WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BILLY DIEBALL, ***Applicant***

vs.

STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS - MEN'S COLONY, legally uninsured; STATE COMPENSATION INSURANCE FUND/STATE CONTRACT SERVICES, adjusting agency, ***Defendants***

Adjudication Number: ADJ11330624
San Luis Obispo District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the October 28, 2021 Findings and Award. The workers' compensation administrative law judge (WCJ) found that applicant, while employed during the period January 1, 1995 through October 14, 2016 as a correctional officer, sustained an industrial injury to his lungs as a result of valley fever (coccidioidomycosis). The WCJ found that applicant was entitled to 20% permanent disability indemnity and future medical care.

Defendant contends that the applicant did not meet his burden of proving that he sustained an industrial injury, arguing that valley fever is a nonoccupational disease and that the spores causing valley fever are present in the environment near applicant's home as well as at work. Defendant also contends that the reports of the Dr. Tirmizi are not substantial medical evidence because Dr. Tirmizi cited a population study that contradicted his conclusions about applicant's work environment, included applicant's commute in his analysis of work exposures, and did not know how far the valley fever spores could travel.

The WCJ prepared a Report and Recommendation for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the Report, which we adopt and incorporate by reference, and for the reasons discussed below, we will deny the Petition for Reconsideration.

As an initial mater, we note that the parties agreed to submit this case for decision based on the evidence listed on the pre-trial conference statement and waived use of a court reporter.

While the WCJ memorialized the stipulations and issues as part of the Findings and Award, a separate document should have been prepared on the date of trial memorializing stipulations and issues and admitting evidence. The admitted evidence should have been correctly identified in the Electronic Adjudication Management System (EAMS) by exhibit number and marked as admitted.

FACTS

Applicant was evaluated by Omar Tirmizi, M.D. at the direction of the WCJ pursuant to Labor Code section 5701. Dr. Tirmizi noted that applicant was first diagnosed with valley fever in 2012. (Exh. F, November 16, 2019, Omar Tirmizi, M.D., Panel Qualified Medical Evaluation Report, p.1.) According to the history taken by Dr. Tirmizi, applicant was employed as "a supervising sergeant and his work involves supervising the inmates and maintaining the security of the prison. His work also involves spending one to two hours a day in the yard." (Id. at p. 2.)

The parties corresponded with Dr. Tirmizi and requested supplemental reports, which Dr. Tirmizi produced. Dr. Tirmizi addressed the issue of whether applicant sustained an industrial injury in a report dated October 11, 2020.

> I have previously seen and evaluated Billy Dieball in my office in Sant Maria, California on 11/16/19. I had diagnosed him as having coccidiomycosis with an impairment rating of 17% of which, I apportioned 60% industrial and 40% nonindustrial.
>
> This was followed by supplemental reports, dated 04/26/20, 06/19/20, and 06/25/20. I have now been sent additional correspondence, and asked to produce a supplemental report. In my original report, I had noted that Mr. Dieball was diagnosed with Valley Fever in 2012. He is an employee of CDCR since 1998. He lived in Paso Robles and has a 45 minute drive each way, to work and back and worked 10:00 pm to 6:00 am shifts, although, in the past, he had done previous shifts as well. He spends one or two hours a day in the yard. In the latest correspondence, dated 09/21/20, I have been asked to note that the applicant did not work in construction, and have been sent maps for the same, and I am asked to assume that it is unlikely he would be exposed to spores during those shifts. The second shift was 6:00 am to 2:00 pm in the following areas, which is A Facility East, which is a mixture of cement walkways, basketball courts, handball courts, grass, and dirt in the open are with no construction; G Facility, which is concrete walkways, basketball courts, baseball courts with grass areas and dirt also; and D Facility which is under construction.
>
> …
>
> With respect to counsel's discussion about exposure to construction areas, it not my contention that spore acquisition is through construction only. Spore

> acquisition inhalation could be simply by walking in an area with dirt, where wind gusts may aerosolize the pathologic spores, which an individual may inhale.
>
> …
>
> Mr. Billy Dieball gives a plausible history of patrolling the yard, which has dirt, during his shifts. However, he is also at risk for acquiring/inhaling the spores while traveling back and forth to his workplace. Both of these are considered industrial factors. His risk of acquiring coccidiomycosis is minimal at his home, as he is not involved in any home activities. Therefore, he either inhaled the cocci spores at his place of work, at the yard, or while traveling back and forth to work, both of which are industrial factors. It is unlikely that he inhaled the spores at home as the conditions at his home are not such that would allow aerosolization of spores or dirt. (Exh. B, October 20, 2020, Omar Tirmizi, M.D., Supplemental Panel Qualified Medical Evaluator Report, pp.1-2.)

At his deposition, Dr. Tirmizi clarified that applicant's home would be low risk compared to his workplace even if there was a construction project in close proximity to his home. "One has to compare the area where dirt is being dug up. Typically the area around prisons is kept free of all greenery and foliage for obvious reasons. So there is a higher risk of dry soil being aerosolized…Most people at home are not exposed to wind gusts where they can inhale spores." (Exh. A, August 30, 2021, Deposition Transcript of Omar Tirmizi, M.D., p. 25.) Dr. Tirmizi also clarified that "The environment around the prison is a more significant risk for inhalation of spores than driving a car." (Id. at p. 33.)

ANALYSIS

Labor Code section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment." Labor Code section 3208.1 states, "An injury may be either: (a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as 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."

An occupational disease is one where the symptoms are latent after exposure to a disease-causing agent in the workplace. (*General Dynamics Corp. v. Workers' Comp. Appeals Bd.* (1999) 71 Cal.App.4th 624, 629 [64 Cal.Comp.Cases 515]. When filing an application for an injury resulting from an occupational disease, parties often plead either the Labor Code section 5412 date of injury, or the period of injurious exposure pursuant to Labor Code section 5500.5. Labor Code

section 5412 states "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." Labor Code section 5500.5(a) states, "liability for occupational disease or cumulative injury claims … shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first." Occupational diseases and cumulative injuries are separate concepts. An occupational disease may be the result of a single exposure (i.e. a needle stick) or exposure arising over an extended period (i.e. radiation). It may not be possible to pinpoint with certainty the date of exposure. In this case, the WCJ correctly identified applicant's 5412 date of injury, and although the injury was likely the result of a specific exposure in approximately 2011, defendant does not dispute the WCJ's determination that applicant sustained a cumulative injury. Therefore, we will not disturb that finding.

As with any injury, in order to be entitled to workers' compensation benefits, the applicant has the burden of proving reasonable probability of industrial causation based on substantial evidence. However, the applicant is not required to prove causation to a "scientific certainty." (See *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 408, [33 Cal.Comp.Cases 660].) It is sufficient if work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 298 [80 Cal.Comp.Cases 489].)

To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].)

The test for whether an injury is AOE/COE is well-established. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette, supra,* 63 Cal.Comp.Cases at p. 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permit him to do." (Ibid.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 328].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." *(Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288]. "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher, supra,* 48 Cal.Comp.Cases at page 329.)

In cases where an applicant's injury is caused by a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. In those circumstances, the employee can establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com*. (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].) For example, a detective's Hepatitis B infection arose out of and in the course of employment because the nature of his work exposed him to drug addicts and needles and those exposures resulted in a higher probability of contracting Hepatitis B than the general population. (*City of Fresno v. Workers' Comp. Appeals Bd. (Bradley)* (1992) 57 Cal.Comp.Cases 375 (writ den.).) In a similar case, a Hepatitis C infection contracted by a sewage worker was found industrial based on medical reporting that it was "more probable than not" that applicant contracted the virus at work. (*City of Turlock v. Workers' Comp Appeals Bd.* (STK09YYZZZ) (2007) 72 Cal.Comp.Cases 931, 934 (writ den.).)

In a Supreme Court case addressing an industrial injury caused by valley fever, the Court affirmed the Industrial Accident Commission's finding that a traveling salesman who contracted

valley fever sustained an injury arising out of and in the course of his employment. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622.) As with many of the cases discussed above, the Court emphasized that it is a medical expert's job to assess whether is medically probable that disease transmission occurred at work. The opinions of qualified physicians are entitled to consideration "since it is part of their vocation to observe diseases and how they spread and to draw conclusions from those observations." (Id. at 629, quoting *San Francisco v. Industrial Acc. Com. (Slattery)* (1920) 183 Cal. 273, 284.)

In this case, Dr. Tirmizi explained why working outside as a prison yard supervisor exposed applicant to a greater risk of infection than the general public. Applicant's job required him to be outside in an area where the fungus that causes valley fever is present. When dirt is disturbed by construction or wind and the disease-causing spores become airborne, applicant's job duties required him to be in a place that posed a greater risk of coming into contact with the spores than an ordinary member of the community. Dr. Tirmizi's individualized assessment of applicant's workplace exposure risk is more relevant and persuasive than a population study, particularly given that Dr. Tirmizi cited the population study before addressing applicant's particular exposure risk. In addition, Dr. Tirmizi clarified at his deposition that applicant's job duties, which required him to spend significant amounts of time outside at a prison yard, exposed him to a very favorable environment for airborne valley fever spores. The WCJ's finding that applicant sustained an industrial injury is based on substantial medical evidence. Accordingly, we deny defendant's petition.

For the foregoing reasons,

IT IS ORDERED that defendant's petition for reconsideration is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ _JOSÉ H. RAZO, COMMISSIONER__________

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER_________

/s/ _ANNE SCHMITZ, DEPUTY COMMISSIONER___

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 13, 2022

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

BILLY DIEBALL
LAW OFFICES OF SPATAFORE & GRANT
STATE COMPENSATION INSURANCE FUND
THE 4600 GROUP

MWH/oo

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

ADJ11330624

BILLY DIEBALL v. **CALIFORNIA DEPT. OF CORRECTIONS & REHABILITATION – MEN'S COLONY; STATE COMPENSATION INSURANCE FUND**

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation:	Correctional Sergeant
Applicant's Age:	
Date of Injury:	January 1, 1995 – October 14, 2016
Parts of body alleged:	Lungs; Coccidioidomycosis
2. Identity of Petitioner:	Defendant
3. Verification:	The Petition was appropriately verified.
4. Timeliness:	Petition was timely filed
5. Date of Issuance of Order appealed:	October 28, 2021
6. Issue presented	(1) Whether the medical reporting was substantial evidence or, in the alternative, was speculative.

II

FACTS, CONTENTIONS AND ISSUES

Defendant, California Men's Colony, has caused to be filed a Petition for Reconsideration requesting reconsideration of and/or reversal of the WCJ's finding that applicant contracted Coccidioidomycosis (Valley Fever) while working in the course of his employment at California Men's Colony. The WCJ relied upon the medical reporting of Labor Code Section 5701-appointed physician, Tirmizi, and his deposition testimony.

Defendant asserts, in essence, that Dr. Tirmizi's reporting is speculative and that applicant failed in his duty to prove that the Valley Fever arose out of his employment.

Review of the medical reporting and deposition of Dr. Tirmizi, and the analysis of such reporting by the WCJ reveal that the appeal is non-meritorious and reconsideration should be denied.

Dr. Tirmizi, relying upon unchallenged and unrebutted statements of the applicant to the doctor that his home environs were dustless, green, and without any ongoing construction, concluded that applicant's home environment was not the cause or a contributor to his contraction of Valley Fever. Applicant further described his workplace, its dust component, and its ongoing construction. Based upon such findings of fact, as well as the nature of applicant's medical history of exposure and symptoms, Dr. Tirmizi unambiguously stated that applicant was exposed at work to such fungal elements which caused his contraction of the disease.

Of interest is that the defendant now appears to raise the "going and coming" rule as a possible defense since applicant was required to drive into work through areas known for fungal spores which create Valley Fever. It is well-established that the "going and coming" rule is an ill-favored affirmative defense that must be specifically raised and proved at the time of trial. Defendant did not raise such issue as a defense either prior to trial or at trial. Accordingly, it cannot be raised here upon reconsideration.

Defendant further raises the *Latourette* case as supportive of this appeal. Close review of the *Latourette* case, and its findings, seem to support the WCJ's findings in this case. Defendant asserts that the WCJ never provided an analysis that contraction of the disease would not have occurred but for the applicant going to work. Review of the Opinion on Decision, as well as the analysis provided by Dr. Termizi, indicates that such analysis was clearly provided. The WCJ flatly observed and concluded that Dr. Termizi was convinced that applicant contracted the Valley Fever at work and could not have contracted this disease at home. Applicant would not have contracted Valley Fever unless he had gone to work. Although the drive may have contributed as a possibility of contraction, this was never raised by defendants as an issue and the "going and coming" rule was never raised.

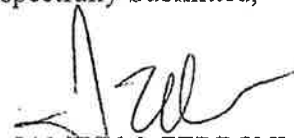
The report and deposition of Dr. Tirmizi were substantial evidence of the contraction of the disease at work and of the de minimis causative risk at the home of the applicant. Accordingly, based upon the unrebutted statements of the applicant to Dr. Termizi, and his utilization of those statements of fact, Dr. Termizi's findings that applicant contracted this disease at work should be upheld.

III

RECOMMENDATION

As stated above, it is respectfully recommended that the WCJ's decision should be confirmed and reconsideration should be denied.

Respectfully Submitted,



JAMES M. ZERBONI
Workers' Compensation Judge

Please see attached Proof of Service.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PETER SHUERE, ***Applicant***

vs.

STATE OF CALIFORNIA, DEPARTMENT OF YOUTH AUTHORITY, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND/ STATE CONTRACTS, ***Defendants***

Adjudication Number: ADJ11413863
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration on Board Motion to further consider the factual and legal issues presented by this case. This is our Decision After Reconsideration.

Defendant seeks reconsideration of the November 18, 2020 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed by the State of California as a vocational instructor during the period January 14, 2014 through June 1, 2018, sustained injury arising out of and in the course of his employment to his respiratory system and in the form of valley fever.

Defendant contends that the WCJ erred in finding that applicant sustained an industrial injury, arguing that the opinion of the panel qualified medical evaluator (PQME) Dr. Hendel is not substantial medical evidence because his conclusion that it is medically probable that applicant contracted valley fever at work is not supported by an adequate analysis of the relevant facts. Defendant also contends that the standard for finding a "nonindustrial disease" to be industrial is that the applicant must be at greater risk than the general public and, in this case, applicant is not at greater risk for exposure to the fungus that causes valley fever than the general public.

The WCJ prepared a Report and Recommendation for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons

discussed in the Report, which we adopt and incorporate by reference, and for the reasons discussed below, we will deny the Petition for Reconsideration.

FACTS

The applicant was employed as a vocational instructor by the California Youth Authority at Camarillo California when he contracted valley fever. Applicant filed an application claiming that he sustained an industrial injury to his respiratory system.

Valley fever, also called coccidioidomycosis, is an infection caused by the fungus Coccidioides which is present in the soil in certain areas of California.

As mentioned above, Eli Hendel, M.D., acted as PQME in this case. After an exhaustive review of medical records, Dr. Hendel offered the following opinion:

> The first issue that needs to be addressed is the causation of infection, given the fact that coccidioideomycosis is in the soil, and taking into account his activities in the period prior to when he was working, and taking into account the proportion of time that he was outdoors, exposure to exposed soil at work compared to outside of work and there was a reasonable medical probability that he did contract this infection during the course of…employment. (Exh. A, June 19, 2019, Eli Hendel, M.D., Panel Qualified Medical Evaluation, p.167.)

Defendant deposed Dr. Hendel on November 13, 2019. When questioned about whether soil samples would be helpful in assessing where applicant was exposed to the valley fever spores (coccidioidomycosis), Dr. Hendel testified as follows:

> I know I get that question asked often and that has not been done. The prevalence of coccidioidomycosis in certain areas is done based on the cases. It is not—unlike environmental studies, indoor studies where they do scrapings off the floor, when they do air testing for indoor, when they compare the parts per million of certain funguses indoors compared to outdoors.
>
> That is not done with cocci. It's not possible. The—it has two different states. The lifestyle—the life cycle of the fungus is different inside one's body and outside is very deep and it gets stirred up. If you dig down his back yard and front yard, would you take samples from different areas? I do not know. I have not read any literature that has done that— (Exh. C, November 13, 2019, Deposition of Eli Hendel, M.D., 32:23-25, 33:1-13.)

After explaining why it was unlikely that there would be direct evidence of where applicant was exposed to coccidioidomycosis, Dr. Hendel reiterated that his opinion was based on the available evidence of the proportion of time spent outdoors when at work and the amount of time

spent outdoors at home. "I'm basing that on the—on his description of his activities during those months and the preponderance of the time he was outdoors. That crosses reasonable medical probability. And I look at the preponderance of the time inside and outside of work." (Id. at 34:11-16.)

In response to questions by defendant's attorney regarding whether the valley fever fungus could have been present in applicant's body for a long period of time prior to applicant developing valley fever, Dr. Hendel explained that applicant contracted the disease at some time during a two month period in 2017. Dr. Hendel testified that applicant "was found to have the elevated antibody of coccidioidomycosis in September of 2017. The antibody that … was discovered was the IgM type, which is the acute antibody. (Id. at 14:21-25.) Dr. Hendel was able to determine that applicant was infected in July or August of 2017. (Id. at 15:3-4.) During the relevant time period, Dr. Hendel explained "to the level of reasonable medical probability, the preponderance of the time that he's been outdoors during that period was during work. (Id. at 31:22-24.)

DISCUSSION

Labor Code section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury "arising out of and in the course of employment."

Applicant has the burden of proving reasonable probability of industrial causation but is not required to prove causation to a "scientific certainty." (See *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 408, [33 Cal.Comp.Cases 660].) It is sufficient if work is a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 298 [80 Cal.Comp.Cases 489].)

The "contributing cause" standard was articulated in an early Supreme Court case involving a dishwasher who was injured by a collapsing roof. (*Kimbol v. Industrial Acci. Com.* (1916) 173 Cal. 351 [3 I.A.C. 421.) Applicant's employer rented the lower floor of a building and operated a restaurant. Unbeknownst to the restaurant owner, the room above the restaurant was being used to store heavy objects. This eventually caused the floor of the storage room and the ceiling of the restaurant to collapse. Applicant's employer argued that the ceiling collapse did not arise out of employment because the employer had no control over the events that led to applicant's injury. The Court explained:

> [I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would be equally exposed apart from the employment. (*Kimbol, supra,* p. 353.)

At the time *Kimbol* was decided, some courts required that an employee be injured by an instrumentality in the control of the employer, other courts had a more expansive view of work-relatedness. Courts began applying a "street risk" doctrine to cases where an applicant was injured on a public street while performing work for an employer. Even where an accident was unusual or unexpected, the accident would be held to arise out of employment because the employee was out on [dangerous] public streets because of their employment. (See e.g. *Globe Indem. Co. v. Industrial Acci. Com*. (1918) 36 Cal.App. 280 [Applicant hit by car on sidewalk]; *Frigidaire Corp. v. Industrial Acci. Com*. (1929) 103 Cal.App. 27 [Applicant hit by stray bullet from policeman chasing fugitive].)

In a persuasive Court of Appeal case, the First District Court of Appeal addressed the threshold for whether an injury arose out of employment in the context of a bartender was killed by a bullet fired by an angry girlfriend that ricocheted off the bar:

> In the case at bar, if we desired to follow the specious reasoning in the cases which place liability on the fact that the instrumentality of the employer was the last one in a chain of circumstances leading to the employee's injury, we could say that it was the bar, an instrumentality of the employer, which caused the bullet to ricochet and strike Mrs. Baxter. However, it is not necessary to do so. It is only necessary to hold that the death of Mrs. Baxter arose out of her employment because her employment required her to be in what turned out to be a place of danger. (*Industrial Indem. Co. v. Industrial Acci. Com. (Baxter)* (1950) 95 Cal.App.2d 804, 811-812.)

In *Clark,* the Supreme Court reaffirmed that "[c]ontributing proximate cause within the meaning of Kimbol has been applied more broadly in the workers' compensation context than in tort law." (*Clark, supra,* 61 Cal.4h 291, 300.) When determining whether an applicant's injury is AOE/COE (arose out of applicant's employment and occurred during the course of applicant's employment) in the context of the contributing cause standard, the employment must be a cause of applicant's injury, but it does not need to be the sole cause.

The test for whether an injury is AOE/COE is well-established. (*LaTourette v. Workers' Comp. Appeals Bd. (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)*

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette*, *supra,* 63 Cal.Comp.Cases at p. 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permit him to do." (Ibid.) An employee necessarily acts within the "course of employment" when "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 328].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." *(Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288]. "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher, supra,* 48 Cal.Comp.Cases at page 329.)

In *LaTourette,* applicant's husband died while on a business trip to Reno after seeking treatment for a non-industrial heart condition. Applicant died from a bacterial infection after undergoing heart surgery. The Court explained:

> Undergoing major heart surgery for a preexisting condition is not a course of action by a "commercial traveler" that can fairly be said to occur "in the course of employment." The risks at issue here were not ones to which an average healthy traveler would be exposed, but instead arose out of, or flowed from, the employee's heart condition, which was itself nonindustrial. The course of medical treatment was "a purely personal undertaking," outside the scope of the employment. (*LaTourette, supra* at 656.)

In cases such as this one where the parties dispute whether employment contributed to an employee acquiring a communicable disease, the essential questions of when and where applicant contracted the disease may be unanswerable with any certainty. In those circumstances, the employee can establish industrial causation by demonstrating that it is more likely applicant acquired the disease at work or that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com.* (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61].) For example, a detective's Hepatitis B infection

arose out of and in the course of employment because the nature of his work exposed him to drug addicts and needles and those exposures resulted in a higher probability of contracting Hepatitis B than the general population. (*City of Fresno v. Workers' Comp. Appeals Bd. (Bradley)* (1992) 57 Cal.Comp.Cases 375 (writ den.).) In a similar case, a Hepatitis C infection contracted by a sewage worker was found industrial based on medical reporting that it was "more probable than not" that applicant contracted the virus at work. (*City of Turlock v. Workers' Comp Appeals Bd.* (STK09YYZZZ) (2007) 72 Cal.Comp.Cases 931, 934 (writ den.).)

In a Supreme Court case addressing an industrial injury caused by valley fever, the Court affirmed the Industrial Accident Commission's finding that a traveling salesman who contracted valley fever sustained an injury arising out of and in the course of his employment. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622.) As with many of the cases discussed above, the Court emphasized that it is a medical expert's job to assess whether is medically probable that disease transmission occurred at work. The opinions of qualified physicians are entitled to consideration "since it is part of their vocation to observe diseases and how they spread and to draw conclusions from those observations." (Id. at 629, quoting *San Francisco v. Industrial Acc. Com. (Slattery)* (1920) 183 Cal. 273, 284.)

Applying the two-part test outlined in *LaTourette* to the facts of this case, we will first address whether applicant contracted valley fever in the course of his employment. Dr. Hendel's reporting is substantial evidence that it is probable that applicant was exposed to the coccidiodes fungus as work. As explained by the PQME in this case, exposure to coccidioides fungus occurs primarily outside after soil where the fungus normally resides has been disturbed. It would be extremely difficult, if not impossible to directly prove that soil from a particular place harbored the fungus that caused applicant's disease. (Exh. C, p. 32-33.) Based on his expertise in how this disease spreads, the PQME explained that there was no direct evidence of where applicant was exposed and set forth the factors he considered in determining whether the disease was acquired at work. The PQME's conclusion that it is probable applicant contracted the disease as a result of an exposure to the fungus at work is based on the proportion of applicant's time outdoors while at work compared to all time spent outdoors. Defendant is correct that Dr. Hendel's reporting does not address whether applicant had a greater risk of contracting valley fever than a member of the general public. It is Dr. Hendel's expert medical opinion that the best way to assess the probability that applicant was exposed to the fungus at work is to compare non-industrial time outdoors with

time spent outside at work. When faced with an unrebutted expert opinion, we cannot substitute our own method of assessing medical probability.

Turning to whether applicant's injury arose out of employment, the conditions that caused applicant to spend a significant amount of time outside resulted from the layout of the facility and its parking lot. But for his employment, applicant would not have spent as that time outside in an area where he could be exposed to the fungus that causes valley fever. Defendant did not present evidence that applicant's time outside on his employer's premises was for his benefit rather than his employer's benefit. Unlike *LaTourette,* where applicant was exposed to an infectious agent while receiving medical care for a nonindustrial condition, it is medically probable that Mr. Shuere's exposure to the infectious agent occurred at work as a result of work duties that required applicant to be outdoors.

The WCJ correctly determined that applicant proved by a preponderance of the evidence that his injury arose out of and occurred in the course of employment. As explained in *Clark,* causation in workers' compensation differs from causation in tort law. Given that applicant met his burden, it is not necessary to develop the record regarding an alternate theory of causation.

Therefore, we will affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 18, 2020 Findings and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I DISSENT,

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2021

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

PETER SHUERE
GORDON EDELSTEIN KREPACK GRANT FELTON & GOLDSTEIN
STATE COMPENSATION INSURANCE FUND

MWH/oo

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

DISSENTING OPINION OF COMMISSIONER DEIDRA E. LOWE

I dissent. I would return this matter to the trial level for further development of the record on the issue of whether applicant was exposed to a greater risk of contracting valley fever than the general public.

When the disputed injury involves an infectious disease, the employee must demonstrate a relationship of cause and effect between the employment and the disease. In the absence of direct evidence of the cause of the disease, the applicant can establish industrial causation with evidence that the employment subjected the employee to a special risk of exposure in excess of that of the general population. (*Bethlehem Steel Co. v. Industrial Acc. Com.* (*George)* (1943) 21 Cal.2d 742 [8 Cal.Comp.Cases 61]; *City of Fresno v. Workers' Comp. Appeals Bd. (Bradley)* (1992) 57 Cal.Comp.Cases 375 (writ den.).) In *George, supra,* the Court agreed that it was probable that applicant acquired kerato conjunctivitis at work at a shipyard despite a large outbreak of that disease in the area. Applicant presented evidence that the shipyard first aid station did not follow adequate sanitation practices. "[W]here an employee contracts a contagious or infectious disorder he must, in order to recover compensation, establish the fact that he was subjected to some special exposure in excess of that of the commonalty, and in the absence of such showing, the illness cannot be said to have been proximately caused from an injury arising out of his employment." (*George, supra,* 21 Cal.2d 742, 744.)

Where an employee travels at their employer's request from an area of relative safety to an area where the risk of contracting a disease is greater, the employee can establish a greater risk of exposure in comparison to the general public where the employee lives. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Ehrhardt)* (1942) 19 Cal.2d 622; *Fidelity & Casualty Co. v. Industrial Acci. Com. (Gardiner)* (1927) 84 Cal.App. 506.)

In this case, unlike *Ehrhardt,* applicant lived and worked in an area where it was possible to contract valley fever. Because we have no direct evidence that applicant was exposed to valley fever at work, applicant must show that his work created a special risk of exposure. Applicant was only outside at work while walking between buildings and the parking lot. This is not very different from the risk any member of the community might experience from being outside. In essence, Dr. Hendel's opinion on industrial causation is dependent less on potential exposure at work than on applicant's lack of exposure during non-work hours.

After carefully reviewing the PQME reports, it is apparent that Dr. Hendel did not adequately address whether applicant's employment exposed him to special hazards that would justify an inference that he contracted valley fever at work.

In his initial PQME report, Dr. Hendel stated:

> [G]iven the fact that coccidioidomycosis is in the soil, and taking into account his activities in the period prior to when he was working and taking into account the proportion of time he was outdoors, exposure to exposed soil at work compared to outside of work and there was reasonable medical probability that he did contract this infection during the course and out-of-course of employment. (Exh. A, June 19, 2019, Eli Hendel, M.D., Panel Qualified Medical Evaluation, p.167.)

Not all expert medical opinion constitutes substantial evidence. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97*]; Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals* Bd., supra, 69 Cal.2d 408, 413, 416-417; Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin, supra,* 36 Cal.Comp.Cases at p. 97.) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (Ibid.)

Dr. Hendel's opinion on industrial causation is not substantial medical evidence because he did not use the correct legal standard. As the majority acknowledges, the PQME did not evaluate whether applicant, in the course of performing his job duties, was at a special risk of contracting

valley fever. A full evaluation of whether applicant's employment created a special risk of exposure would consider all of applicant's employment activities. As discussed in the WCJ's Report, applicant testified that his classroom was not air-conditioned, had open windows, and was generally more exposed to the open air than most indoor environments. (Report, p. 3.) Dr. Hendel did not consider these factors.

Furthermore, Dr. Hendel relies on applicant's recollection of his daily activities provided nearly two years after the relevant time period. Given that the fungus requires recently disturbed soil to spread, Dr. Hendel's distinction between outdoor and indoor exposure is overly general. A paved parking lot presents a different risk than farmland or a construction site. Quantifying indoor and outdoor time without addressing the difference in risk from specific environments is not substantial evidence that applicant was more likely exposed to the disease-causing fungus at work than at home.

In his deposition, Dr. Hendel explained why it would not be possible to test specific soil samples to ascertain the location of the exposure and stated that "prevalence of coccidioidomycosis in certain areas is done based on the cases." (Exh. C, November 13, 2019, Deposition of Eli Hendel, M.D., 32:23-25, 33:1-13.) However, other than noting that no other cases were reported at applicant's jobsite during the time period when applicant was likely exposed, Dr. Hendel did not discuss the "prevalence of coccidiodomycosis" in terms of either geographical areas or employment.

The Appeals Board "may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Raymond Plastering v. Workmen's Comp. App. Bd.* (1967) 252 Cal.App.2d 748, 753. See also, *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264], citing *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318 [Board should have obtained medical evidence of causation]; *Lundberg v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 436, 440 [Board should have obtained medical evidence of causation].) Therefore, I would return this matter to the trial level for further development of the medical record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 20, 2021

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

PETER SHUERE
GORDON EDELSTEIN KREPACK GRANT FELTON & GOLDSTEIN
STATE COMPENSATION INSURANCE FUND

MWH/oo

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

I. INTRODUCTION

PETER SHUERE, born on xx/xx/xxxx, while employed during the period 01/14/2014 through 06/01/2018 as an instructor and vocational in occupation group number 214 at Camarillo, California, by the State of California, legally uninsured and adjusted by State Compensation Insurance Fund/State Contracts claims to have sustained injury arising out of and occurring in the course of employment to his respiratory system and valley fever (coccoidmyocosis).

His condition was found on 11/16/2020 to have been caused on account of employment and to have occurred in the course of employment. By timely verified petition defendant State Compensation Insurance Fund / State Contract Services seeks reconsideration.

II. CONTENTIONS

Petitioner contends that 1) applicant failed to meet the burden of proof of industrial injury since the panel qualified medical examiner's reporting is not substantial medical evidence, and 2) applicant's employment did not place him at a greater risk of valley fever infection than the general public.

III. FACTS

Applicant worked as a vocational instructor at the California Youth Authority Ventura facility located on Wright Road in Camarillo, California. He testified credibly that his classroom was outfitted with windows to the outside, and that he was positioned 12 feet from the windows. Some of the windows could not be closed. The area was windy and he could feel the outside air all of the time he was in class. (Summary of Evidence, 10/02/2020, page 3.)

The facility is near farmland, and there is crop dusting in the area all the time (page 4). He began work at CYA in 2014. He was diagnosed with valley fever in September of 2017.

At home, however, he keeps his windows closed. There are fruit trees on properties in his neighborhood but no farmland.

He acknowledged being evacuated from his home during the Thomas fire, housed in a building at the Ventura County fairgrounds. During the evacuation, he went to work every day.

He acknowledged owning a shack in Arizona near the Colorado River. He denied there was any farmland right around the shack, though there was farmland in the area.

At his Ventura home he has an entirely artificial front yard, and the back yard is made up of a kumquat tree from which rotten fruit and leaves fall. He does nothing about cleaning up in the back yard (page 5).

Defense witness Seth Hawkins stated at trial that the terrain around the classroom where applicant worked was concrete or asphalt, but that it gives way to dirt with foliage (Summary of Evidence, page 7). Hawkins testified that he had been in applicant's classroom "a couple of times," and that the building was not air conditioned, though he was unsure of that. He conducted a "casual inspection" of the room and it "looked like" the windows could open.

IV. DISCUSSION

The testimony of Mr. Hawkins did not substantially contradict applicant's testimony as the proximity of the workplace to farmland, and the functionality -- or lack thereof -- of the classroom windows.

There was no rebuttal evidence as to the condition of applicant's home or its location in relation to farmland. Similarly, there was no evidence that applicant Arizona shack was near farmland.

Turning to the evacuation, applicant was diagnosed with coccoidmycosis in September of 2017; the Thomas fire began on December 4th of that year.

SUBSTANTIALITY OF PQME REPORTING

Eli E. Hendel, M. D., panel qualified medical examiner, produced two reports and testified on cross-examination. His reporting and testimony were jointly offered and admitted in evidence. His 06/19/2019 report (Joint Exhibit A). On page 165 of his June report he listed six criteria, apparently of his own, for determining industrial causation.

> 1. "The nature of the job. Specifically, the way the job involves being outdoors and working with soil and exposed to dust made airborne by winds."
> 2. "The location of residence. How far is it from the place of work. Is it in and endemic area for this condition, Arnau nt of time spent outdoors during off work

time. Hobbies, sports, mode of tra11sportation that would involve being exposed to dusts and winds."

3. "Try to establish the time of exposure based on the time when the acute serology became positive for the first time. The lgM cocci. Antibody would indicate a time of exposure within the previous 30 days."

4. "Do a search into the air quality, air pollution and weather conditions for that particular period as published by the San Joaquin Valley Air pollution control District. Or the University of Arizona Air pollution control advisory council."

5. "See if there is a difference in the conditions on that time from the place of residence from the place of work."

6. "Inquire about other medical factors that increase the risk of developing the disease after exposure. lmmunocompromised state or the presence of Tuberculosis. History of behaviors conducive of lung disease such as smoking or illicit drug use."

Dr. Hendel concluded on page 167 as follows:

The first issue that needs to the addressed is the causation of the infection, given the fact that coccidioidomycosis is in the soil, and taking into account his activities in the period prior to when he was working, and taking into account the proportion of time that he was outdoors, exposure to exposed soil at work compared to outside of work and there was reasonable medical probability that he did contract this infection during the course and out-of-course of employment.

Petitioner asserts that this language is insufficient since Dr. Hendel did not address each of his six criteria in giving his medical opinion on industrial causation. However, the body of the report includes discussion of the nature of the job and exposure to dust from soil, location and character of applicant's home and at-home outdoor activities, the time of exposure (well documented in extensive medical records.), air quality, conditions at the place of residence versus the place of work and applicant's well documented medical factors.

The doctor did not need to repeat the history and medical records information in order to state his medical opinion.

On 11/13/2019 petitioner cross-examined Dr. Hendel addressing all of the enumerated matters, and then some. (Joint Exhibit C)

Petitioner asserts that the PQME is incorrect in reciting that applicant does not seem to have had any conditions that would render him immunocompromised. Applicant suffered from

asthma, documented in 2015. On pages 26 – 28 of the deposition transcript the doctor explained that the records show that applicant's asthma was not chronic, and thus not immunocompromising.

RELATIVE RISK

Petitioner asserts that defense witness Hawkins disputes applicant's testimony about the proximity of the workplace to the farmland. On page 7 of the Summary of Evidence, Hawkins testified that the farmland was not in the "immediate area." He stated that from the front gate parking lot there is dirt and then the road and then the golf course and beyond that there is farmland. He estimated the midpoint between the fence and a barn in the distance is about 1000 yards. Then he stated that this area of about ten football fields is land, but that he was not sure if it was being cultivated.

This testimony about where the farmland was in relation to the workplace is not specific enough to determine what the "immediate area" meant.

Cases involving exposures are fact-specific, and comparisons to other cases where the exposure was not established do not serve to demonstrate that applicant was not exposed to valley fever at his workplace.

V. RECOMMENDATION

Based on the foregoing the undersigned WCALJ recommends that the petition for reconsideration be denied.

DATED AT OXNARD, CALIFORNIA

DATE: 12/17/2020

WILLIAM M. CARERO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE