WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JESS PEREZ, *Applicant*

vs.

SOUTHERN CALIFORNIA GAS COMPANY,
permissibly self-insured, *Defendants*

Adjudication Number: ADJ14362966
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the November 12, 2024 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an Energy Technician from November 1, 2020 to November 29, 2020, sustained industrial injury in the form of COVID-19.

Defendant contends that the WCJ's legal conclusions are not supported by the medical reporting in evidence.

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return this matter to the trial level for further proceedings.

FACTS

Applicant claimed injury in the form of COVID-19 while employed as an Energy Technician by defendant Southern California Gas Company from November 1, 2020 to November 29, 2020. Defendant denies liability for the claim.

The parties have selected Lazaro Alonso, M.D., as the Qualified Medical Evaluator (QME) in internal medicine. In a report dated September 7, 2022, Dr. Alonso noted applicant's assertion that he was exposed to the COVID-19 virus during a specific service call to a residential address where the resident was suffering from COVID-19. (Ex. 1, Report of Lazaro Alonso, M.D., dated September 7, 2022, at p. 2.) Following the QME's review of the specifics of this interaction, estimated to have lasted 15-20 minutes, the QME opined, "[k]eeping in mind the proximate distance needs for contracting COVID-19, and keeping in mind this interaction did not happen in a totally enclosed indoor setting, it was for a very short period of time (since customer did not remain there during entire service call), there's no substantial medical evidence that an occupational exposure to COVID took place during this encounter." (*Id.* at p. 8.)

On October 2, 2024, the parties proceeded to trial on the sole issue of injury arising out of and in the course of employment (AOE/COE). (Minutes of Hearing and Summary of Evidence (Minutes), dated October 2, 2024, at p. 2:12.) The WCJ heard testimony from applicant, who testified that in November 2020 he worked as an Energy Tech and would visit eight to thirteen orders a day and spend an average of 30 to 40 minutes with each customer. (*Id.* at p. 3:14.)

On November 12, 2024, the WCJ issued the F&O, determining that applicant "sustained an injury arising out of and in the course of employment in the form of Covid-19." (Finding of Fact No. 1.) The WCJ's accompanying Opinion on Decision reviewed the testimony of applicant and applicant's spouse, who testified to limited interactions with persons outside the household during the month of November, 2020. In addition, the WCJ cited the QME's opinion that symptoms of COVID-19 "start to show three to five days from exposure." (Opinion on Decision, at p. 2.) The WCJ constructed a timeline demonstrating that applicant was the first person in his household to contract COVID-19 symptoms and further noted the credible testimony of applicant's spouse that applicant "did not go out with any friends or co-employees after work." (*Ibid*.) The WCJ concluded that based on the testimony of applicant's spouse and the reports of QME Dr. Alonso, applicant contracted COVID-19 at work. (*Ibid*.)

Defendant's Petition contends that the F&O was based on the WCJ's timeline of events, and that the conclusions reached by the WCJ are contrary to the medical reporting in evidence. Defendant asserts the WCJ's analysis "goes against the PQME's medical conclusion there is no support for the theory that the source of Applicant's Covid infection was during the alleged particular service call and therefore there was no industrial causation." (Petition, at p. 7:12.) Defendant contends the QME reporting constitutes substantial evidence and should be relied upon to determine that applicant did not contract COVID-19 as a result of industrial exposures. (*Id.* at p. 12:17.)

Applicant's Answer notes that QME Dr. Alonso testified in deposition that asymptomatic people can unknowingly infect others, and that the QME's opinion of non-industrial causation was limited to a single residential service call on November 14, 2020. (Answer, at p. 11:17.) Applicant further notes that the QME could not testify if the applicant's COVID resulted from an asymptomatic exposure on another service call. Thus, applicant concludes that the QME's opinions, coupled with the testimony of applicant's spouse that "no one in their household left their home in November except for the applicant going to work and her weekly grocery shopping trip, and the applicant was the one who brought COVID into the home; the only possible place that the applicant could have suffered COVID was at work." (*Id.* at p. 11:20.)

The WCJ's Report notes that applicant was the first member of his household to develop symptoms of COVID-19, and because applicant only had work-related personal contact outside the home, that the record supports the conclusion of industrial causation. (Report, at p. 3.)

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

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

> (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 December 20, 2024, and 60 days from the date of transmission is February 18, 2025. This decision is issued by or on February 18, 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 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 December 20, 2024, and the case was transmitted to the Appeals Board on December 20, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 20, 2024.

II.

It is well established that any award, order, or decision of the Board be supported by substantial evidence in the light of the *entire* record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Accordingly, our inquiry cannot rely solely on

isolated evidence which supports a particular conclusion. Our review must include all "other relevant facts of record which rebut or explain that evidence." (*Lamb, supra*, at p. 281.)

Here, defendant challenges the WCJ's determination that applicant's industrial exposures resulted in the development of COVID-19-related symptoms. Defendant's Petition notes that QME Dr. Alonso has never opined to industrial causation to a reasonable medical probability. (Petition, at p. 5:1.) Accordingly, defendant contends that the WCJ's finding of injury AOE/COE is not supported in the medical record.

QME Dr. Alonso has undertaken an analysis limited to whether applicant "became infected with Covid during the specific service call of November 14, 2020." (Ex. 4, Report of Lazaro Alonso, M.D., dated April 9, 2024, at p. 7.) As part of his evaluation, Dr. Alonso reviewed applicant's narrative history and identified "issues in the [applicant's] testimony" which caused the QME to deem applicant's testimony to be unreliable and delivered in a "rehearsed fashion." (Ex. 3, Transcript of the Deposition of Lazaro Alonso, M.D., dated June 12, 2024, at p. 12:24.) While the QME agreed that the trier of fact would make the ultimate credibility determination, Dr. Alonso concluded that the evidentiary record did not support the assertion that applicant was infected with COVID-19 during a service call which transpired November 14, 2020. (*Id.* at p. 29:8.)

The WCJ's Opinion on Decision does not address with specificity the QME's conclusions regarding the lack of evidence to support industrial COVID-19 exposure during the November 14, 2020 service call. Rather, the WCJ identified Dr. Alonso's opinion that COVID symptoms will arise three to five days from exposure and constructed a timeline of events that appears to exclude nonindustrial vectors of exposure in the days leading up to applicant's first symptoms arising on or about November 21, 2020. (Opinion on Decision, at p. 3.)

Because the WCJ's opinion appears to identify and isolate portions of the medical record supporting his analysis without substantively addressing "other relevant facts of record which rebut or explain that evidence," we are persuaded that the conclusions reached in the F&A are not supported by substantial evidence in the light of the entire record. (*Lamb, supra*, at p. 281.)

Initially, we note that the QME's stated understanding of the scope of his inquiry is *limited to a single service call* rendered by applicant on November 14, 2020. (Ex. 4, Report of Lazaro Alonso, M.D., dated April 9, 2024, at p. 7; Ex. 3, Transcript of the Deposition of Lazaro Alonso, M.D., dated June 12, 2024, at p. 20:11.) Given that applicant's claimed cumulative injury spans

the period of November 1, 2020 to November 29, 2020, it is unclear whether this reflects an allegation of cumulative exposure, or uncertainty as to when a specific exposure transpired. When questioned about whether applicant might have been exposed to COVID-19 at other job locations or service calls, the QME's response was unequivocal: "I have no idea if there were other work sites that he attended to for Southern California Gas where he may have had exposure." (*Id.* at p. 26:15.) Thus, the QME's opinions are, at present, limited to a specific service call, and the QME has made it clear that he does not have information necessary to formulate an opinion with respect to exposures beyond the November 14, 2020 service call.

An industrial injury may be either "specific" or "cumulative." (Lab. Code, § 3208.1.) A specific injury occurs "as the result of one incident or exposure which causes disability or need for medical treatment." (Lab. Code, § 3208.1.) A cumulative injury is due to "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (§ 3208.1.) "In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. [Citations.] The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)

In evaluating an allegation of industrial exposures to a communicable disease, "it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. [Citations.] It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. [Citations.] The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i.e., the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof." (*Bethlehem Steel Co. v. Industrial Acci. Com.* (*George*) (1943) 21 Cal.2d 742, 744 [8 Cal. Comp. Cases 61, 62-63] (*George*).)

In *Lamb, supra*, 11 Cal.3d 274, applicant widow sought benefits in relation to her husband's death after working 10 hour days for seven days out of 10 days without a day off. Two evaluating physicians opined that applicant's work activities contributed to his death, while two

other physicians opined there was no contribution. The WCAB reversed the compensable findings of the WCJ and held that the evidence relied upon by the WCJ was "just too speculative and weak" to support a finding of industrial causation. (*Id.* at p. 280.) The Supreme Court, however, held that it was error for the WCAB to rely on the isolated segments of the medical record, and that in doing so, the WCAB "ignored competent and substantial evidence on the point which was both uncontradicted and unimpeached." (*Id.* at p. 280.) The court concluded that "[a]lthough the Board may choose to disbelieve relevant uncontradicted and unimpeached evidence if it has grounds other than mere speculation and conjecture to do so [citations], it may not disregard such evidence as it has done in this case." (*Id.* at p. 283.)

In *Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372 [35 Cal.Comp.Cases 525], the Supreme Court considered the question of the adequacy of the medical record in support of a determination by the WCAB that applicant did not sustain industrial injury. Therein, applicant sustained a specific back injury superimposed on a long history of prior back injuries. The question presented to the Appeals Board thus involved whether applicant had sustained new injury resulting in additional disability. Applicant's medical history reflected a long history of gradually worsening of symptoms. While several evaluating physicians opined to the existence of a new injury with additional permanent disability, one physician opined, "[i]t would seem to me that, if the ruptured thoracic disc for which the patient underwent surgery was caused or aggravated by the injury of June 26, 1967, the patient would have sought medical attention before August 18, 1967 … In other words, I would think that he should have had some symptoms immediately at the onset which would have led him to seek medical attention." (*Id.* at p. 376.) Based on this single report, the WCJ found no injury, and the WCAB affirmed. However, the Supreme Court observed that applicant's credible and unimpeached testimony established that prior to his industrial injury, his back symptoms were largely dormant. The court also found the physicians' analysis regarding the delay in seeking treatment to be unpersuasive, as the court identified a "myriad of possible reasons" for the delay. (*Id.* at p. 380.) The court concluded that it was improper for the Appeals Board to rest its decision on a medical opinion that speculated as to the reasons for why applicant did not seek immediate medical attention and that the physician had effectively substituted his own surmise in place of evidence. "An expert opinion is … insufficient to support a board determination when that opinion is based on surmise, speculation, conjecture, or guess." (*Id.* at p. 378.)

Here, the medical evidence in the record addresses but one possible instance of exposure, initially surmised by applicant to have occurred during a November 14, 2020 service call involving a homeowner that was experiencing COVID-19-related illness. (Ex. 1, Report of Lazaro Alonzo, M.D., dated September 7, 2022, at p. 3.) The QME reporting does not weigh the totality of the evidence both supporting and detracting from applicant's general assertion of industrial exposure to the COVID-19 virus between November 1, 2020 and November 29, 2020.

In this regard, we note that the testimony of applicant and his spouse is germane insofar as it addresses their interactions with persons outside the household, as is applicant's testimony regarding his workplace exposures. In addition, the WCJ's assessment of the credibility of the witnesses is entitled to great weight in these proceedings. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

The WCJ and the Appeals Board have a duty to further develop the record when there is insufficient evidence to adjudicate an issue. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261].) The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) Accordingly, the WCJ or the Board may not leave undeveloped matters within its acquired specialized knowledge (*Id*. at 404).

Following our review of this matter occasioned by defendant's Petition, we conclude that the evidentiary record must be augmented to fully address the issue of industrial causation. Pursuant to our holding in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), once it has been established that, as a threshold matter, the specific medical opinions are deficient, for example, that they are inaccurate, inconsistent, or *incomplete*, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reporting in the case. (*Id*. at 141.) Development of the record is warranted and appropriate when "neither side has presented substantial evidence on which a decision could be based." (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal. Comp. Cases 986].)

Because the WCJ has isolated portions of the QME reporting without considering the totality of the record, including the QME's opinions both supporting and detracting from the issue

of industrial causation, and because the QME reporting does not completely address the question of industrial causation beyond a single service call, we conclude that the F&A is not based on substantial evidence. Accordingly, we will grant defendant's Petition and return this matter to the trial level for development of the record.

In so doing, we offer the following nonbinding guidance to the parties. We note that the issue presented is whether, to a reasonable medical probability, applicant's industrial exposures contributed to the development of COVID-19-related symptoms or illness. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal. 4th 291, 297-298 [80 Cal.Comp.Cases 489]; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660]; *George, supra*, 21 Cal.2d at p. 744; Lab. Code, §§ 3202.5, 3600(a).) In evaluating the issue, the QME should be afforded the opportunity to evaluate the entirety of the record, including applicant's work activities during the claimed period of injurious exposure. In addition, the QME should be afforded the opportunity to address causation in light of the relevant deposition and trial testimony, as well as the WCJ's credibility determinations. (*Garza, supra*, 3 Cal.3d at p. 319.) Once the record has been appropriately developed, the WCJ will, in turn, need to review the medical legal reporting and determine whether the QME reporting constitutes substantial evidence. (*Lamb, supra,* 11 Cal.3d at p. 281; *Place, supra,* 3 Cal. 3d 372.) The WCJ may then determine whether applicant's risk of contracting COVID-19 by virtue of his employment was "materially greater than that of the general public." (*George, supra,* 21 Cal.2d 742, 744.) We also observe that irrespective of the mechanism or duration of injury pleaded by applicant, the WCJ should conform the pleadings to proof, as is necessary. (Cal. Code Regs., tit. 8, § 10517.)

The WCJ may then issue a decision that is based on substantial medical evidence and a review of the entire record.

For the foregoing reasons,

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

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on November 12, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSE H. RAZO, COMMISIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 18, 2025

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

JESS PEREZ
LAW OFFICES OF ROSE, KLEIN & MARIAS
LAW OFFICES OF CIPOLLA, BHATTI, HOYAL & ROACH

SAR/bp

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