WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NICHOLE JACKSON, *Applicant*

COUNTY OF LOS ANGELES, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ13319190
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact of June 1, 2022, wherein it was found that, while employed on March 11, 2020 as a probation officer, applicant sustained industrial injury to "the body system, COVID-19, circulatory system, respiratory system, [and] psyche/stress." The only issue at trial was whether applicant's injury arose out of and in the course of her employment. The finding of industrial injury was made both based on the fact that qualified medical evaluator internist Jeffrey A. Hirsch, M.D. found the injury industrial (Finding No. 7) and because the injury was presumed industrial pursuant to Labor Code section 3212.86.

Defendant contends that the WCJ erred in finding industrial injury arguing that Dr. Hirsch's report was not substantial medical evidence due to an incomplete history and arguing that the Labor Code section 3212.86 presumption does not apply to this case.[1] We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will grant reconsideration, rescind the Findings of Fact of June 1, 2022, and return this matter to the trial level for further development of the record and decision.

Labor Code section 3212.86 states in pertinent part:

> (b) The term "injury," as used in this division, includes illness or death resulting from COVID-19 **if both of the following circumstances apply**:

[1] Defendant also contends that it timely denied applicant's claim. However, the WCJ deferred this issue in her decision. (Finding No. 6.) Thus, we do not reach this issue.

(1) The employee has tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction.

(2) **The day referenced in paragraph (1) on which the employee performed labor or services at the employee's place of employment at the employer's direction was on or after March 19, 2020, and on or before July 5, 2020**. The date of injury shall be the last date the employee performed labor or services at the employee's place of employment at the employer's direction.

(3) If paragraph (1) is satisfied through a diagnosis of COVID-19, the diagnosis was done by a licensed physician and surgeon holding an M.D. or D.O. degree or state licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice, and that diagnosis is confirmed by testing or by a COVID-19 serologic test within 30 days of the date of the diagnosis.

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(e) An injury described in subdivision (b) is presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence. Unless controverted, the appeals board is bound to find in accordance with the presumption.

(Lab. Code, § 3212.86 [Emphasis added].)

In this case, applicant last worked on March 11, 2020. (Transcript of December 16, 2021 trial at p. 9.) Since the presumption only covers cases of COVID of employees who worked in person from March 19, 2020 to July 5, 2020, the presumption is not applicable to the facts of this case.

With regard to medical evidence of causation, Dr. Hirsch wrote in his April 1, 2021 report: At the time of the subject illness, Ms. Jackson was working in supervision of adult probationers. These individuals present to Ms. Jackson in her office in Baldwin Park. Ms. Jackson works with about fifty colleagues in the Baldwin Park building. These deputy probation officers performed similar duties as compared to Ms. Jackson at that time. Ms. Jackson states she worked in an open cubicle in a large office setting. When considering the co-workers and probationers who entered and exited each day, Ms. Jackson was around hundreds of individuals on a daily basis." (April 1, 2021 report at p. 2.) Based on the fact that applicant "was around hundreds of people on a daily basis in a large office" and applicant "did not recall any sick contacts or potential personal sources

of exposure" to COVID, Dr. Hirsch opined that it was more likely than not that applicant's COVID was industrial. (April 1, 2021 report at pp. 9-10.)

Applicant testified at trial that she worked at a cubicle in an area with four to six probation officers. (Transcript of December 16, 2021 trial at p. 10.) Applicant testified that she met with "a little more than" 10 clients per month, on average. (Transcript of December 16, 2021 trial at pp. 22-23.) When applicant was not meeting with clients, she was generally at her cubicle. (Transcript of December 16, 2021 trial at pp. 22-23.) Meetings with clients were held in a private, enclosed office and took an average of 20-30 minutes. (Transcript of December 16, 2021 trial at p. 24.) Applicant's supervisor testified that there were four supervisors and 32 probation officers working at the work location. (Transcript of March 15, 2022 trial at p. 10.) The supervisor testified that applicant met in person with clients once or twice per week. (Transcript of March 15, 2022 trial at p. 19.)

Defendant presented testimony that, other than applicant, no employees at applicant's location were diagnosed with, or tested positive for in February, March or April of 2000. (Transcript of December 16, 2021 trial at pp. 33-34.)

"The applicant for workers' compensation benefits has the burden of establishing the 'reasonable probability of industrial causation'" (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) Reports that contain an erroneous or inadequate history do not constitute substantial medical evidence upon which the WCJ can rely. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 1993]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 801 [33 Cal.Comp.Cases 358].)

Dr. Hirsch must be provided with the more specific history given in the trial testimony including applicant's working conditions, the frequency and duration of her contacts with the public and her co-workers, and the fact that none of applicant's co-workers were diagnosed with COVID during any relevant period.

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395

[62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. 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 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision on the issue of industrial causation. We express no opinion on the ultimate resolution of this issue.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact of June 1, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact of June 1, 2022 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 23, 2022

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

NICHOLE JACKSON
CRAWFORD & RANSOM
LEWIS BRISBOIS BISGAARD & SMITH

DW/oo

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