WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ISABEL MIRANDA, *Applicant*

vs.

UC SAN DIEGO MEDICAL CENTER, Permissibly Self-Insured, Adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ10984938
San Diego District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the Report and in the WCJ's July 22, 2024 Opinion on Decision ("Findings and Order on Decision," pp. 3-18), both of which we adopt and incorporate, we will deny reconsideration.

I.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

II.

Former Labor Code 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, Labor Code 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 Labor Code 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 August 15, 2024, and 60 days from the date of transmission is October 14, 2024. This decision is issued by or on October 14, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 August 15, 2024, and the case was transmitted to the Appeals Board on August 15, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 15, 2024.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2024

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

ISABEL MIRANDA
LAUGHLIN, FALBO, LEVY & MORESI

MB/*ara*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Workers' Compensation Administrative Law Judge: Alicia D. Hawthorne
Counsel:
Petition for Reconsideration Filed By: Applicant, Isabel Miranda
Attorney for Petitioner: *In Propia Persona*
Attorney for Defendant: Laughlin, Falbo, Levy & Moresi; Marc Leibowitz, Esq.

INTRODUCTION

Petitioner, Isabel Miranda, has filed a timely, verified, petition for reconsideration on the following grounds, from the trial court's July 22, 2024 Findings and Order, pleading that:

1. By the Order, Decision, or Award, the Board acted without or in excess of its powers.

2. The Order, Decision, or Award was procured by fraud,

3. The evidence does not justify the findings of fact.

4. Petitioner has discovered new evidence material to her which she could not with reasonable diligence have discovered and produced at the hearing.

5. The findings of fact do not support the Order, Decision, or Award.

BACKGROUND

Applicant filed an application for adjudication on August 17, 2017, through her prior attorney. Applicant alleged injury to her ears, nose, throat, face, left eye, headaches, migraine, allergy, nausea, immune system, neurologic, circulatory, brain, respiratory system, and nervous system. Applicant presented to Dr. Ira Fishman in the capacity of the Panel QME. Dr. Fishman issued multiple reports, requested all medical records for review, performed multiple evaluations of the applicant, and referred applicant for further diagnostic testing. Applicant was referred to Dr. Michael Takamura in the capacity of a Panel QME in the specialty of psychiatry. Applicant presented to Dr. Takamura for an evaluation. Dr. Takamura reviewed applicant's medical file and issued reports on his findings. This WCJ concurred with the findings of Dr. Takamura as it related to her credibility in that he found the applicant lacking in credibility. This WCJ during the course of the trial also noted applicant's inconsistencies and found her less than credible.

The evidentiary record in this matter consisted of the reports from Applicant's treaters, the Panel QME reports, documentary evidence, as well as testimony. Based on the evidentiary record, which has been thoroughly reviewed in the Opinion on Decision, this WCJ found that applicant had failed to meet her burden of proof to establish industrial injury to her ears, nose, throat, face, left eye, headaches, migraine, allergy, nausea, immune system, neurologic, circulatory, brain, respiratory system, and nervous system.

Applicant made serious allegations regarding attorneys falsifying documents and failing to have an MRI forwarded for review of the doctor(s). However, as noted in the Opinion on Decision, all doctors were given an opportunity to review all medicals, all documentation, as well as the deposition transcript of the applicant.

DISCUSSION

It is well established that Findings of the WCAB must be supported by substantial evidence in light of the entire record. *(Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence an expert's opinion may not be based upon an inadequate history, surmise, speculation or conjecture. *(Hegg/in 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 [35 Cal.Comp.Cases 525].)

In this case, the reporting physicians had full and sufficient information about applicant's condition and history to form reasonable opinions about the cause of applicant's alleged industrial injuries. After a thorough evaluation of the applicant as well as the medical records from multiple QMEs, there was no medical evidence to establish industrial causation.

Throughout this matter, applicant continually alleged fraudulent "movements" but failed to provide any evidence to these allegations. During the course of the trial, to ensure all necessary information was obtained from the applicant, this WCJ had asked the applicant on multiple occasions if there was anything further she wished to add to the record. Applicant alleged that the defense attorney broke into her privacy and deleted a diagnosis from her medical records. There was no evidence of these allegations, including any diagnosis of nasopharyngitis. Applicant references chemicals which she indicates are dangerous, but it is clear from the record that these allegations were properly addressed by her employer as well as the medical experts. In addition, this WCJ found the reporting of the QMEs to be substantial medical evidence and gave them great weight. Furthermore, this WCJ had the opportunity to evaluate applicant's credibility and found her not to be credible.

This WCJ will not reiterate what was already stated in the Findings and Order and Opinion on Decision. However, it is imperative that the Board understands that there were three different trial dates allowing applicant ample opportunity to ensure she had submitted any and all evidence she wanted to present for her case, as well as ask any questions regarding procedures. At the end of applicant's Petition for Reconsideration, she indicated that she has "evidence of everything," however she has already had multiple opportunities to present all of her evidence, and such additional evidence is not appropriate at this time.

RECOMMENDATION

For the reasons discussed above as well as the incorporation of the Findings and Order into this Report and Recommendation, it is respectfully recommended that the petition for reconsideration be denied.

DATE: August 15, 2024

Alicia D. Hawthorne
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

FACTUAL BACKGROUND

Applicant, Isabel Miranda, born [ ], while employed during the period January 1, 2017, through June 13, 2017, as an MC custodian, Occupational Group Number 340, at San Diego, California, by UC San Diego Medical Center, claims to have sustained injury arising out of and in the course of employment to her ears, nose, throat, face, left eye, headaches, migraine, allergy, nausea, immune system, neurologic, circulatory, brain, respiratory system, and nervous system.

At the time of injury, the employer was permissibly self-insured, adjusted by Sedgwick Claims Management Services. At the time of injury, the employee's earnings were $699.60 per week, warranting indemnity rates of $466.40 for temporary disability and $290.00 for permanent disability.

The employer has furnished no medical treatment. The claim was timely denied by the defendant.

EVIDENTIARY ISSUES

Defendant has objected to applicant's exhibit 2 based on the lack of foundation. Following review, and in the interest of fundamental fairness, particularly as to the development of a medically complex record, all exhibits previously marked for identification are admitted into evidence and will be considered according to its weight.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Applicant alleged industrial injury to her ears, nose, throat, face, left eye, headaches, migraine, allergy, nausea, immune system, neurologic, circulatory, brain, respiratory system, and nervous system. Due to the disputed nature of her claim, applicant presented to multiple panel qualified medical evaluators to comment on whether or not the alleged injuries were industrial.

Applicant's claim was originally delayed for further information. (Defendant's Exhibit A) Defendant eventually denied the claim based on the reporting of Dr. Molenaar. (Defendant's Exhibit B)

The evidentiary record consists of three QME reports who have all indicated applicant's condition is non-industrial in nature. The record also consists of some treating physician reports, a letter from applicant and co-workers regarding the work environment, letters from the defendant, and the testimony of the applicant.

Applicant presented to Dr. Ira Fishman in the specialty of internal medicine for a medical-legal evaluation wherein Dr. Fishman issued his first report. (Joint Exhibit 102) Applicant provided Dr. Fishman her job history and noted that she was hired by UCSD Medical Center as a housekeeper. (Joint Exhibit 102, page 3) Applicant indicated that she last worked on 8/20/17, when her treating physician took her out of the workplace due to alleged occupational exposures causing persistent complaints. Dr. Fishman detailed applicant's job description at UCSD Medical Center. The

applicant started working in the NICU in approximately November 2016. Dr. Fishman noted that at the start of her job cleaning incubators, the applicant completed three one-half hour training sessions for hands on training. (Joint Exhibit 102, page 5) In approximately April of 2017, she attended a meeting and was informed that the hospital was changing the disinfectant chemical from Cavicide to Oxivir. In addition, Dr. Fishman noted that the applicant is not aware of any coworkers that have become ill with exposure to either CaviCide or Oxivir. (Joint Exhibit 102, page 6) Applicant gave a detailed description of the alleged injury to Dr. Fishman. He indicated that the alleged industrial injury pled as a specific injury should really have been pled as a cumulative trauma. (Joint Exhibit 102, page 6) Applicant stated that she was issued a respirator, goggles, and gown to use while cleaning incubators in approximately February 2017. Applicant stopped working as of 8/10/2017. Dr. Fishman noted applicant's current complaints consisted of migraine headaches three to four times a week, had marked hypersensitivity to certain smells, fumes and odors. When she was exposed to these smells, she felt tingling in her throat, numbness, dizziness and headaches. Although, applicant did note that since she was out of the workplace, these symptoms have improved, but have not resolved. (Joint Exhibit 102, page 8) When asked about pre-existing issues, applicant was adamant with Dr. Fishman that prior to approximately December 2016 or January 2017, she had no other complaints and she explained to Dr. Fishman that the symptoms gradually started in January 2017 and worsened over time until August 2017 when she was taken off of work. (Joint Exhibit 102, page 9) The applicant told Dr. Fishman she had a negative CT brain scan in November 2017. However, Dr. Fishman noted in his review of records that Dr. Cross noted the applicant had a history of seasonal allergies during Dr. Cross' examination at the Occupational Medicine Clinic at UC San Diego on 6/15/2017. (Joint Exhibit 1202, page 13) Dr. Cross also noted that her primary problem was "a chemical reaction located in her face intermittently which is getting worse" and had started less than two months ago when she was assigned a new room in NICU. (Joint Exhibit 102, page 14) In this same medical report reviewed, Dr. Cross indicated that the cause of applicant's problem was not known at that time. Again, Dr. Cross indicated that her symptoms of seasonal allergies were noticeable at the time of the examination and applicant has a history of such. In addition, it was noted that there were no sprayed chemicals. Additional review of records by Dr. Fishman notes applicant presented to Dr. Molenaar at UCSD Occupational and Environmental Medicine on 7/7/17 who noted that applicant had a chemical reaction in her face which began on 6/13/2017, but was now resolved and applicant had been out of work for a non-occupational surgery. (Joint Exhibit 102, page 15) Three days later, on 7/10/17, applicant presented to Dr. Leslie Oyama at the emergency room department. On physical examination, applicant was not in respiratory distress with a normal ENT examination. Applicant was told to avoid the chemicals that were causing the symptoms. The next day, 7/11/17, applicant went to see Dr. Kim at Occupational Medicine who noted that the applicant denied any known allergies. She was told to return to modified work on the same day with the restriction of no use of Oxivir wipe. Applicant then returned to Dr. Molenaar on 7/17/17 wherein the doctor noted that the **applicant was showing the signs of allergies while working and at home**, such that the applicant was discharged as a patient since she was symptomatic both at, and away from, work and her condition has not fully improved under an alternate work setting assignment. Dr. Molenaar noted that since applicant's condition did not improve away from work, her symptoms appear to not have been caused by workplace exposures. He indicated no work restrictions and advised the applicant to return to full duty the same day with no restrictions. (Joint Exhibit 102, page 17) Under diagnostic studies, Dr.Fishman noted applicant's RAST test suggested mild grass sensitivity. Dr. Fishman noted in this first report that he had an incomplete medical history, discussed that Dr.

Cross' occupational history was markedly different than the one he obtained, and supplied a list to the parties of what he needed to complete his medical-legal determination. (Joint Exhibit 102, page 21)

Dr. Fishman authored a second report dated September 17, 2018. He noted that for this report he had over 1,000 pages of records to review, including the applicant's deposition. In such records, as far back as 2013, applicant shows a history of thyroid problems. In January of 2015, applicant notes feeling anxious and a shortness of breath. (Joint Exhibit 101, page 7) There is a clear history of applicant's history of feeling like she cannot breathe and a choking sensation. Dr. Fishman highlighted applicant's medical appointment with Dr. Sanque dated 6/13/2017 wherein the doctor noted applicant was having an adverse drug reaction, likely having reaction to chemicals she is using at work. (Joint Exhibit 101, page 14) One week later, on 6/20/2017, applicant underwent a total thyroidectomy. Dr. Fishman further reviewed applicant's allergy consultation with Dr. Eric Macy dated 8/4/17. Dr. Macy indicated applicant had no previous history of any environmental allergy symptoms and gave a history of applicant's exposure to chemicals at work. He further noted that the x-rays taken on the same day showed no acute or chronic sinus disease. Dr. Macy explained that the migraines applicant was complaining of are often mistaken for sinus or allergy problems. She was prescribed allergy medication. (Joint Exhibit 101, page 17) Applicant underwent a CT of her head without contrast. The findings were no significant abnormalities. Dr. Fishman noted in his review of applicant's deposition that she worked in a special room, specifically room number 824, 40 hours a week. (Joint Exhibit 101, page 20)

It is important to note the discrepancies at this point before further discussing Dr. Fishman's medical reporting. Applicant was asked during this trial if she had been honest and truthful during the deposition, and she indicated she believes she was. (MOH/SOE, 5/30/24, page 2, lines 24-25) However, during the trial applicant testified she worked in room 8-925 for the last seven to eight months. (MOH/SOE, 5/30/24, page 5, lines17-18)

Dr. Fishman reviewed extensive medical records and indicated that the credibility of the applicant would be left to the Trier of Fact. In addition, he noted that he was still missing information he previously requested, including information if anyone else at the applicant's employer had become ill from similar occupational exposure. He was not provided with any investigative materials performed of the working environment and/or other coworkers. He was provided with the MSDS for the disinfectants used by the applicant and performed his own independent research on the CDC website regarding CaviCide and Oxivir. He noted that Oxivir does contain hydrogen peroxide which can be irritating to the eyes and skin. Dr. Fishman was not provided with a completed safety or industrial hygiene evaluation of the workplace ventilation system, something Dr. Cross also requested. Absent such items previously requested, he took applicant's description of the environment she worked in with no ventilation and in a completely closed hospital room as accurate. He noted that in Dr. Molenaar's reporting, chest x-rays and PFTs were found to be normal and the doctor needed no other follow up diagnostic testing. Dr. Fishman noted that he had not been provided with any medical records prior to date 10/7/13 as well as any medicals from Tijuana, Mexico, where she had undergone plastic surgery. He presented this report under the assumption, absent evidence to the contrary, that are there no medical records available prior to October 2013 and the applicant did not manifest any of her alleged exposure related symptoms prior to October 2013. (Joint Exhibit 101, page 41) Dr. Fishman concluded that applicant needed further

evaluations from a neurologist and a psychiatrist. Dr. Fishman deferred his findings in these areas to these experts. (Joint Exhibit 101, page 44) He did note that the applicant was not complaining of any asthma-like symptoms and had a previous history of normal pulmonary function test and chest x-ray. He determined that applicant likely has a nonindustrial component of allergic rhinitis and any allergy may have predisposed her to be more sensitive to the irritant effects of the disinfectants used in the workplace. He found no industrial causation for applicant's ear complaints. (Joint Exhibit 101, page 45) Dr. Fishman stated that if the applicant routinely used either CaviCide or Oxivir in the workplace for long periods of time in a closed unventilated room, then it would be reasonably medically probable that she would have experienced irritant symptoms in the upper airways and on the skin manifesting as nasal irritation, swollen lips, throat and mouth numbness and/or reddened skin. He further reported, that, in general, however, such upper respiratory tract symptoms would have been acute, self-limited and not be expected to cause any lasting mucosal or structural damage. (Joint Exhibit 101, page 45) Dr. Fishman commented that the applicant has persisted with a myriad of somatic complaints long after she was removed from the UCSD NICU and chronic exposure to Oxivir. Despite many months having already passed with the applicant not exposed to hospital disinfectants, she continued to have persistent complaints. Due to these continued complaints, Dr. Fishman deferred his findings on AOE/COE until after the applicant has been evaluated by the additional specialists in neurology and psychiatry. (Joint Exhibit 101, page 52)

Based on Dr. Fishman's report, applicant presented to Dr. Michael Takamura in the capacity of a Panel Qualified Medical Evaluator in psychiatry. (Joint Exhibit 107) Applicant presented to Dr. Takamura on 3/1/2019 for a 2.5 hour face-to-face evaluation. Dr. Takamura reviewed the cover letter from the defendant and noted that none was received from applicant's attorney. Defendant discussed that Dr. Fishman had given a controversial diagnosis of multiple chemical sensitivity or other idiopathic environmental intolerance. Dr. Takamura reviewed applicant's current medications and noted applicant did not feel overly sedated. Dr. Takamura reviewed applicant's medical records from October 2013 to current, including the reporting from Dr. Fishman, Kaiser and UC San Diego. He also reviewed the deposition transcript of the applicant. Dr. Takamura highlighted the room number and hours that applicant worked in for the defendant. It is also noted in the review of her deposition that applicant testified that prior to being assigned to the NICU, she never had any symptoms. (Joint Exhibit 107, page 49) While performing his evaluation, Dr. Takamura noted that applicant appeared to be a fairly good historian, good memory for dates, and was not confused or confabulating. (Joint Exhibit 107, page 52) Dr. Takamura took note that applicant had good attention to details and memory during her description of her work record. He further reported she gave good and accurate memory for dates and was a descriptive and detailed historian who does not ramble or get her facts confused. Applicant gave the history that she was assigned to work in a small room…without ventilation wherein she was to clean incubators for the babies in the NICU, but then immediately changed this information to state that each room has one incubator with 63 rooms on the entire floor. Then she noted that some of the rooms had two incubators and in rare mornings, maybe there were three or four incubators in a small room. Dr. Takamura indicated that this seems to be an adequate clarification of her prior contradiction. He further noted that in the medical records within the timeframes of 6/13/17-7/27/17, none of these medical reports describe her cognitive impairment such as her vividly telling Dr. Takamura during this evaluation, for example, her description of losing conversations midstream. (Joint Exhibit 107, page 55) At this point in the evaluation, Dr. Takamura comments that while she had done well

with regard to her historical narrative, when comparing and fact-checking with the prior notes, applicant does not seem to be a consistently reliable or credible historian. He concluded that there may be an element of confabulation or amplification/exaggeration. (Joint Exhibit 107, page 55) Dr. Takamura asked the applicant what happened after the cumulative trauma injury date. She indicated the workers' compensation doctor made her go back to work with protective gear, "like shoes and goggles and masks and robes and gloves." (Joint Exhibit 107, page 56) Applicant told Dr. Takamura she thought she probably went back to work on or around 6/16/17 and indicated she wore all the extra precautions. She further stated that she did not feel any better. At this point in Dr. Takamura's report, the doctor noted that if applicant were wearing shoes, goggles, masks, robes, and gloves as recommended by Dr. Cross, one would have expected some of applicant's symptoms have gotten less or better. (Joint Exhibit 107, page 56) She stated that despite wearing the protective gear, she did not think she got better despite taking all those precautions. At this point in the evaluation, Dr. Takamura noted that despite not using CaviWipes and/or Oxivir chemicals she used in the NICU, applicant still reported being sick from toxic exposure to chemotherapy fumes at Moore's Cancer Center after being moved. Dr. Takamura noted that nowhere in the medical records is this information ever stated and noted that applicant's credibility is very low at this point. Applicant represented to Dr. Takamura that Dr. Macy reported she had poison in her blood, but Dr. Takamura cannot substantiate this representation in any of Dr. Macy's reports. (Joint Exhibit 107, page 57) When asked about her activities of daily living, applicant appeared to be proud that she does all her chores at home, noting only that she is bothered by strong smells. However, Dr. Takamura noted that it had been almost a year and a half since her last chemical exposure to Oxivir or CaviWipes such that he believes the controversial diagnosis of multiple chemical sensitivity being irreversible is controversial at best since she is cleaning her own home without being bothered by any cleaning supplies at home. During Dr. Takamura's mental status exam, he found the applicant to have no evidence of depressed mood, high anxiety, or dysphoria. Rather he noted there was a bit of an "a la belle" indifference context to her despite applicant having described multiple medical conditions and problems. (Joint Exhibit 107, page 63) Dr. Takamura noted applicant was not very reliable or credible, noting there were a lot of inconsistencies with regard to the scope of the problem but also the timeline of the problem which made applicant both inaccurate historically as well as now. Applicant's scores on the Beck Depression and Beck Anxiety Inventory seemed to be grossly out of proportion to what the doctor observed and he did not give much validity to such scores. Applicant's final GAF score was 70 both for the best past year and at the time of the examination. This score equates to the applicant not having any present-day evidence of psychiatric impairments. This was substantiated by the fact that applicant is able to do all her chores at home, including helping her disabled son. Dr. Takamura concluded that on a psychiatric basis, applicant has a 0% impairment. Furthermore, Dr. Takamura concluded that based upon a preponderance of the evidence, his opinion with a high degree of reasonable medical probability, applicant did not incur a work/labor disabling psychiatric injury. In addition, he noted that based on the multiple inconsistencies in the medical records around the time of the alleged injury as well as the present day, Dr. Takamura did not find the applicant's history or narrative reliable or credible to meet the threshold of predominant causation. He did not find a clinically based medical rationale for any psychiatric impairment to be correlated to any internal medical diagnoses (or lack thereof). (Joint Exhibit 107, page 67) Additionally, Dr. Takamura did not find that applicant's headaches are necessarily related to any chemical exposures at work, especially when removing such toxic exposures, if they are indeed toxic, did not alleviate

such headaches. Finally, Dr. Takamura noted applicant did not require any psychological or psychiatric treatments industrially or non-industrially. (Joint Exhibit 107, page 70)

Applicant was further evaluated by a Neurological Panel QME, specifically, Dr. Robert Moore. (Joint Exhibit 106) It should be noted that this is the doctor that indicated applicant was a good historian. Applicant reported to Dr. Moore a history of her injury and noted that her problems began when her job assignment changed in November of 2016. However, Dr. Moore correctly noted that the medical records established that her headaches began prior to her assignment change in November of 2016. (Joint Exhibit 106, page 2) Dr. Moore reviewed additional medical records of the applicant, noting that applicant complained of a chemical reaction in the face, beginning on June 13, 2017, as well as seasonal allergies. (Joint Exhibit 106, page 3) During the current evaluation, applicant noted that her headaches appeared to have improved, but she still suffered from approximately 8 headaches per month. Dr. Moore reported that from a cognitive standpoint, there were no complaints of decreased memory or concentration. There were also no complaints of decreased vision or hearing or other neurological issues. Dr. Moore reviewed the medical records of Dr. Donald Mokenaar of UCSD Occupational and Environmental medicine dated 7/7/2017 which gave a history of applicant's experiences while working at the Jacobs Medical Center. Applicant was moved into the Jacobs Medical Center 8 months earlier but problems only began less than 2 months prior to this evaluation. Applicant returned to Dr. John Kim who diagnosed applicant with headaches and allergies, unspecified. A review of the medical records by Dr. Moore also noted that on August 4, 2017, applicant returned to Dr. Mokenaar who discharged applicant from his care noting that applicant showed signs of allergies both at work and at home. (Joint Exhibit 106, page 10) Under Dr. Moore's discussion section, he noted applicant's first complaints of headaches is found in Kaiser records back in October of 2016. He found her neurological examination to be entirely within normal limits with no focal motor, sensory or reflex abnormalities. Applicant had a normal CT scan of the brain as well as normal x-rays of the sinuses. He found she did have migraines for which she has been treated by various neurologists. He noted applicant's thyroid condition and commented that there is medical literature describing the association between migraine headaches and thyroid disorders. Dr. Moore concluded that applicant's current complaints of migraine headaches are non-industrial and any ongoing treatment for such would be on a non-industrial basis. Dr. Moore noted that although the applicant's migraine headaches were felt to be non-industrial, he noted that there was a period of temporary **exacerbation** of her headaches as a result of chemical exposures between the periods of November 2016 and August of 2017 when she left her job. Dr. Moore confirmed that he felt the headaches were non-industrial and pre-dated the work incident. He felt it medically reasonable applicant had a temporary exacerbation for a specified period of time. (Joint Exhibit 106, page 21)

After her evaluation with Dr. Moore, Dr. Fishman issued another supplemental report dated April 30, 2020. (Joint Exhibit 103) In this report, Dr. Fishman reviewed the reports of Dr. Takamura and Dr. Moore. Dr. Fishman also reviewed his prior reports and concluded that he has no reason to disagree with the medical legal conclusions of Dr. Takamura or Dr. Moore. He noted that both of the evaluators documented applicant is functioning well at home without major impacts on her activities of daily living and there was no evidence of industrial psychiatric or neurologic injury. In addition, in reviewing his own reporting, Dr. Fishman updated his determinations of cacosmia and idiopathic environmental intolerance. Dr. Fishman concluded that he could not find with reasonable medical probability that any internal disease state that is causing objectively

quantifiable permanent disability. Furthermore, there were no ratable internal permanent impairment or any need for internal future medical care. (Joint Exhibit 103, page 18)

The parties had the applicant re-examined by Dr. Fishman on 12/27/2021. (Joint Exhibit 104) During this evaluation, applicant indicated that since her last evaluation with Dr. Fishman over 3 years ago, her complaints regarding shortness of breath and sensitivity to odors and chemical smells remained unchanged. (It should be noted that applicant had not worked for UCSD since August of 2017.) Since the last evaluation, applicant had obtained medical treatment with a rheumatologist, neurologist, cardiologist and other physicians regularly. This re-evaluation was set as applicant added additional body parts to her claim which this PQME needed to address; specifically the circulatory system. The applicant continued to disagree that her claim should be denied, and Dr. Fishman was again to address the denied body parts. Dr. Fishman was provided with additional medical records to review and comment upon. Dr. Fishman was also given a letter from CA DIR Occupational Safety and Health Administration to UCSD indicating the Division has not determined whether the hazard, as alleged, existed at the workplace and at that time the Division did not intend to conduct an inspection of the workplace. The Division indicated that UCSD, the employer in this matter, was to investigate the alleged condition and notify the office in writing whether the alleged conditions existed, and, if so, specify the corrective actions taken. Having reviewed the additional findings and medical records, Dr. Fishman concluded that there was nothing contained in the new records and documents that would change any of the internal medical legal conclusions previously issued in this matter. (Joint Exhibit 104, page 25) Furthermore, a review of applicant's cardiology records by Dr. Fishman resulted in Dr. Fishman concluding that, absent the cardiac monitor results, he would be speculating as to whether the applicant even has an underlying cardiac arrhythmia and/or what that arrhythmia might be. Dr. Fishman did indicate other possibilities that may manifest an elevated regular pulse rate as well as noted that applicant's current cardiologist did not indicate in his records that any of applicant's symptoms or abnormal echocardiogram were related to any workplace exposure. (Joint Exhibit 104, page 26) Dr. Fishman did review Dr.Taylor's ENT reports and noted that Dr. Taylor never mentioned any occupational cause of the applicant's ENT symptoms. Rather he noted that Dr. Taylor prescribed a steroid nasal spray for treatment of nonindustrial allergic rhinitis. Noting that he had not been provided with the entire medical record he believed was still outstanding, Dr. Fishman concluded that he could not presently conclude with reasonable medical probability that any workplace event or exposure led to the development of circulatory disease. Dr. Fishman reported that he was unaware, absent strong evidence to the contrary, that transient exposure to a disinfectant of the type used by the applicant in the manner that she described would cause permanent cardiovascular disease. (Joint Exhibit 104, page 28) Finally, in this same report Dr. Fishman stated that regarding the new addition of the circulatory system to the claim, he did not find any industrial injury to the circulatory system. (Joint Exhibit 104, page 29)

Dr. Fishman issued his final report dated April 18, 2023. (Joint Exhibit 105) Dr. Fishman was given the opportunity to review additional subpoenaed medical records, Cal OSHA records and the request from legal counsel to review such documents. The medical records contained the results of diagnostic testing performed by applicant's treaters. Applicant's pulmonary function tests showed normal lung mechanics and volumes. The spirometry was within normal limits. Dr. Fishman was provided with UC San Diego's response to the Cal OSHA complaint including information showing that the EH&S Department concluded that the Oxivir was not classified as

hazardous and personal protective equipment (PPE) was not required under normal use condition. (Joint Exhibit 105, page 14) As to applicant's contention that the room(s) she worked in did not have adequate ventilation, UCSD responded that the Facilities Engineering and third-party check the ventilation monthly and the air-balanced is checked annually in room 824. In room 8-925, this room has a ventilation rating at 9 air changes per hour positive with airflow at intake and exhaust at 158 CFM and 151 CFM respectively. The computerized management asset system database managed by the Facilities Engineering showed no reported ventilation loss in Room 8-925 for the last three years. (Joint Exhibit 105, page 15) It is important to note that the response of UCSD to the Cal OSHA allegations directly contradict the representations the applicant made to this Court during the course and scope of the trial. Her credibility was at issue during the trial and these records substantiate applicant's lack of credibility. Having reviewed the medicals from Cristobal Soto, Imaging Healthcare Specialists, Dr. Kugel, and other medical providers did not change any of Dr. Fishman's prior internal medical legal conclusions. In addition, the responses from Jason Peterson, DHSc MPH/Director, Environmental Health and Safety, UCSD Health reviewed by Dr. Fishman did not change Dr. Fishman's medical legal conclusions. Dr. Fishman again articulated that he previously concluded that there was no industrial injury to the applicant's circulatory system and there was nothing contained in the currently provided attested medical records and documents that changed the previously issued internal medical legal conclusions. As to applicant's respiratory system, Dr. Fishman previously failed to find any industrial contribution to the applicant's respiratory complaints and nothing in the currently provided information changed his medical legal conclusions.

In addition to the medical records reviewed above, applicant submitted a letter dated August 26, 2021. (Applicant's Exhibit 2) This letter states that the individuals who signed this letter give their support to the applicant. In addition, it states that UCSD hospital does do an annual test with the N-95 213 respirators but that the employer does not give them a copy with the information nor do the employees get a certificate. The letter then has multiple names, signatures and phone numbers. This letter was offered into evidence by the applicant. However, there were no witnesses called to authenticate the letter, no testimony by the applicant to indicate how and why this letter was generated or to authenticate it, such that this WCJ does not give this letter any weight in making any determinations in this matter.

Applicant also entered into evidence the reports from Imaging Healthcare Specialist. (Applicant Exhibit 1) This report was reviewed and incorporated into the findings of Dr. Fishman. This is also true of applicant's exhibit 3, the medical reports of Maria de Jesus Vazquez-Campos from 2014 and Kaiser reports from June of 2017.

Applicant submitted into evidence the San Diego Air Balance Co., Inc., Air Distribution Test dated 12/29/2020. (Applicant's Exhibit 4) Applicant testified and wanted to point out that the testing did not include the room in which she believes there was inadequate ventilation. However, the response from UCSD to Cal OSHA has been reviewed and incorporated into the medical legal reporting from Dr. Fishman. This WCJ finds the reporting of Dr. Fishman to be substantial medical evidence and gives great weight to his findings. In addition, this WCJ found the applicant lacked credibility and does not give much weight to her proffered exhibits. Specifically, there was no foundation for Applicant's Exhibit 4 and no testimony to explain what exactly this exhibit was and what its probative value is.

Applicant's Exhibits 5 and 6 were additional medical records which the panel QME, Dr. Fishman, was given the opportunity to review and comment upon. It will be noted that these medical records were acquired around the time of applicant's alleged industrial injury and this WCJ was concerned at the beginning of this case with defendant's denial. On its face, it may appear that applicant suffered a workplace injury in the form of exposure to chemicals. However, after reviewing all of the medical records along with the detailed information provided by Dr. Fishman, Dr. Takamura, and Dr. Moore it became more apparent that applicant did not suffer a work-related injury, rather her conditions were pre-existing and non-industrial. Further discussions regarding these conclusions are below.

In order to be compensable, an injury must arise out of and occur in the course of employment (AOE/COE). (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.) To determine whether an injury is AOE/COE, we look to the nature of the act and the nature of the employment, the custom or usage of the employment, the terms of the employment contract, and "other factors." (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568 [49 Cal.Comp.Cases 772] (*Price*); *North American Rockwell Corp. v. Workmen's Comp. App. Bd.* (1970) 9 Cal.App.3d 154, 158 (*Saska*) [35 Cal.Comp.Cases 300].) It is well established that for the purpose of meeting the causation requirement in a workers' compensation injury claim, it is sufficient if the work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd*. (2015) 61 Cal.4th 291 [188 Cal. Rptr. 3d 46, 349 P.3d 141, 80 Cal.Comp.Cases 489].) "...[T]he proximate cause requirement of Labor Code section 3600 has been interpreted as merely elaborating on the general requirement that the injury arise out of the employment. The danger from which the employee's injury results must be one to which he or she was exposed in the employment." (*Id.*, at 297 - 298 [citations omitted].) The acceleration, **aggravation** or 'lighting up' of a preexisting condition "is an injury in the occupation causing the same." (*Id.*, at 301, quoting *Tanenbaum v. Industrial Acc. Com*. (1935) 4 Cal. 2d 615, 617 [52 P.2d 215, 1935 Cal. LEXIS 590]; see also *Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [69 Cal. Rptr. 88, 441 P.2d 928, 33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd*. (*Buckner*) (1966) 65 Cal.2d 438 [55 Cal. Rptr. 254, 421 P.2d 102, 31 Cal.Comp.Cases 421].) An exacerbation is a temporary increase in the symptoms of a pre-existing condition that returns to its prior level within a reasonable period of time. An aggravation is an increase in the severity of a pre-existing condition where the underlying pathology is permanently moved to a higher level. The industrial aggravation of a pre-existing condition constitutes an injury for workers' compensation purposes. (*Tanenbaum v. Industrial Acc. Com*. (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590; *Zemke v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [69 Cal. Rptr. 88, 441 P.2d 928, 33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd*. (Buckner) (1966) 65 Cal.2d 438 [55 Cal. Rptr. 254, 421 P.2d 102, 31 Cal.Comp.Cases 421]; see also Hanna, California Workers' Compensation Law & Practice, § 4:41., which states, "An aggravation of an underlying condition is an injury in the course of employment. [LC § 4663.] A problem sometimes arises where an employee has had an industrial accident causing or precipitating a particular condition and thereafter sustains another strain on the job. If the subsequent strain indeed aggravates and worsens that original condition, then it may be considered a new injury, to the extent of the aggravation or worsening. However, if the subsequent strain does not rise to the dignity of an aggravating injury, but rather is a mere exacerbation or

recurrence of the original injury, then no new industrial injury has occurred. Another important distinction between an aggravation and an exacerbation is that if the second incident causes disability it is, by definition, an aggravation. That is because an aggravation causes the temporary or permanent disability while an exacerbation does not. [See *Clark v. City of Los Angeles* (W/D 2017) 82 CCC 1404.] Thus, if a second injury causes no additional temporary or permanent disability, it is likely a mere exacerbation."

Whether an employee's injury arose out of and in the course of employment is generally a question of fact to be determined in light of the particular circumstances of the case. (*Wright v. Beverly Fabrics* (2002) 95 Cal.App.4th 346 [67 Cal.Comp.Cases 51].) The burden of proving injury AOE/COE rests with the employee and must be met by a preponderance of the evidence. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253] (*LaTourette*).)

Labor Code §3202.5 states:

> "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of evidence."

Under Labor Code Section 5705, the burden of proof rests upon the party holding the affirmative of the issue. Here, it would be applicant's burden to establish industrial causation for the alleged industrial injury during the periods January 1, 2017, through June 13, 2017, to her ears, nose, throat, face, left eye, headaches, migraine, allergy, nausea, immune system, neurologic, circulatory, brain, respiratory system, and nervous system.

In the case at hand, there is no medical evidence to establish industrial causation. Applicant presented to three different QMEs in three different specialties all providing the same conclusions; applicant did not suffer a compensable injury during the period of January 1, 2017, through June 13, 2017. Although, at the onset of applicant's complaints, she did present to a clinic that indicated she was having a reaction to potential chemical exposure at work, after multiple evaluations and further testing, Dr. Moore correctly noted that applicant's symptoms occurred prior to her workplace assignment and were only exacerbated at her new workplace. Dr. Fishman was given the opportunity to review all of applicant's medical records as well as the objective testing performed by other evaluators and came to the reasonable conclusion that applicant's alleged injury is non-industrial in nature. Furthermore, applicant's credibility is at issue such that this WCJ finds her testimony to be unreliable. The applicant contended that the room she worked in was not tested. However, the documentary evidence says otherwise, such that Room 8-925 had been tested and has a ventilation rating at 9 air changes per hour (ACH) positive with airflow at intake and exhaust at 158 CFM and 151 CFM respectively. The computer-based TMA, a computerized management asset system database managed by Facilities Engineering showed no reported ventilation loss in Room 8-925. (Joint Exhibit 105, page 15) Applicant indicated that she has proof that the Oxivir chemical is able to break open gloves and break open plastic mattresses that babies

are laid on in the NICU. (MOH/SOE, page 7, lines5-6) However, no evidence of such allegations was ever presented in this case. All other allegations or contentions made by the Applicant were not substantiated with any evidence presented in this matter.

This WCJ found the reporting of the QMEs to be substantial medical evidence, thus the undersigned gave such reporting great weight in making the determinations in this matter. It is the applicant's burden of proof to establish industrial causation for the alleged injury. In this case, the applicant has not presented any persuasive evidence to meet her burden of proof.

CONCLUSION

Based on the testimony of the applicant, along with the documentary evidence, this workers' compensation administrative law judge (WCJ) now concludes that Applicant has failed to show by a preponderance of the evidence that the alleged injury did occur at the work site and she has not met her burden of proof on the causation issue presented for the date of injury for the period of January 1, 2017, through June 13, 2017. An Order shall issue that Applicant take nothing.

As applicant has failed to meet his burden of proof to establish an industrial injury, all other issues, including applicant's attorney's fees, are moot.

DATE: July 22, 2024

Alicia D. Hawthorne
WORKERS' COMPENSATION JUDGE