JAM

CALIFORNIA WORKERS COMPENSATION
ALTERNATIVE DISPUTE RESOLUTION
LABOR CODE SECTION 3201.5 1 and 3201.7

[redacted]

Applicant,

vs.

[redacted],
permissibly SELF-INSURED and administered by CLAIMQUEST

Defendants.

ADR No. RPM20187(b)

FINDINGS AND ORDER

The above-entitled matter having been heard and submitted for arbitration, this arbitrator now makes her decision as follows:

FINDINGS OF FACT

1. It is found that [redacted] while employed as a janitor, at [redacted] by [redacted] did not sustain injury arising out of and occurring in the course of his employment.

2. Defendant [redacted] has no liability for self-procured medical treatment.

3. There are no funds from which to award attorney's fees.

ORDER

IT IS ORDERED the Applicant take nothing.

DATED: SEPTEMBER 30, 2021

ARBITRATOR LINDA DAVIDSON-GUERRA

Served by mail on all parties
as shown on the Official Address Record.
See attached proof of service

OCT 04 2021

STATE OF CALIFORNIA WORKERS COMPENSATION
ALTERNATIVE DISPUTE RESOLUTION
Labor Code Section 3201.5 and 3201.7

ADR Case Number 20187(b)

[redacted] vs. [redacted]
permissibly self-insured and administered by CLAIMQUEST

OPINION OF ARBITRATOR

[redacted], employed as a janitor for [redacted], working at [redacted] in Foothill Ranch, California, has alleged injury arising out of and in the course of employment to the lungs, internal system and resulting in pneumonia due to COVID-19 on August 2, 2020. [1] Defendant has denied the claim. The parties dispute the applicability of the presumptions of industrial causation under Labor Code 3212.88. The matter was set for arbitration on injury AOE/COE and parts of body injured.

ADMISSIBILITY OF EXHIBITS

Marked for identification on behalf of the Applicant were Exhibits 1, the medical report of Dr. Pietruska dated July 28, 2021, Exhibit 8, the amended DWC-1 dated September 20, 2021 and Exhibit 10, the Labor Code 4600 designation letter. The basis for Defendant's objection was the discovery cut-off under Labor Code 5502(d)(3). It being found that L.C. 5502(d)(3) is inapplicable to the arbitration here, the exhibits are hereby admitted.

Marked for identification on behalf of Defendant was Exhibit J, an Application for Adjudication of Claim date stamped April 25, 2021. Applicant's basis for objection was that the exhibit was not in existence at the time of the mediation. The document having a date stamp of April 25, 2021 and no contrary evidence having been offered, it is found that the document was in existence as of the date of the mediation and is therefore admissible and is hereby admitted.

[1] On September 17, 2021, the four days before the Arbitration, Applicant submitted as an Exhibit an amended DWC-1 dated September 20, 2021. The date of injury was changed to July 22, 2021 and additional parts of body were alleged. The claim however is essentially the same.

APPLICABILITY OF THE PRESUMPTION OF INDUSTRIAL INJURY UNDER LABOR CODE 33212.88

Under Labor Code 3212.88, a presumption of industrial injury exists in certain circumstances where an employee tests positive for COVID-19. The Section applies to employees who test positive during an outbreak at the employee's specific place of employment, and whose employer has five or more employees. In order for the presumption to apply the following conditions must be met:

> "(1) The employee tests positive for 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 July 6, 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 prior to the positive test.
>
> (3) The employee's positive test occurred during a period of an outbreak at the employee's specific place of employment."

There is no dispute that [redacted] was diagnosed with COVID 19 on August 2, 2020 while hospitalized at Garden Grove Hospital Medical Center. It is also not disputed that the positive test was within 14 days of him working for [redacted] location. However, the criteria required for the presumption to apply includes that the employee's positive test took place during an outbreak at the employee's specific place of employment. [redacted] has not satisfied that prong of the statute.

[redacted]llo testified to having two places of employment. He worked for [redacted] full-time in the morning then he worked full-time for [redacted] from 6:00 p.m. through 2:30 a.m. His last day working for both employers was July 22, 2020. There was no testimony or other evidence that established an outbreak at either location before or after that date. Based on the foregoing, the Applicant will not meet the criteria for the presumption to apply.

In the alternative, Applicant appears to allege the presumption under Labor Code 3212.88 applies because Defendant failed to timely deny the claim. Applicant and Defen-

dant were asked to provide briefs on this subject no later than Monday September 27, 2021. A brief was submitted by Defendant but none by Applicant.

Under Labor Code 3212.88, a presumption of industrial injury also occurs if the claim is not denied within 45 days after the claim form is filed with the employer. The date the claim form was filed with the employer is paramount in determining whether the presumption should apply. Defendant asserts that the DWC-1 was received by [redacted] on April 25, 2021. Applicant appears to contend it was served on or about February 24, 2021. The parties are in agreement that [redacted] through ClaimQuest issued a delay letter on April 26, 2021 (Joint Exhibit Y) and a denial on May 14, 2021 (Joint Exhibit X).

In support of the February 24, 2021 date of filing, Applicant offered an Application for Adjudication of Claim dated February 24, 2021 (Exhibit 6) and the letter of representation from [redacted] (Exhibit 7). The Application was filed with the DWC Office through the EAMS system and there is a confirmation of filing on that date. The Notice of Representation document is dated February 2, 2021 and included several additional documents. According to the proof of service a DWC-1, Fee Disclosure Statement, a Labor Code 4906(h) letter, a letter showing compliance with Rule 10773 and a Labor Code 4600 letter were attached. Review of the proof of service shows it was sent only to insurance carrier AIG which was not the correct carrier. It was not sent to either [redacted] work location, nor to his actual employer [redacted]. The only 4600 letter in evidence was to Dr. Pietruska (Exhibit 10). Although listed as being served with the February 2, 2021 proof of service from [redacted] it could not have been served on that date as it is dated July 15, 2021.

Applicant elected not to offer any witnesses to explain these discrepencies. Defendant offered the testimony of [redacted], Vice President of Human Resources who was found to be a credible witness. [redacted] testified in a logical and consistent manner regarding [redacted] business practices. Additionally, she testified credibly regarding the common business practices and procedures when handling workers compensation claims between [redacted] and [redacted]. [redacted] testimony that [redacted] receipt of the DWC-1 on April 25, 2021 was both reasonable and consistent with the date on the Employer's First Report of Injury which was April 26, 2021. Additionally, she credibly testified she did not receive a Notice of Representation from the [redacted] in Feb-

ruary 2021. The timeline for receipt of the claim form per [redacted], is consistent with the dates of the DWC-1, and the joint exhibits relative to delay of the claim and the denial. In assessing the evidence it is found that Defendant's evidence of when the DWC-1 was received carries more weight and is more persuasive than Applicant's and the presumption does not apply.

Applicant bears the burden of establishing his injuries are industrial and here he has not met that burden. The medical report of Dr. Pietruska omits significant facts within the history. Dr. Pietruska was not provided with information that [redacted] was working full time for two (2) different employers in July 2020, an important fact. The report also does not include a review of the very germane records of [redacted] diagnosis of and treatment for COVID 19 at Kaiser and Garden Grove Hospital Medical Center. Thus a very significant portion of the Applicant's medical course was not provided to Dr. Pietruska. The report therefore is based on incomplete and inadequate facts and issued without review of the integral and critical treatment records. A medical opinion is not substantial evidence when based on incorrect facts, history or legal theory or surmise, speculation, conjecture or guess. Place v. Workers Compensation Appeals Bd. (1970) 3 Cal. 3d. 372, 378; 35 Cal. Comp. Cases 525. A medical opinion must also be "based on logical and persuasive reasoning that is consistent with the record. Escabedo v. Marshalls (Escobedo)(2005) 70 Cal. Comp. Cases 604, 620-621. As it is found that the report of Dr. Pietruska was based on incomplete facts and history, this evidence is insufficient to satisfy Applicant's burden of proof. Consistent with the above, it is found that [redacted] did not sustain an industrial injury while employed with [redacted]

DATED: September 30, 2020. Arbitrator Judge Davidson-Guerra (Ret.)

Re: [redacted] **vs.** [redacted] **Building** [redacted]

Claim No. 300501032001651; 300501032001778 ADR No. RPM 21087(a)(b)

(PROOF OF SERVICE BY MAIL-C.C.P 1013a, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of/employed in the aforementioned County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address/residence address is P.O. Box 2269, Toluca Lake, California 91610.

On September 30, 2021, I served the foregoing **ARBITRATOR'S OPINION and FINDINGS of FACT and ORDER** on all interested parties by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Toluca Lake, California addressed as follows:

[redacted]

Josh Malter, Esq.
Colantoni Collins Marren Phillip & Tulk, LLP
555 Corporate Drive, Suite 205
Ladera Ranch, CA 92694

I certify (or declare), under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

DATE: 09/30/21

Signature of Declarant

Ruth Davidson-Guerra

Type or print name of Declarant