

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ELSA GARCIA, JOFFRE GARCIA (Deceased), *Applicant*

vs.

U.S. BANK; OLD REPUBLIC, *Defendants*

**Adjudication Number: ADJ14627934
Anaheim District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 26, 2025, wherein the WCJ found in pertinent part that Joffre Garcia (deceased) did not sustain injury arising out of and in the course of employment (AOE/COE) in the form of COVID-19 and ordered that applicant takes nothing.

Applicant contends that the WCJ misstated facts and dates from the Minutes of Hearing and Summary of Evidence (MOH/SOE) from prior trial dates. Applicant further contends that decedent's employment as a bank teller subjected him to a special risk of exposure in excess of that of the general population and that the WCJ applied the incorrect standard. Applicant also contends that the case should be returned to the trial level for further development of the record to allow the QME an opportunity to issue a supplemental report.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant applicant's Petition, rescind the WCJ's February 26, 2025 Findings and Order, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed that decedent sustained injury resulting in his death on November 26, 2020, in the form of COVID-19, while employed by defendant as a bank teller. He last worked at the branch on November 16, 2020. Decedent began experiencing symptoms on November 16, 2020, he was administered a COVID-19 test on November 17, 2020, and he received the positive test result on November 19, 2020.

On October 4, 2022 and November 21, 2022, the matter was tried by WCJ Bolynda Schultz. Exhibits were admitted and testimony was taken and the matter stood submitted.

On January 27, 2023, WCJ Schultz issued a Finding of Fact that decedent sustained injury AOE/COE, resulting in his death, based on a presumption of compensability pursuant to Labor Code section 3218.88.¹ Defendant sought reconsideration. The Appeals Board determined that, based on the record, there did not appear to be evidence to satisfy the requirements of section 3218.88, and therefore applicant was not entitled to the presumption of compensability under section 3212.88. The case was returned to the trial level to determine the issue of industrial causation without the presumption.

Judge Schultz subsequently retired and the case was assigned to WCJ Howard Lemberg.

On February 6, 2025, the matter proceeded to trial on the sole issue of injury AOE/COE. The parties stipulated that the court could rely on the testimony already taken and summarized by WCJ Schultz in the Minutes of Hearing and Summary of Evidence (MOH/SOE), dated October 4, 2022, and November 21, 2022. (MOH/SOE, February 6, 2025, p. 4.)

On October 4, 2022, defense witness Jason Ferrier testified as follows:

The branch did not shut down completely during the pandemic. Between October 2020 and November 2020, the highest number of employees at the location at any given time depended on the day and the need for the branch, but possibly four to five. . . . The witness remembers when he was notified about the potential positive case. It was when he received a text from Rosie Pinto. . . . He believes her last day of work was on the 13th. . . . When asked how many customers would walk into the branch on a Monday or a Friday, the witness responded 200. . . . He was on vacation from November 9 to November 13 and could not have viewed their use of masks and gloves during that period.

(October 4, 2022, MOH/SOE, pp. 5-9.)

¹ All statutory references are to the Labor Code unless otherwise stated.

On October 4, 2022, applicant Elsa Garcia testified as follows: “She tested positive for COVID after her husband tested positive. Her daughter and grandsons also live with them. One of her grandsons tested positive after her husband tested positive also.” (October 4, 2022, MOH/SOE, p. 10.) On November 21, 2022, she testified that: “ Her husband did not go to the hospital. He had a telephonic doctor’s visit and he passed away at home.” (November 21, 2022, MOH/SOE, p. 4.)

On November 21, 2022, defense witness [Rocio] Pinto testified that she tested positive for COVID and that she missed time from work. “Prior to when she took time off of work, she remembers working with Mr. Garcia. . . . Co-workers walked by each other throughout the day. She can’t estimate how many times. She worked full time, 40 hours per week, and so did Mr. Garcia. . . . When COVID-19 positive results were noted in November of 2020, the branch completely shut down for a period of time. She doesn’t know whether she contracted COVID-19 from her husband and then worked without knowing she had it” (November 21, 2022, MOH/SOE, pp. 4-7.)

Qualified Medical Evaluator (QME) Eli E. Hendel, M.D., prepared a report dated June 9, 2023, relevant portions of Dr. Hendel’s summary are as follows:

In the 60 days before he had Covid, he was not hospitalized for any reason. She recalls that he had symptoms related to Covid on Monday, November 16th. When he arrived, he said he was feeling sick, and she says they immediately isolated from each other.

(Exhibit W, Dr. Hendel’s QME Report, dated June 9, 2023, p. 7.)

In the 30 days prior to November 19th, both Mr. and Ms. Garcia did not attend any outside of the home activities where they would be exposed to Covid. She was not notified by school or any other outside of the house of any type of contact of any individuals exposed to Covid in the previous 30 days.

...

Mr. Garcia had not visited anyone at a hospital facility in the previous 30 days, and Mr. Garcia did not travel anywhere outside of the state of California in the previous 30 days. She stated none of them used public transportation.

(Exhibit W, Dr. Hendel’s QME Report, dated June 9, 2023, p. 9.)

What is known is the timeline that Mr. Garcia became symptomatic on November 16, 2020. He took a Covid test on November 17, 2020, and he received the results on November 19th. He was in isolation at his home since November 19th when he became aware of the results. He died at home on

November 26th. Apparently, he had telephone conversations with his primary care doctor, but no treatment was given.

It is therefore presumed that Mr. Garcia died from the consequences of Covid-19.

(Exhibit W, Dr. Hendel's QME Report, dated June 9, 2023, p. 10.)

As to causation, Dr. Hendel opined as follows:

Mr. Garcia became symptomatic on Monday 11/16. He tested on 11/17 and got the results on 11/19. His last day of work was 11/16. His family tested positive Friday 11 /20.

CONCLUSION

There is conflicting information as to the date of the positive test of Ms. Pinto, and thus, the last day she worked.

The probability of Mr. Garcia getting the infection from Ms. Pinto depends on which date is accurate:

1. If the date of Ms. Pinto's positive COVID test and last day of work was on Friday 11/14 - then there is a reasonable medical probability that Mr. Garcia did contract the COVID infection during the course of employment.
2. If the date of Ms. Pinto's positive COVID test and the last day of work was on the following Thursday - 11 /19 - which was after Mr. Garcia tested positive and was off work since 11/16, then Mr. Garcia did not get the infection during the course of employment.

The decision of whether the death of Mr. Garcia is industrial will depend on which of the previous possibilities is the most accurate in terms of dates.

(Exhibit W, Dr. Hendel's QME Report, dated June 9, 2023, p. 11.)

On May 16, 2024, the parties took Dr. Hendel's deposition. The following are pertinent excerpts:

Q. And during the time, a customer facing roles, like working in a bank, it's my understanding, were considered higher risk due to the increased chance of exposure to 19 -- COVID-19 through interactions with the public and handling items like money which could potentially carry the virus. Is that your understanding?

A. Well, I would not over- -- overstate handling money, but, yes, exposure to people. I did describe what my understanding was. They -- they have taken measures, but they were exposed to members of the public. . . .

Q. And as a banker, from the information we have, the applicant spent approximately 40 hours a week working inside of a bank which was open to the public. Is that your understanding?

A. Yes.

(Exhibit V, Dr. Hendel's deposition, pp. 11-12.)

A: If he worked in a place of employment that saw 200 members of the public per day twice a week and the rest less than that, but I would estimate there would be at least 600 to 800 members of the public per week, if you consider that Tuesday, Wednesday, and Friday were less than 200, that means that he was exposed to the individuals of the general public more than the average person of the general public.

(Exhibit V, Dr. Hendel's deposition, p. 20.)

Q. Okay, Doctor, so when you just testified, was it your intention to say that, yes, you thought a bank provided a special risk of exposure that was in excess of the general population -- I'm sorry -- working in a bank?

A. Based on the numbers that you told me, yes.

Q. Okay.

(Exhibit V, Dr. Hendel's deposition, pp. 20-21.)

Q. Doctor, if somebody works in a bank during COVID-19, based on the -- your understanding of how it's spread, if -- if they interact with somebody -- right? -- and then that person interacts with somebody else in the -- in the office, can it be spread from one event to the next person?

A. Yes.

Q. So whether he personally interacted with each of these people, is that as important as how many people actually entered the bank on any particular day or week?

A. The importance is how many people in a close enclosure in a -- in a facility.

(Exhibit V, Dr. Hendel's deposition, pp. 22-23.)

Q. Okay. And -- so, Doctor -- and that was the one. As far as the -- the other question -- I actually think they're very similar -- the special risk in excess of that of the general population and if it is more likely that he would have obtained

it at work. As far as the people that the applicant interacted with, from your understanding, are there more people he would have interacted with per week at work or away from work?

A. At work.

(Exhibit V, Dr. Hendel's deposition, p. 23.)

Q. And in answering counsel's questions that you felt there was a greater risk, was that purely based on the numbers proposed to you by counsel in his question and not necessarily relative to the job duties of Mr. Garcia?

A. It's based on the number of people in the general public one is exposed to.

(Exhibit V, Dr. Hendel's deposition, p. 34.)

... Because if the timeline was the -- the -- we've got the 13th or 14th for Pinto and then Mr. Garcia on the 16th and then the 20th from Mrs. Garcia, then isn't it more likely than not that it was Mrs. Pinto and then Mr. Garcia and then Mrs. Garcia?

A: If that is a timeline of events, yes.

(Exhibit V, Dr. Hendel's deposition, p. 47.)

A. The timeline speaks -- the incubation period varies. If Mrs. Garcia became symptomatic on the 20th and Mr. Garcia became symptomatic on the 16th, there is the distinct possibility that Mr. Garcia gave it to Mrs. Garcia. That is the one point for industrial. I would have to put all of this together, and I would say not with preponderance of evidence, but the degree of closeness with Mr. and Mrs. Garcia exceeds the other possibilities. So, yes --

(Exhibit V, Dr. Hendel's deposition, pp. 48-49.)

DISCUSSION

I.

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.

(b)

(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.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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 April 9, 2025, and 60 days from the date of transmission is Sunday, June 8, 2025. The next business day that is 60 days from the date of transmission is Monday, June 9, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, June 9, 2025, so that we have timely acted on the petition as required by 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 shall be notice of transmission.

According to the proof of service for the Report by the WCJ, the Report was served on April 9, 2025, and the case was transmitted to the Appeals Board on April 9, 2025. 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 April 9, 2025.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers’ Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

To be compensable, an injury must arise out of and occur in the course of employment. (Lab. Code, § 3600.) The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) Medical evidence that industrial causation was reasonably probable, although not certain, constitutes substantial evidence for a finding of injury AOE/COE. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

In cases where an applicant's injury is caused by a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. Medical evidence is required to establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com.* (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].) It is a medical expert's job to assess whether is medically probable that disease transmission occurred at work. The opinions of qualified physicians are entitled to consideration "since it is part of their vocation to observe diseases and how they spread and to draw conclusions from those observations." (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622, 629 quoting *San Francisco v. Industrial Acc. Com. (Slattery)* (1920) 183 Cal. 273, 284.)

Here, decedent worked full time as a bank teller. Applicant testified that decedent's hours were 9:00 to 6:00, Monday to Friday, although sometimes he would work a half day on Wednesday and then a half day on Saturday. (October 4, 2022, MOH/SOE, p. 9.) Decedent worked at the bank the previous week and had not missed any days. (October 4, 2022, MOH/SOE, p. 9.) Jason Ferrier, the branch manager, testified that Mondays and Fridays were likely the busiest days at the branch in terms of the highest number of transactions. (October 4, 2022, MOH/SOE, p. 5.) He estimated that approximately 200 customers would walk into the branch on a Monday or a Friday. (*Id.*, at p. 8.)

Decedent spent approximately 40 hours a week working inside of a bank which was open to the public. (Exhibit V, May 16, 2024, deposition transcript of QME Dr. Hendel, pp. 11-12.) If

200 members of the public entered the branch on the two busiest days of the week, and fewer entered on the other three days, that could be approximately 600 to 800 customers entering the branch each week. (Exhibit V, Dr. Hendel's deposition, p. 20.) Dr. Hendel went on to testify that if 600 to 800 members of the public entered the branch per week, decedent was exposed to the individuals of the general public more than the average person of the general public. (Exhibit V, Dr. Hendel's deposition, pp. 20, 34.) Based on Dr. Hendel's testimony, decedent's employment as a bank teller in November 2020 subjected him to a special risk of exposure in excess of that of the general population.

With respect to potential industrial exposure, other than from bank customers, decedent's co-worker Rosie Pinto also contracted COVID. WCJ Schultz noted that Ms. Pinto was a poor historian. (Opinion on Decision, January 27, 2023, p. 2.) Branch manager Jason Ferrier was on vacation from November 9 to 13, 2020, so he has no first-hand knowledge of the events in the week prior to the onset of decedent's symptoms. (October 4, 2022, MOH/SOE, p. 9.) Mr. Ferrier testified that Ms. Pinto called in sick and he believed that her last day of work was on November 13, 2020. (October 4, 2022, MOH/SOE, pp. 6-7.) Mr. Ferrier was informed of Ms. Pinto's diagnosis on November 19, 2020, via text. (October 4, 2022, MOH/SOE, p. 7.)

Decedent became symptomatic on November 16, 2020 and his COVID test results were positive. He was in isolation at his home starting November 19, 2020, when he became aware of the results. He died at home on November 26, 2020. (Exhibit W, Dr. Hendel's QME Report, dated June 9, 2023, p. 10.) It is unclear the last date that Ms. Pinto and decedent worked together prior to November 16, 2020, but it appears likely that it was on or around November 13, 2020 - or the last day that Ms. Pinto worked, before she called in sick.

To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc); see also *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687].) The doctor must set forth the basis for the opinion, and may not rely on facts that are not germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases

358].) Looking at the record before us, the QME's opinion is not substantial medical evidence because it is based on surmise, speculation, conjecture, or guess. At Dr. Hendel's deposition, the parties could have clarified the record, but instead it appears more confused.

With respect to possible non-industrial exposure, this seems the least probable source, based on the evidence in the record. Applicant testified that they did not attend social gatherings, including family events, and they did not go to church. (Exhibit W, Dr. Hendel's QME Report, dated June 9, 2023, p. 8.) They did not attend any outside of the home activities where they would be exposed to COVID, they did not take public transportation, and she was not notified by school or any other individuals exposed to COVID in the previous 30 days. (*Id.*, at pp. 8-9.) Decedent lived with applicant, her daughter, and two grandsons. (November 21, 2022, MOH/SOE, p. 3.) Prior to decedent testing positive, nobody else had any symptoms or tested positive for COVID. (*Id.*) However, after decedent tested positive, applicant and one of the grandsons tested positive. (*Id.*)

The WCJ may wish to consider the issue of whether further medical-legal reporting is necessary in order to have an adequate record. The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc); see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.)

Accordingly, we grant applicant's Petition, rescind the Findings and Order issued on February 26, 2025, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on February 26, 2025 **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 9, 2025

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

**ELSA GARCIA
SCHLOSSBERG & UMHOLTZ
SILBERMAN & LAM**

JB/pm

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