*