

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

MD HOSSAIN, deceased; SALMA BASHAR, widow, *Applicant*

vs.

**ALI'S ENTERPRISES, INC. 2; TECHNOLOGY INSURANCE COMPANY
administered by AMTRUST NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ15819265
Van Nuys 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 3, 2025, wherein the WCJ found in pertinent part that decedent, while employed by defendant as a store manager on October 18, 2021, did not sustain injury arising out of and in the course of employment (AOE/COE) to his head, circulatory system, stress, psych, resulting in his death.

Applicant contends that the WCJ erred in relying on the opinions of Gerald Weingarten, M.D., the Panel Qualified Medical Evaluator (PQME) on the issue of causation because they are not substantial medical evidence.

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 as discussed below, we will grant applicant's Petition, rescind the Findings and Order issued on February 3, 2025, we will return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

On February 19, 2022, applicant filed an application for adjudication, claiming that injured worker Md Hossain (decedent) sustained injury resulting in death to various body parts while employed by defendant as a store manager on October 18, 2021.

PQME Gerald Weingarten, M.D., issued reports dated May 19, 2022 (Exhibit B) and May 1, 2024 (Exhibit E). Dr. Weingarten's deposition was taken on February 20, 2023 (Exhibit C) and September 3, 2024 (Exhibit F).

In the May 19, 2022 report, Dr. Weingarten stated the following regarding causation:

Cause of death: Acute coronary syndrome with probable acute myocardial infarction, triple vessel coronary artery disease with extensive atherosclerosis of thoracic and abdominal aorta, fatty liver, also tested positive for COVID but no pathologic findings of COVID infection.

He did test positive for COVID and had been feeling on the ill side in the days prior to his death. I have no information as to where he might have acquired his COVID-19 infection

(Exhibit E, QME Report of Dr. Weingarten, dated May 19, 2022, p. 22.)

He had multiple risk factors responsible for his death, including his dyslipidemia and his hypertension and probable metabolic syndrome. He had extensive atherosclerosis at the age of 45 and his condition was probably hereditary. He was not doing any physical activity at his time of death. It is unclear where he acquired his COVID-19 infection. There is no indication that he acquired this from work. There was no evidence of any blood clots in the system or any other findings of COVID-19 and this probably did not contribute to his death. Based upon the information I have available, his cause of death was nonindustrial due to multiple nonindustrial risk factors according to the Kaiser records and the autopsy report.

(Exhibit E, QME Report of Dr. Weingarten, dated May 19, 2022, pp. 22-23 [emphasis added].)

On February 20, 2023, Dr. Weingarten testified, in pertinent part, as follows:

... And you came up with some conclusions regarding the cause of his death.

A Yes. Well, that was in the -- the medical report from the coroner, the autopsy report.

Q And after review of the records, you concurred with the autopsy report?

A Yes. I didn't have any indication to indicate differently.

Q Okay. So let me ask you. Apart from records that you reviewed, you had no other information?

A I had no other information.

Q So you indicated you had the autopsy report. What else did you consider in determining the causation?

A I had some medical records of his treatment before he died that I reviewed.

(Exhibit C, deposition transcript of QME Dr. Weingarten, dated February 20, 2023, at 6:8-22.)

Q And how far back do the records go?

A The records went back to 2015.

Q Okay. And do you have records up to 2015 to the date of his death, which would be October 18th, 2021?

A I had medical records up until 2019, January 2019.

Q And then you had no records between January of 2019 to October of 2021?

A That's correct.

Q So that would probably be about a year and 10 months of no records prior to his death.

A That's correct.

Q So at the time of his death, other than the autopsy, you really don't know what his pre-death condition was?

A That's correct.

Q You don't have any records as far as symptomatology goes?

A That's correct.

(Exhibit C, deposition transcript of QME Dr. Weingarten, dated February 20, 2023, at 7:1-20.)

In the May 1, 2024, QME report, Dr. Weingarten stated the following regarding causation:

REVIEW OF SYSTEMS

She states he never complained of any specific chest pain, shortness of breath, or palpitations. Prior to his death, he never complained of any additional medical conditions.

In regards to COVID and other illnesses, she states that he had cold-like symptoms one week before he died. He never took time off of work. He had a slight persistent cough but was getting better, and **no family members in her household had COVID.**

She was aware that he tested positive for COVID-19 post-mortem.

(Exhibit E, QME Report of Dr. Weingarten, dated May 1, 2024, p. 6 [emphasis added].)

He had multiple risk factors over a prolonged period of time. According to his autopsy which contributed to his death are not industrial basis. This included left ventricular hypertrophy, probable hypertension, metabolic syndrome with fatty liver, dyslipidemia with extensive atherosclerosis of all coronary arteries, and thoracic and abdominal arteries. He also had a COVID-19 infection at the time of his death or shortly before his death and this could have contributed to his death by causing a hypercoagulable state on top of his severe 90% lesions and two arteries from his heart. It is my opinion that he would have died on the date he did independent any work factors.

(Exhibit E, QME Report of Dr. Weingarten, dated May 1, 2024, p. 7 [emphasis added].)

On September 3, 2024, Dr. Weingarten was deposed again, testifying in pertinent part, as follows:

Q. ... Doctor, can you please reiterate what you believe the cause of Mr. Hossain's death was?

A. Atherosclerotic coronary artery disease.

Q. Now, when you spoke to Ms. Bashar, did she -- did you ask her about Mr. Hossain's working conditions?

A. I did.

Q. Okay. And what did you ask her?

A. The air conditioning was broken, and he had to work under hot conditions.

...

Although, COVID might or might not have played a role when he died, having an acute COVID infection, sometimes that can cause a hypercoagulable state that lead to the heart attacks. It's like a known fact these days. It was inevitable that he was going to have something seriously happen to him, you know, with that pathology.

(Exhibit F, deposition transcript of QME Dr. Weingarten, dated September 3, 2024, at 27:21-28:4, 32:6-12 [emphasis added].)

On October 21, 2024, the matter proceeded to trial on the sole issue of whether or not the death of the injured worker arose out of and in the course of employment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 21, 2024 trial, p. 2.)

The following exhibits were admitted and the matter was continued to November 13, 2024:

Exhibit 1: Death certificate dated December 16, 2021.

Exhibit A: Denial notice dated January 25, 2022.

Exhibit B: Report by PQME Gerald Weingarten, M.D., dated May 19, 2022.

Exhibit C: Deposition transcript of Gerald Weingarten, M.D., dated February 20, 2023.

Exhibit D: Amended death certificate dated January 4, 2024.

Exhibit E: Report by PQME Gerald Weingarten, M.D. dated May 1, 2024.

Exhibit F: Deposition transcript of Gerald Weingarten, M.D., dated September 3, 2024.

(MOH/SOE, October 21, 2024 trial, pp. 2-3.)

On November 13, 2024, applicant Salma Bashir testified at trial, as follows:

On October 18, 2021, the witness was married to Md Hossain, hereinafter the deceased. They had three children together []. The deceased worked at 7-Eleven as a manager at a store at San Pedro and Washington at the time of his death.

When the deceased started working for Mr. Ali at the end of 2019, he started as a cashier trainee at a store on Wilshire Boulevard for three or four months. The second store was at 8th and Alvarado, where he worked as a cashier. When the store manager at 8th and Alvarado left, Mr. Ali made the deceased store manager.

The deceased worked as the manager and there was one cashier. The management job was made difficult because there was a shortage of employees, and the homeless would come in. If the next shift did not show up, the cashier would have to stay on. Sometimes, the deceased stayed the whole night. The witness testified this happened many, many times. The deceased worked six days a week, and out of the six days, he would work late three days.

...

(MOH/SOE, November 13, 2024 trial, p. 2.)

The witness testified that on the day her husband passed away ... she spoke to the deceased at 9:00 or 9:30 a.m. They spoke for about a half hour. The deceased asked about the kids, and the deceased complained that he was in the cooler because of the lack of air conditioning, and when he would step out, he would sweat and his body would dry. That was the last time the witness spoke to the deceased. The deceased died in his office.

(MOH/SOE, November 13, 2024 trial, p. 3.)

The witness recalled seeing Dr. Weingarten. She said her conversation with him was very brief. He asked several questions, and she was not given an opportunity to explain anything. The witness, with the help of an interpreter, filled out some general questionnaires. The forms did not ask anything about the working conditions. The witness said the interpreter was having trouble with Bengali. The witness said she did not get to ask the doctor questions about types of trauma, physical and mental. She said she did not tell the doctor about the broken air conditioning, or the confrontation with the homeless person, or that the deceased had to attend a court case.

(MOH/SOE, November 13, 2024 trial, pp. 3-4.)

The witness received a copy of Dr. Weingarten's report. The May 1, 2024, report, page 4, was shown to the witness, and she said that the defense medical reports were not available to the doctor and the doctor got the family information incorrect. He said there were only two children.

(MOH/SOE, November 13, 2024 trial, p. 4.)

No further witnesses were called to testify and the matter stood submitted.

DISCUSSION

I.

Former Labor Code section¹ 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.

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

(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 March 3, 2025, and 60 days from the date of transmission is May 2, 2025. This decision is issued by or on May 2, 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.

Here, according to the proof of service for the Report by the WCJ, the Report was served on March 3, 2025, and the case was transmitted to the Appeals Board on March 3, 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 March 3, 2025.

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.) In applying this requirement, however, all reasonable doubts as to whether an injury arose out of

employment are to be resolved in favor of the employee. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1290-1291 [68 Cal.Comp.Cases 831]; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280 [39 Cal.Comp.Cases 310]; *Lundberg v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 439 [33 Cal.Comp.Cases 656].) As the California Supreme Court discussed in *Lauher*, section 3202 provides that:

[I]ssues of compensation for injured workers “shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.” Thus, “[a]lthough the **employee bears the burden of proving that his injury was sustained in the course of his employment**, the established legislative policy is that the Workmen’s Compensation Act must be liberally construed in the employee’s favor ..., and **all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee.** ...”

(*Lauher, supra*, at 1290, quoting *Lamb, supra*, at 280 [emphasis added]; see Lab. Code, § 3202.)

The determination of whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].) First, the injury must occur “in the course of employment,” which ordinarily “refers to the time, place, and circumstances under which the injury occurs.” (*LaTourette, supra*, at 645.)

Second, the injury must “arise out of” the employment, “that is, occur by reason of a condition or incident of employment, [however], the injury need not be of a kind anticipated by the employer nor peculiar to the employment in the sense that it would not have occurred elsewhere.” (*Employers Mut. Liability Ins. Co. v. Industrial Acci. Com. (Gideon)* (1953) 41 Cal.2d 676, 679-680.)

If we look for a causal connection between the employment and the injury, such connection need not be the sole cause; it is sufficient if it is a contributory cause. (*Gideon, supra*, at 680; *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 736 [48 Cal.Comp.Cases 326]; *Madin v. Industrial Acc. Com.* (1956) 46 Cal.2d 90, 92-93 [21 Cal.Comp.Cases 49].) “All that is required is that the employment be one of the contributing causes without which the injury would not have occurred.” (*South Coast Framing, supra*, at 297-298, quoting *LaTourette, supra*, at 651, fn. 1; *Maher, supra*, at 734, fn. 3.)

Turning to whether the QME’s opinions are substantial medical evidence, 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].)

As a preliminary matter, 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].)

A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or 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]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798.)

Here, when questioned about the initial QME report at his deposition on February 20, 2023, Dr. Weingarten testified that he did not have records for the 10 to 12 months prior to decedent's death and that “other than the autopsy, [QME Dr. Weingarten] really don't know what [decedent's] pre-death condition was[.]” (Exhibit C, deposition transcript of QME Dr. Weingarten, dated February 20, 2023, at 7:1-20.)

Following the initial QME report, Dr. Weingarten interviewed applicant (decedent's widow), with the aid of an interpreter, however, no additional records were sent. (Exhibit E, QME Report of Dr. Weingarten, dated May 1, 2024, p. 3.)

Further, in the May 1, 2024, QME report, Dr. Weingarten acknowledged there were multiple risk factors which contributed to his death, in addition to a COVID-19 infection at the time of death. (Exhibit E, QME Report of Dr. Weingarten, dated May 1, 2024, p. 7.)

With regard to decedent's medical history, applicant advised Dr. Weingarten that applicant had cold-like symptoms one week before he died, he never took time off of work, and that while she was aware he tested positive for COVID-19 post mortem, no family members in her household had COVID. (Exhibit E, QME Report of Dr. Weingarten, dated May 1, 2024, p. 6.)

Finally, on September 3, 2024 at his further deposition, Dr. Weingarten opined that COVID might or might not have played a role when he died. (Exhibit F, deposition transcript of QME Dr. Weingarten, dated September 3, 2024, at 32:6-12.)

The Appeals Board must accept as true the intended meaning of testimony both uncontradicted and unimpeached. (*LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16]; *McAllister, supra*, at 413.) Defendant does not dispute the veracity of applicant's testimony and defendant called no witnesses at trial, however, applicant was not questioned about COVID at trial. As such, we have only the history documented in Dr. Weingarten's report.

While the QME opined that "COVID might or might not have played a role" in decedent's death and that "having an acute COVID infection, sometimes that can cause a hypercoagulable state that lead to the heart attacks. It's like a known fact these days." (Exhibit F, deposition transcript of QME Dr. Weingarten, dated September 3, 2024, at 32:6-12), he offered no conclusions as to whether decedent's COVID was industrial.

Here, Dr. Weingarten's opinions are not substantial medical evidence, as the analysis with respect to whether COVID contributed to decedent's death is incomplete and thus his opinions amount to surmise, speculation, or conjecture. (*Escobedo, supra*; see also *Hegglin, supra*; *Place, supra*; *Zemke, supra*.)

"[T]he WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc).) "Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see *Hamilton, supra*, at 476.) "The opinion enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record. (*Hamilton, supra*, at 476.)

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.) The WCJ “may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

We note that Dr. Weingarten's opinions were based largely on decedent's autopsy, which was not admitted to the record, which hampers our ability to evaluate the underlying basis of Dr. Weingarten's opinions.² Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton, supra*, at 476.) We also note that the QME did not have an opportunity to review applicant's medical records between the period January 2019 and October 2021, the period preceding his death.

Accordingly, we grant applicant's Petition, rescind the Findings and Order issued on February 3, 2025, and return the matter to the WCJ for further proceedings consistent with this opinion.

Upon return to the trial level, we recommend that the WCJ consider further development of the record, including whether the parties provide Dr. Weingarten with additional medical records and request that he submit a supplemental report clarifying and explaining his opinions, or whether other augmentation of the existing medical record is appropriate.

² The Appeals Board's record of proceedings is maintained in the adjudication file. “Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings.” (Cal. Code Regs., tit. 8, § 10803.)

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 3, 2025 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 2, 2025

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

**SALMA BASHAR
NIZINSKI & ASSOCIATES
LAW OFFICE OF NATALIE KAPLAN**

JB/pm

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