

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

**DEANGELO ELLINGTON (deceased); KRISTAL AVILA-ELLINGTON;
JAMES ELLINGTON; IZABELLA ELLINGTON, *Applicants***

vs.

CITY OF SACRAMENTO, permissibly self-insured, *Defendant*

**Adjudication Number: ADJ11687715
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the June 23, 2026 Findings, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that decedent employee sustained injury in the form of lung cancer that resulted in death, and that the injury and death arose out of and in the course of his employment (AOE/COE) as a Sanitation Worker II during the period of August 1, 1996 through August 8, 2018. She further found that based on the parties' stipulation, the maximum compensable death benefit is \$275,000; that Izabella Ellington is a wholly dependent minor per Labor Code section 3501; and that James Ellington, the son, and Kristal Ellington, the spouse, are partial dependents.

Defendant contends that the opinion of Panel Qualified Medical Evaluator (PQME) Stewart Lonky, M.D., on causation fails to constitute substantial medical evidence and that applicants did not meet their burden to show that decedent's injury and death were caused by his employment.

We have received an Answer from applicants. The WCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny the Petition.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated in the WCJ's Report, and as explained below, we will deny defendant's Petition for Reconsideration.

FACTS

The WCJ summarized the salient facts as follows:

The decedent's wife, Kristal Avila Ellington, filed a DWC-1 claim form on or about September 10, 2018, alleging that the decedent, Deangelo Ellington, was injured due to exposure to a toxic work environment. The decedent passed away on September 5, 2018, due to acute respiratory failure (per the death certificate). On or about October 25, 2018, Defense attorney, Douglas Sparks, filed an Application for Adjudication of Claim alleging cumulative trauma exposure to toxins resulting in metastatic lung cancer. The Application alleged Kristal Avila Ellington as the only dependent. Ms. Avila Ellington retained counsel, and the Application was eventually amended to include additional dependents, James Ellington (son) and Izabella Ellington (daughter). On or about December 30, 2019, Office of the Director, Death Without Dependents Unit filed a letter with the Court that DWC disclaimed any interest as to death benefits.

On June 13, 2023, Applicant's counsel amended the Application correcting the date of cumulative trauma exposure and alleged additional employers. On December 17, 2025, Applicant filed an election against the City of Sacramento.

The parties proceeded to a Mandatory Settlement Conference on February 12, 2026, where the matter was set for trial on the issues of AOE/COE, attorney fees and dependency. The matter proceeded to trial on April 21, 2026, on the issues of AOE/COE and attorney fees and was submitted for decision on May 4, 2026. The Findings of Fact issued June 23, 2026, wherein the undersigned found that the decedent sustained injury arising out of and in the course of employment in the form of lung cancer that resulted in death. The issue of attorney fees was deferred.

On July 14, 2026, Defendant filed a Petition for Reconsideration. Defendant is appealing the undersigned's finding of injury AOE/COE contending that the Court did not address the issues raised by Defendant at trial regarding the alleged lack of supporting factual and medical evidence on the issue of causation or more simply, the QME's opinion does not constitute substantial medical evidence.

Applicant filed a response to Defendant's Petition for Reconsideration arguing that the medical evidence established that the decedent's death was industrial.

(Report, pp. 1-2.)

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code¹ section 5909, which states that:

¹ Further unlabeled statutory references are to the Labor Code.

(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 July 27, 2026, and 60 days from the date of transmission is September 25, 2026. This decision is issued by or on September 25, 2026, 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, the Report was served on July 27, 2026, and the case was transmitted to the Appeals Board on July 27, 2026. 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 July 27, 2026.

II.

The Report responds to the contentions of the Petition and explains the basis for the Findings as follows:

When an injured worker claims a physical injury, the injured worker has the initial burden of proving industrial causation by showing the employment was a contributing cause. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297-298, 302; § 5705.) The injured worker must prove by a preponderance of the evidence that an injury arises out of and occurs in the course of employment (Labor Code §§ 3202.5, 3600(a)).

“The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur in the course of the employment. This concept ordinarily refers to the time, place, and circumstances under which the injury occurs. On the other hand, the statute requires that an injury arise out of the employment. It has long been settled that for an injury to arise out of the employment it must occur by reason of a condition or incident of the employment. That is, the employment and the injury must be linked in some causal fashion.

* * *

The statutory proximate cause language [of section 3600] has been held to be less restrictive than that used in tort law, because of the statutory policy set forth in the Labor Code favoring awards of employee benefits. In general, for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury.” (*South Coast Framing, supra* at 297-298 (internal citations and quotations omitted).)

Furthermore, the California Supreme Court has held that causation may be found on reasonable probability even where the exact mechanism is unclear, the Board cannot demand an “unbearable” level of specificity about toxicity and quality of exposure as though scientific certainty were required. Employment need only to be a “contributing cause” of injury (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408). *McAllister* involved the death of a fireman after toxic exposure to smoke. The Court held that the uncontroverted evidence established exposure to smoke, the doctor stated that it was probable that the smoke inhaled contained carcinogens and it was reason that prolonged exposure could lead to lung cancer, need only establish that it was reasonably probable and was not required to produce exact type/amount of exposure, and that employment need only be a contributing cause.

In the present matter, the issue of AOE/COE was addressed in the Findings of Fact. Applicant alleged that the decedent's lung cancer and resulting death were caused by diesel exhaust exposure at work. The parties used Stuart Lonky, MD as the panel qualified medical evaluator. QME Lonky provided five reports and sat for four depositions. He reviewed extensive medical records, deposition transcripts from various employees at the City of Sacramento, including the Kristal Ellington, the injured worker's spouse, and multiple medical articles on the relationship between diesel fumes and lung cancer. Throughout the reporting and deposition testimony, QME Lonky opined that there was industrial causation. QME Lonky's

opinion remained unchanged despite multiple depositions and questioning by defense. Some of the relevant comments and opinions by QME Lonky were:

“It is important to recognize that, in the case of Mr. Avila-Ellington, we are dealing with a gentleman who had a history of smoking somewhere between 10 pack years and, perhaps, as many as 25 pack years. This is, unfortunately an adequate length of time to exert carcinogenic effects. Although he stopped smoking in 2005, the carcinogenic effect may have been established even before that time; however, it is certainly unusual for an anaplastic, rapidly growing tumor to arise 13 years after discontinuation of cigarette smoking, and one would look for other factors which would have accelerated growth, such as concomitant exposure to various toxic agents.” (Joint Exhibit 1, page 60)

“Once again, the diesel fuel aspect becomes very important to analyze, since in an individual who as a history of smoking with early precancerous or even cancerous changes in the epithelium of the lung, who then discontinued their cigarette smoking for a period of 13 years, during which time they were exposed to a “cofactor,” such as diesel exhaust “lit up” or accelerated the cancerous changes in the cells, which eventually grew in Mr. Avila-Ellington and eventually caused his demise.” (Id., page 61)

“The material safety data sheets that were provide to me also showed that he was exposed to special LS diesel #2 which contains distillate of kerosene, hydrodesulfurized distillates, napthese, and total sulfa. This diesel #2 was noted to be a well-known carcinogen.” (Joint Exhibit 2, page 27)

“There is no question that Mr. Avila-Ellington had a history of cigarette smoking, which was present even in 2005. This may have gone on for a long period and there is no question that cigarette smoke is a carcinogen and is a factor in the development of his non-small-cell lung cancer; however, the exposure to diesel exhaust, even for a year or two, would serve as a “co-carcinogen” in this case, resulting in higher likelihood of developing non-small-cell lung cancer.” (Id., page 28)

“A:..... The problem is not when you are exposed to the carcinogen. The answer is when the effect of the carcinogen unaided by a co-carcinogen begins to change cellular morphology. It could be that individuals who develop cancer actually have the tendency to get that cancer pretty quickly. But your immune system, your genetics and epigenetics are sound enough to basically ward off anything. We don’t know. The more we know about signaling in genetic and epigenetic fashion, the less we know. All of our old ideas about latency period may have nothing to do with anything except your body’s ability to ward off what’s been going on for 10

or 20 years. If your body becomes exhausted, it is losing the battle now, and the cancer cells start to multiple rather than being one or two or three cancer cells sitting there, trying to replicate but not being allowed to by your own body's immune response to a different cell. So, who knows? I think that we are going to begin to understand that an exposure at any time to one, two, three carcinogens or co-carcinogens. The more you have, the more likely that cancer is going to break out and become detected." (Joint Exhibit 6, 22:22- 23:22)

"A:...So, the more carcinogenic exposures you have, the more likely that this latency period that everybody talks about as if it is a major thing from heaven, that gets contracted because your body can't ward that off. There are too many facts playing on cellular division and playing on cellular DNA to change it." (Id., 24:17-22)

"In my deposition, I discussed the fact that I intended to show that diesel exhaust and diesel particles from the exhaust are carcinogenic. I also made it quite clear that in Mr. Avila-Ellington, these exhaust particles were not acting alone. The most significant fact in the causation of his cancer was his cigarette smoking, but when one adds a co-carcinogen, the use of articles quoted by Attorney Sparks becomes relatively useless. These are articles that are in all sorts of individuals, smokers, and nonsmokers, and in some cases, as I discussed in my deposition, the smoking issue was complete[ly] removed from the data analysis. This is not appropriate for Mr. Avila-Ellington.

I have reviewed all of the data in the articles that were sent, and continue to feel that one cannot completely ignore the fact that for at least 14 years of latency, Mr. Avila-Ellington did have exposure to diesel exhaust. He was a cigarette smoker, and in this instance, it is my opinion, even after reviewing these articles, that diesel exhaust acted as a "co-carcinogen," and under those circumstances, it is reasonably medically probable that at least a 1 percent contribution to his development of cancer came from these exposures." (Joint Exhibit 4, page 2-3)

Defendant raised the issue of latency period. QME Lonky was questioned extensively at deposition regarding the article "*Lung Cancer and Diesel Exhaust: A Critical Review of the Epidemiology Literature*" (Defense Exhibit F). QME Lonky disagreed with the Defendant's interpretation of the significance of the article and explained why in deposition (Joint Exhibits 7 and 8). QME Lonky pointed out the age of the article relied upon by Defendant, including the limitations of the studies in the article. Furthermore, QME Lonky reviewed an article regarding latency periods for various cancers following the Twin Towers collapse on 9/11 which demonstrated shortened latency periods (Applicant Exhibit 7). He remained of the opinion that the diesel exhaust exposure acted as a co-carcinogen (Joint Exhibit 5).

Applicant demonstrated that there was diesel exhaust exposure in the workplace. The evidence showed that the decedent operated vehicles that used diesel fuel. The diesel fuel that the decedent was exposed to is well-known carcinogen (Applicant Exhibit 11 and Joint Exhibit 2, page 27). QME Lonky explained through multiple reports and depositions that the diesel exhaust exposure was a co-carcinogen even though exposure was low level and intermittent. Per *McAllister*, Applicant does not need to show the exact type/amount of exposure with scientific certainty, only reasonable probability. QME Lonky concluded that employment was a contributing cause (Joint Exhibit 4, pages 2-3), and he addressed Defendant's concerns with latency periods pointing out the limitations of the articles presented by Defendant as well as the interplay of genetics and epigenetics with the development of cancer (Joint Exhibit 6, 22:22- 23:22, 24:17-22, Joint Exhibits 7 and 8, Applicant Exhibit 7).

After careful review of the Defendant's Petition for Reconsideration and Applicant's response, there is nothing that would change the original analysis in the Findings of Fact.

(Report, pp. 2-6.)

Based upon our review of the record, we agree with the WCJ that the evidence is sufficient to support the finding that decedent employee sustained injury arising out of and in the course of employment in the form of lung cancer that resulted in death.

All decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

We agree with the WCJ that the expert opinion of Dr. Lonky on causation constitutes substantial medical evidence. The PQME's reasoning that decedent's proven exposure to diesel exhaust in the workplace provided a co-carcinogen that contributed to the causation of lung cancer to some degree, however miniscule, has probative value and is reasonable in nature. It is more than a mere scintilla of evidence, and is not pure conjecture, even though the workplace exposure to diesel exhaust was low level and intermittent. Defendant's contention that the PQME's opinion

was somehow speculative because of lack of scientific support is not supported by the record here. The PQME was not required to provide a scientific study that fits decedent's exact circumstances, and the possible existence of any scientific literature to the contrary does not override the PQME's reasoned expert opinion that was obtained as prescribed by the Labor Code.

Defendant further misapprehends the necessary quantum of proof required of applicants to meet their burden in this case. As explained in *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 296 [80 Cal.Comp.Cases 489, 492], even a miniscule contributing occupational cause is sufficient to support a finding of industrial injury. Further, "the acceleration, aggravation or 'lighting up' of a preexisting disease is an injury in the occupation causing the same." (*Id.* at p. 301.) On this point, the California Supreme Court referred to its earlier opinion in *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]), which affirmed the award of a death benefit to the wife of a firefighter who died of lung cancer, even though the firefighter also "smoked about a pack of cigarettes a day for some 42 years." (*McAllister, supra*, 69 Cal.2d at p. 418.) The Court in *McAllister* declined to allow bare skepticism to dismantle an unrebutted and plausible medical opinion, even where there was ample room for doubt:

Future scientific developments will tell us more about lung cancer. Ultimately it may be possible to pinpoint with certainty the cause of each case of the disease. But the Legislature did not contemplate years of *damnum absque injuria* pending such scientific certainty. Accordingly, we and the Workmen's Compensation Appeals Board are bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or "convincing." We must do so even though the exact causal mechanism is unclear or even unknown.

(*Id.* at p. 419.)

The present case is not one where, as defendant glibly suggests, "there are no grounds whatever" in support of the PQME's conclusion regarding causation of injury. (Petition, p. 2, lines 13-14.) This is a case where, as in *McAllister*, the medical evaluator plausibly connected a likely carcinogen in the workplace with the acceleration or worsening of lung cancer, and we agree with the WCJ that Dr. Lonky's opinion was substantial evidence to support the finding of industrial causation. (See *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) Like the evaluator in *McAllister*, the PQME in this case concluded that industrial exposure contributed to causation within a reasonable degree of medical probability, even in the presence of a much lengthier exposure to another carcinogen on a nonindustrial basis.

Accordingly, we deny the Petition for Reconsideration of the June 23, 2026 Findings.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of June 23, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 24, 2026

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

**KRISTAL AVILA-ELLINGTON
JAMES ELLINGTON
IZABELLA ELLINGTON
EASON & TAMBORINI, A LAW CORPORATION
CITY OF SACRAMENTO
LAUGHLIN, FALBO, LEVY & MORESI, LLP**

CWF/cs

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