WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCISCO BANUELOS (Dec'd), MICHELE BANUELOS (Wife) ***Applicant,*** **vs.** **TIME WARNER, INC. (NOW CHARTER COMMUNICATIONS); NEW HAMPSHIRE INSURANCE CO., administered by ESIS,** ***Defendants.***	**Case No. ADJ10613123** **(Van Nuys District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.

Applicant[1] seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 4, 2019.[2] By the F&O, the WCJ found that the employee did not sustain injury arising out of and in the course of employment (AOE/COE) causing colon cancer and resulting in death. Applicant was ordered to take nothing.

Applicant contends that the WCJ exceeded his authority by finding no industrial causation for the employee's injury because the only medical evidence in the record found industrial causation for his cancer. Applicant also contends that she met her burden of proving that the employee's work proximately caused his death and the WCJ failed to consider all of the evidence in reaching his decision.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration. Applicant submitted a supplemental pleading in response to the WCJ's Report, to which defendant filed an opposition. (Cal.

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[1] Applicant is the deceased employee's wife, Mrs. Michele Banuelos. We will hereinafter referred to her as "applicant" and her husband as "the employee."

[2] The F&O is dated January 9, 2019, but the proof of service shows that it was served on February 4, 2019.

Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) We will accept applicant's supplemental pleading and defendant's opposition to this pleading.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer, the supplemental pleadings and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&O and issue a new decision finding that the employee sustained injury AOE/COE to his internal system and digestive system causing colon cancer. The reporting of Dr. Azizad and Dr. Reynolds will be found to constitute substantial medical evidence. We will also make a finding that Dr. Reynolds' reporting and deposition testimony are admissible and order these exhibits be admitted into the record. An award for applicant will be issued with the amounts to be paid to be adjusted by the parties and jurisdiction reserved.

FACTUAL BACKGROUND

Applicant filed an application for death benefits claiming that the employee sustained a cumulative trauma injury through October 9, 2015 to his internal and digestive system causing colon cancer and resulting in death on November 22, 2015 while employed as a maintenance technician by Time Warner Cable (now Charter Communications). The employee's and applicant's three children, Ruben, Rita and Steven Banuelos,[3] were listed as dependents in the application. Cause of death in the death certificate was identified as metastatic colon cancer. (Applicant's Exhibit No. 8, Death Certificate of Francisco Banuelos, November 22, 2015.)

Masoud Azizad, M.D. evaluated causation for the employee's death as the internal medicine panel qualified medical evaluator (QME). The employee's history was provided to the QME by his wife. (Court's Exhibit Y3, Report of PQME Dr. Masoud Azizad, September 14, 2017, p. 1.) Under occupational history, Dr. Azizad's report states that the employee worked for defendant from 2006 until October 2015 and previously worked as a maintenance technician from 1988 to 2006 for King Video Cable. (*Id.* at p. 4.) The history of injury reflects that the employee was seen in the emergency room for acute abdominal pain on October 11, 2015 when it was discovered that he had multiple liver masses. (*Id.* at p. 2.) He subsequently died from colon cancer on November 22, 2015. (*Id.* at p. 3.)

[3] We refer to applicant's children by their first names for clarity and convenience.

Dr. Azizad opined that the employee's medical records show that he had adenocarcinoma of the colon and high grade neuroendocrine tumor (NET). (*Id.* at p. 96.) Dr. Azizad noted that the employee's work entailed repairing cables that emitted radiofrequency (RF) radiation. (*Id.* at p. 133.) Dr. Azizad concluded as follows:

> Mr. Banuelos's pathology report indicated mixed adenocarcinoma and high grade neuroendocrine tumor. From the reviews I have provided, the applicant's presentation and deterioration more resemble a high grade neuroendocrine tumor arising from his colon. This is an aggressive cancer with high mortality, as was suffered by Mr. Banuelos. It is a very rare cancer as indicated in the research.
>
> In addition, adenocarcinoma of the colon, the usual "Colon Ca" is also less frequent given the applicant's age. In addition, the risk factors presented and associated with Colon cancer in general, are not present in the applicant. The applicant does not have a family history of Colorectal cancer. He does not engage in a sedentary life style; quit [*sic*] the contrary, he is known to exercise regularly and is part of a baseball team. He is not vegan, but his eating habits are not indicative of a high meat diet. The applicant is not a smoker, possible distant history, or second-hand smoking exposure in social situations. He did not suffer from any forms of IBD; i.e. Crohn's disease or Ulcerative colitis.
>
> Given the limited predisposing risk factors, the question arises of the possibility of his work-related exposure, specifically radiofrequency as a potential risk factor. He has worked as a maintenance Technician from 1988 to 2015. As per his history, he has worked full time, and occasionally on weekend. His main job duty was that of repairing coaxial cables. The level of exposure to radiofrequency radiation cannot be measured, given its distance from the body is one of the factors. I do believe that his exposure to radiofrequency radiation is higher than the average persons.
>
> From the American Cancer Society, radiofrequency radiation, is not an ionizing form of radiation. This means it does not directly impact DNA. Radiofrequency, works more through energizing electrons and thus causing heat. The impact of RF and its potential for causing cancer is still full not [*sic*] understood. Cell phone radiation studies are ongoing for potential brain cancer risk. The American Cancer Society noted that the IARC has stated that there is limited evidence that RF radiation causes cancer in animals and humans, and classifies RF radiation as "possibly carcinogenic to humans" (Group 2B).
>
> I have provided a research article from Sweden that looks at colon cancer being related to colon heat. The article asserts that the amount of bacteria in the colon can effect the potential for colon cancer by the amount of heat they

> produce by aspects of their metabolism; i.e. the foods they ingest (the foods we ingest). Also, sedentary life styles, they indicate limits dissipation of heat and thus signify the significance of heat in causing or accelerating tumor cell growth.
>
> From his occupation, the applicant has higher exposure to RF than the average individual. RF radiation mainly results in heat. Although it is not an ionizing form of radiation, and does not cause direct DNA impact, I do believe heat can cause or accelerate cell growth; in this case tumor cell growth. The applicant has had @27 [*sic*] years of exposure to radiofrequency radiation. Given the rarity of the cancer in general, the paucity of risk factors in the applicant; in my medical opinion, the applicant's cancer is work related.
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> (*Id.* at pp. 139-140.)

Applicant obtained a report from Timothy Reynolds, M.D. Dr. Reynolds interviewed applicant and her son, Steven, in addition to reviewing medical records. (Applicant's Exhibit No. 2, Report of Timothy Reynolds, October 31, 2017, pp. 1, 4-6.) In his October 31, 2017 report, Dr. Reynolds stated in pertinent part:

> I was asked to perform an internal medicine consultation on Mr. Francisco Banuelos, a gentleman who died on 11/22/15 at 49 years of age. Based on the available information, his death was caused by exposures in his former work environment.
> …
> When a person contracts an illness at a much younger age than expected, it is important to wonder why. In the instant case, Mr. Banuelos had a long career in the cable business, during which time he was repeatedly exposed to radiofrequency (RF) radiation. I am able to state with reasonable medical certainty that he worked in such close proximity to RF radiation that it repeatedly penetrated his body.
>
> Colon heat affects cell growth. Increased colon heat reduces growth of intestinal bacteria and increases growth of colonic mucosal cells. It is malignant transformation inside colonic mucosa cells that causes adenocarcinoma of the colon. It is increased heat in the colon that accelerates the growth of all cells therein, including cancer cells.
>
> Therefore, mindful of this gentleman's long career in the cable industry, mindful of his repeated close exposures to RF radiation in the course of his work, mindful that such close exposures to RF radiation would increase the temperature within the colon and promote cell growth therein, and mindful of the young age at which metastatic colon cancer was diagnosed, I am able to state with a degree of reasonable medical probability that Mr. Banuelos'

colon cancer occurred as and when it did because of his exposures in the course of employment at Time Warner Cable.

This is the history of industrial metastatic cancer. Mr. Banuelos' death arose out of and in the course of his employment at Time Warner Cable according to the information at hand.

(*Id.* at pp. 6-8.)

The QME Dr. Azizad was deposed in January 2018. He testified in pertinent part:

Q….Doctor, is your opinion on causation taking into account this -- we will call it an article that you attached?

A. It is an article, yes. Radiofrequency causes heat as its main form of effect.

Q. Right. And how much radiofrequency heat does one need to be exposed to to increase body temperature to accelerate tumor cell growth?

A. I don't know.

Q. Did this article from Sweden specify how much?

A. No, but it made a good point.

Q. Because it's a hypothesis, isn't that correct?

A. It's an interesting hypothesis, a mixed mechanism of cell growth, consistencies within it.

Q. And are you aware of whether this has been proven up to a theory or peer reviewed in any way?

A. I think it's still being worked out.

…

A. … If the applicant had 27 years, I don't know the exact amount of how he was exposed, but mainly -- I'm sure he's working at his waist level or below, and you can probably figure those things out more. But there is a heat exposure that's much different than the average person that's not in his field of work.

Q. Right. So you're trying to -- you're making the argument that because R.F. radiation causes heat and colon heat can accelerate tumor cell growth, therefore R.F. radiation heat causes cancer?

A. Probability. It's all about probability.

Q. Right. And since we need to have opinions of reasonable medical probability and we need to have opinions not based on surmise, conjecture or guess, which you testified earlier to --

A. Right.

Q. -- in this case, you can make a definitive opinion within reasonable medical probability that R. F. radiation caused his NEC and mixed adenocarcinoma?

A. Yes.

Q. Okay. But you've reviewed no research -- you've reviewed no medical literature that actually makes that correlation, Doctor, correct?

A. Within what I've provided.

(Court's Exhibit Y4, Cross-Examination of PQME Dr. Masoud Azizad, January 23, 2018, pp. 32:15 to 33:5; 34:1-24.)

Dr. Azizad was provided with a copy of Dr. Reynolds' report during his deposition and confirmed that Dr. Reynolds agreed with Dr. Azizad's conclusions. (*Id.* at pp. 43-44.)

Dr. Reynolds issued a supplemental report in February 2018 following review of Dr. Azizad's deposition testimony. (Applicant's Exhibit No. 1, Report of Timothy Reynolds, February 14, 2018.) He opined as follows:

> Now Mr. Banuelos' medical history comes into focus. He was exposed to electromagnetic radiation, low frequency RF [radiofrequency], in the course of his long career in the telecommunications industry. He was diagnosed with metastatic colon cancer at 49 years of age, a young age for this particular type of cancer.
>
> Mindful of the molecular effects that RF can have on gene expression, and mindful of how suppression of the expression of certain genes results in the growth of neoplasms, I am able to state with reasonable medical probability that this gentleman's colon cancer arose out of and in the course of work at Time Warner Cable.
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> (*Id.* at p. 5.)

Dr. Reynolds was deposed on March 7, 2018, during which the following exchanges occurred as

relevant:

Q. Okay. And Doctor, then at least for purposes of the adenocarcinoma, it is your opinion on the causation of that portion, stems from the initial principle that he was exposed to RFR from repairing cable signal leakage . Correct?

A. Well, be more specific -- be more accommodating -- in the course of his job, he was exposed to RFR.

Q. And that exposure by itself is the cause of the adenocarcinoma?

A. Well, that exposure plus his genetic makeup caused his adenocarcinoma to occur as and when it did, based on reasonable medical probability.

…

Q.…And based at least on the neuroendocrine tumor, was the neuroendocrine tumor caused by his job duties?

A. No, based on my understanding of the medical literature, which means based on reasonable medical probability.

Q. That leads us to reasonable medical probability of the adenocarcinoma. Your opinion that the adenocarcinoma was caused by his job duties is based on his exposure to RF radiation. Is that correct?

A. Yes. And the belief that he was exposed to RF radiation.

Q. And if he wasn't exposed to RF radiation in the frequency that you talked about, 300 megahertz, 300 gigahertz, would his job duties have caused the adenocarcinoma?

A. Well, not according to my current understanding of the medical literature.

…

Q. So does that mean you disagree with Dr. Azizad's discussion on heat and colon growth for the determination of the adenocarcinoma?

A. Yeah, at this time I do. I'd have to find more research than a hypothesis 18 years old.

Q. And in your review of Dr. Azizad's report and deposition, Dr. Azizad also opined that the neuroendocrine tumor was industrial. Correct?

A. Yes, he did. He lumped them together.

…

Q. And there is no other explanation, as you've indicated today, separate and apart from the connection, the association, the hastening, the but for his work, is there? According to your understanding.

A. With the proviso that not all cable installers die from colon cancer at a young age. This is not epidemic. The answer is yes, but for his exposure, his death at a young age from a colon cancer tumor, occurred as and when it did because of employment.

…

Q. So you don't agree with Dr. Azizad's opinion. Correct?

MR. GURVEY: Of what?

BY MR. COMIS:

Q. Of the lump sum, that the work -- that work caused both his adenocarcinoma and his N.E.T.

A. I think that's a messy opinion. We have to choose one or the other.

…

Q. Just following up on that. You don't disagree with Dr. Azizad's conclusions regardless of what you consider the crossover of the two cancerous exposures.

A. I agree that, with him, that Mr. Banuelos' work environment was injurious for him, and caused his death.

…

Q. That there is causation, not necessarily the exclusive only causation, but there is causation as Dr. Azizad found, you would agree that the work environment hastened his death and contributed, if not completely caused his demise, and but for the work he would not have died at the time that he did at the age of 49. Is that correct?

A. Yes.

(Applicant's Exhibit No. 3, Deposition of Timothy Reynolds, March 7, 2018, pp. 37:14-25; 43:15 to 44:7; 44:25 to 45:8; 63:3-12; 77:25 to 78:7; 78:14-19; 79:2-9.)

Dr. Azizad was provided with additional records including medical literature for a supplemental report. Review of these documents did not impact his opinions. (Court's Exhibit Y2, PQME Report of Dr. Masoud Azizad, April 30, 2018, p. 21.) He reiterated that "radiofrequency exposure is a contributing cause of the cancer and death of the applicant." (*Id.*)

Dr. Azizad reviewed Dr. Reynolds' March 7, 2018 deposition transcript and issued a supplemental report on May 1, 2018, wherein he opined as follows:

Dr. Reynolds differs in his opinion in regard to the applicant's adenocarcinoma being, in part, caused by his RF exposure through his

> employment. Given it is impossible to know exactly which cancer, adeno or Neuroendocrine, or possibly both, may have been effected by the RF, I agree with Dr. Reynolds premise that the applicant's employment led to his death. Therefore, no changes are made to my prior assessment causation.
>
> (Court's Exhibit Y1, PQME Report of Dr. Masoud Azizad, May 1, 2018, pp. 16-17.)

The matter proceeded to trial on August 30, 2018 and November 8, 2018. The issues at trial included as relevant herein: injury AOE/COE, whether the reporting of PQME Dr. Azizad is substantial evidence, whether the reporting of Dr. Reynolds is substantial evidence "and whether [Dr. Reynolds' reporting] is admissible, as it was obtained outside the 4062.2 process." (Minutes of Hearing and Summary of Evidence, August 30, 2018, p. 2.) Dr. Reynolds' two reports and deposition transcript were marked for identification only. (*Id.* at p. 3.) Applicant's exhibits included a signed "Employee's Receipt" of defendant's "Safety Practices" with a list of topics covered by the manual. (Applicant's Exhibit No. 9, Time Warner Cable Safety Practices, October 10, 2008.) The topics listed included "Radio Frequency Radiation." (*Id.*)

Applicant and her son, Mr. Steven Banuelos, testified during the first day of trial. (Minutes of Hearing and Summary of Evidence, August 30, 2018, pp. 6-12.) Mr. Steven Banuelos testified in pertinent part:

> Mr. Banuelos worked for Time Warner/Charter or other named owners throughout buyouts for approximately 30 years. Witness's understanding of what his father did for Time Warner over the 30 years is that his father started as a maintenance installer to a maintenance tech at the end. From what witness was told by his father, the job required him to search out for signal leakage, as FCC required no more than a certain amount of signal leakage for the safety of the community and interference with other radio transmissions. Once he found signal leakage by using a tool that showed where the leakage came from, he would find the source and then fix it. As part of fixing it, he had to break the cable and fix the cable, which exposed him to more leakage. Usually, breaking the cable is around the abdomen area, as his father would work standing or on his knees doing this.
>
> Witness would estimate that his father worked with radio frequency leakage for 20 years, as this was the conversation during witness's life from around five years old through when his father passed away at 25. Fixing the leakage was the major duty. There were deadlines to meet FCC requirements, and

> his father would go out at night with the rest of the team. The duties with the radio frequency leakage were performed on a daily basis for the 20 years and may have been more than 20.
> …
> The only protective clothing was from electrical shock but nothing for radiation.
>
> Applicant is shown Exhibit C, and it is witness's understanding that there are safety practices in place and an acknowledgement that there is danger with radio frequency and the job duties. The witness's father expressed to his son/witness that the job entailed risks and he signed something acknowledging such. Witness is unaware of risk factors for colon cancer. The father did not smoke, no one in the immediate family is known to have died from colon cancer, there was no drug use, and the witness's father was otherwise a very healthy man and ran, exercised. There is nothing the witness is aware of that would put his father at risk for colon cancer other than his work.
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> (*Id.* at pp. 6-7.)

In the resulting F&O, the WCJ found that the employee did not sustain injury AOE/COE causing colon cancer and resulting in death. Applicant was ordered to take nothing. The Opinion on Decision states the following regarding Dr. Reynolds' reporting:

> There is no change in the Court's rulings on admissibility. Dr. Reynolds reporting remains marked for identification only as obtained outside the LC §4062.2 process and exhibits Y1 - Y4 remain admitted and are not stricken. Requesting evaluation from another specialty does not render the existing PQME inadmissible.
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> (Opinion on Decision, January 9, 2019, p. 2.)

The rest of the Opinion focused on Dr. Azizad's reporting with the WCJ concluding that his opinions were "not based on a reasonable degree of medical probability but a hypothesis upon which the Court, at this point in time, cannot find applicant's cancer as work related." (*Id.* at p. 6.)

DISCUSSION

I.

Labor Code[4] section 4060 provides as follows:

[4] All further statutory references are to the Labor Code unless otherwise stated.

(a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer.

(b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. However, reports of treating physicians shall be admissible.

(c) If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.

(Lab. Code, § 4060(a)-(c), emphasis added.)

Section 4062.2 outlines the process to obtain a QME panel in represented cases for a compensability dispute per section 4060. (Lab. Code, § 4062.2.) Section 4062.2(a) specifically provides that:

> Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (Lab. Code, § 4062.2(a).)

Section 4064(d) separately provides as follows:

> The employer shall not be liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized pursuant to Sections 4060, 4061, and 4062. However, **no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense.** In no event shall an employer or employee be liable for an evaluation obtained in violation of subdivision (b) of Section 4060. **All comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board except as provided in Section 4060, 4061, 4062, 4062.1, or 4062.2.**
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> (Lab. Code, § 4064(d), emphasis added.)

Section 4605 states as follows:

> **Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation.** A qualified medical evaluator

> or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.
>
> (Lab. Code, § 4605, emphasis added.)

Section 4060(c) mandates use of the process outlined in section 4062.2 to obtain a medical evaluation where compensability is in dispute and the employee is represented by an attorney. (Lab. Code, § 4060(c).) In *Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (writ den.), defendant sought to compel applicant to be examined by a private doctor per section 4064(d). The Appeals Board found that "disputes regarding the compensability of the alleged industrial injury must be resolved, pursuant to section 4060(c), by the procedure provided in section 4062.2 and that an evaluation regarding compensability may not be obtained pursuant to section 4064—and, if a report is obtained, it is not admissible." (*Id.* at p. 1317.)

Consequently, Dr. Reynolds' reporting may not be admissible as a medical evaluation regarding compensability obtained under section 4064(d) pursuant to *Ward*.

However, subsequent to *Ward*, the California Supreme Court analyzed the admissibility of medical reports in workers' compensation proceedings and opined in pertinent part:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports…Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board . . ." except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
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> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As acknowledged by the Court in *Valdez*, sections 4060, 4064(d) and 5703 suggest an expansive rather than limiting approach by the Legislature regarding the admissibility of medical evidence. The Court

recognized that section 4060 "does not limit the admissibility of medical reports." Seen in this light, section 4060(c) merely restricts the *procedure* to obtain a medical evaluation to address compensability to the procedure outlined in section 4062.2 if the employee is represented by an attorney.

With respect to reports privately obtained from doctors by the employee pursuant to section 4605, the *Valdez* Court added:

> …when we consider the reforms enacted by Senate Bill 863…[t]he Legislature did not…narrow employees' right to seek treatment from doctors of their choice at their own expense, or bar those doctors' report admissibility in disability hearings. Rather, it provided that privately retained doctors' reports "shall not be the sole basis of an award of compensation." (§ 4605.) **The clear import of this language is that such reports may provide some basis for an award, but not standing alone.**
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> (*Valdez*, *supra*, 57 Cal.4th at p. 1239, emphasis added.)

Thus, the limiting language in section 4605 concerns the use of such reports as evidentiary support of an award, but does not necessarily limit the admissibility of those reports as evidence. The Court further recognized that "[s]ection 4605 has long permitted employees to consult privately retained doctors at their own expense, and the amendments enacted by Senate Bill 863 maintain that right." (*Id.* at p. 1240.)

After *Valdez*, the Court of Appeal issued its decision in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256]. In *Batten*, applicant's psychiatric condition was evaluated by a panel QME who concluded that her condition was not predominantly caused by industrial factors. (See Lab. Code, § 3208.3(b)(1) [a psychiatric injury must be predominantly caused by actual events of employment to be compensable].) Applicant retained her own medical expert, Dr. Gary Stanwyck, who opined that she had sustained a compensable psychiatric injury. Dr. Stanwyck's report was forwarded to the QME who issued a supplemental report commenting on it. The WCJ admitted Dr. Stanwyck's report into evidence and found it convincing. He consequently issued a decision finding that applicant had sustained a compensable psychiatric injury. On reconsideration, the Appeals Board issued an opinion and decision concluding that Dr. Stanwyck's report was not admissible and the WCJ should have relied on the opinion of the QME.

Ms. Batten petitioned for writ of review of the Appeals Board's decision arguing that it erred in

finding Dr. Stanwyck's report inadmissible. In its opinion following review, the Court of Appeal acknowledged that only section 4061 of the five sections identified in section 4064(d) contains an express prohibition on the admissibility of a medical evaluation. (*Batten*, *supra*, 241 Cal.App.4th at p. 1014.)[5] With respect to section 4605, the *Batten* Court opined:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, **the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME."** We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." **When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible.**
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> (*Id.* at p. 1016, emphasis added.)

The *Batten* Court ultimately affirmed the Appeals Board's decision and held that:

> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. **Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.**
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> (*Id.*, emphasis added.)

In this matter, applicant did not retain Dr. Reynolds to rebut the QME's opinion. At the time of Dr. Reynolds' initial report, the QME Dr. Azizad had already issued a report opining that applicant's cancer was industrially caused. Although there are some differences in their analyses, both doctors agree that

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[5] Specifically, section 4061(i) provides in relevant part:

> …With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board.
>
> (Lab. Code, § 4061(i).)

It is noted that section 4061(i) only prohibits the admissibility of evaluations regarding "permanent impairment and limitations resulting from the injury."

applicant's industrial exposure to radiofrequency radiation contributed to his colon cancer. In other words, Dr. Reynolds' reports do not rebut Dr. Azizad's opinions and therefore, this evidence does not fall within the specific exclusion identified in *Batten*.

It is conceded that the Court of Appeal in *Batten* endorsed the definition of a consulting physician under section 4605 as a doctor who is consulted "for the purposes of discussing proper medical treatment." Dr. Reynolds' opinions could not have been sought in the course of seeking medical treatment because the employee was already deceased. However, the circumstances in this matter are distinguishable from *Batten*. The employee in *Batten* was still alive when she obtained a report from Dr. Stanwyck. Although that report was deemed inadmissible because it was found to have been obtained solely to rebut the QME, Ms. Batten retained the right to obtain other reports from consulting physicians under section 4605 and from her treating physicians, which are generally admissible. (See Lab. Code, §§ 4060(b), 5703(a); see also *Valdez*, *supra*.)

We cannot conclude that a deceased employee does not have the same rights to obtain medical reporting as a living employee under section 4605. All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) Implicit in the right to present evidence is the right to obtain evidence. (See e.g., *Duncan v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 762 (writ den.) [the medical-legal evaluation process in the Labor Code does not apply to claims against SIBTF, but due process requires permitting SIBTF to obtain and offer into evidence medical reports addressing SIBTF claims].)

The factual circumstances of this matter highlight the challenge to applicants if they are precluded from obtaining a consulting physician's report after the employee's death. The employee was diagnosed with cancer in October 2015. He died approximately six weeks after his diagnosis in November. The rapidity of the employee's decline provided a very limited period of time within which to obtain reporting

from a consulting physician while the employee was still alive. In the absence of the right to obtain reporting under section 4605 after his death, applicant is prevented from consulting with a physician in the same manner that would have been available to her if the employee had lived long enough to be evaluated by a physician. We cannot conceive that the Legislature would intend this type of unjust result rendering an applicant's rights under the Labor Code contingent on whether the employee is living or deceased. To the extent that the definition of a consulting physician outlined in *Batten* would preclude applicant from obtaining a report under section 4605, this violates her due process right to obtain and present evidence.

The Appeals Board is not bound by the common law or statutory rules of evidence and procedure. (Lab. Code, § 5708.)[6] In conducting its inquiry into the matter, the Appeals Board has wide latitude to admit evidence necessary to determine the substantive rights of the parties pursuant to section 5708 and as provided by the expansive nature of the Labor Code favoring the admissibility of medical evidence, which was acknowledged by the Supreme Court in *Valdez*. Pursuant to this authority, the Court of Appeal long ago acknowledged that the Appeals Board has the authority to admit into evidence reports from physicians obtained after the employee's death. In *City and County of San Francisco v. Industrial Acci. Com.* (*Murdock*) (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103], the employer offered into evidence a

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[6] Section 5708 provides in its entirety:

> All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. **In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division.** All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.
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> (Lab. Code, § 5708, emphasis added.)

Section 5709 separately provides in its entirety:

> No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. **No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.**
>
> (Lab. Code, § 5709, emphasis added.)

report from Dr. Francis Chamberlain regarding the cause of Mr. Murdock's death. Dr. Chamberlain based his report on documents that were not admitted into evidence. Applicant objected to the report, which was not admitted into evidence by the trier of fact. In discussing admissibility of the report, the Court opined that the trier of fact "**might have received it in evidence** since Labor Code, section 5709 provides that **the commission is not bound by common law or statutory rules of evidence or procedure**," but the Court ultimately concluded that the WCJ's rejection of the report was not an abuse of discretion. (*Id.* at p. 460, emphasis added.)

WCAB Rule 10682(b) also expressly provides that "[i]n death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony." (Cal. Code Regs., tit. 8, former § 10606, now § 10682(b) (eff. Jan. 1, 2020).)[7] Admission into evidence of reports from non-examining physicians is necessary to adjudicate the substantive rights of the parties in death cases because a physician cannot examine a deceased employee.

We therefore conclude that it was error to exclude Dr. Reynolds' reports and deposition testimony from evidence. We will issue a finding of fact that these exhibits are admissible and order them admitted into the record. We will also consider this evidence in determining whether applicant met her burden of proof to show injury AOE/COE.

II.

It is acknowledged that Dr. Reynolds' reporting if treated as from a "consulting physician" under section 4605 may not be the sole basis for an award of compensation. Our inquiry is whether there is substantial medical evidence to support a finding that the employee's injury was industrially caused based on the entire record. (See *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500] ["[A]ny award, order or decision of the board must be supported by substantial evidence in the light of the entire record"].)

It is well established that decisions by the Appeals Board must be supported by substantial

[7] See section 133 [providing the Appeals Board with "power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code"] and section 5703 [the Appeals Board has the authority to "[a]dopt reasonable and proper rules of practice and procedure" and to "[r]egulate and prescribe the nature and extent of the proofs and evidence"]. (Lab. Code, §§ 133, 5307.)

evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza*, *supra*; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Applicant bears the burden of proving her husband's injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) It is sufficient to show that work was a contributing cause of the injury. (See *Clark*, *supra*, 61 Cal.4th at p. 298; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Applicant need only show that industrial causation was "not zero" to show sufficient contribution from work exposure for the claim to be compensable. (*Clark*, *supra*, 61 Cal.4th at p. 303.) The burden of proof "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) It has also long been established that "all reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee." (*Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1310 [81 Cal.Comp.Cases 324], citing *Clemmons v. Workmen's Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1, 8; see also *Garza*, *supra*, 3 Cal.3d at p. 317; Lab. Code, § 3202.)

In this matter, the QME Dr. Azizad concluded that the employee's colon cancer was industrially caused due to his 27 years of exposure to radiofrequency radiation at work. Dr. Reynolds agreed with Dr. Azizad's causation opinion. This conclusion was supported by the many years of industrial radiofrequency

exposure the employee had, the rarity of one of the types of cancer he contracted, the low risk factors applicable to him, his young age at the time of diagnosis and research relating colon cancer to heat exposure to the colon. Dr. Azizad drew reasonable inferences from all of these circumstances to conclude that applicant's cancer must be related to industrial exposure. (See e.g., *San Francisco Chronicle vs. Workers' Comp. Appeals Bd.* (*Paez*) (2017) 82 Cal.Comp.Cases 410 (writ den.) [newspaper carrier/driver's bladder cancer was industrially caused by exposure to printing inks that were considered possible carcinogens]; *County Sanitation District No. 2 of Los Angeles County v. Workers' Comp. Appeals Bd.* (*Chester*) (2004) 69 Cal.Comp.Cases 1463 (writ den.) [reasonable probability that crane operator's exposure to hazardous materials at waste processing facility was a factor in the development of his nasal cancer]; *Shell Oil Co. v. Workers' Comp. Appeals Bd.* (*Romo*) (1993) 58 Cal.Comp.Cases 227 (writ den.) [chemical exposure during several years of employment at an oil refinery was contributing cause of 44-year-old employee's brain cancer in the absence of other risk factors].)

The WCJ rejected Dr. Azizad's opinions in part because exposure to low frequency radiation has not as of yet been found to contribute to colon cancer. As discussed above, applicant need not show causation to a scientific certainty, only to a reasonable medical probability. The circumstances in this case are similar to the circumstances in *McAllister*. In *McAllister*, a widow sought workers' compensation benefits alleging that smoke inhalation during her husband's 32-year employment as a fireman contributed to his death from lung cancer. The doctor who evaluated causation for Mr. McAllister's death concluded that it was probable that the smoke he inhaled while working as a fireman contained carcinogens, which contributed to his lung cancer. The Court of Appeal found this evidence supported a finding that his lung cancer was industrially caused, holding in relevant part:

> In deciding this case we obviously do not hold that all firemen contracting lung cancer can obtain compensation benefits from their employers. In the case before us respondent City elected to introduce no evidence of its own; we conclude that no substantial evidence supports a finding that there is not a reasonable probability that employee's illness arose out of his employment.
>
> Future scientific developments will tell us more about lung cancer. Ultimately it may be possible to pinpoint with certainty the cause of each case of the disease. But the Legislature did not contemplate years of *damnum absque injuria* pending such scientific certainty. Accordingly, we

> and the Workmen's Compensation Appeals Board are bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or "convincing." We must do so even though the exact causal mechanism is unclear or even unknown.
>
> (*McAllister*, *supra*, 69 Cal.2d at p. 419.)

In a similar manner, Dr. Reynolds acknowledged during his deposition that not all cable installers die from colon cancer. As in *McAllister*, further scientific developments will tell us more about colon cancer. Under the circumstances here, Dr. Azizad and Dr. Reynolds both concluded that the employee's long industrial exposure to radiofrequency radiation contributed to his cancer. These opinions were given to a reasonable medical probability based on the evidence and reasonable inferences drawn from the evidence. There is no medical evidence in the record challenging the conclusions reached by Dr. Azizad and Dr. Reynolds. In the absence of contrary evidence, we are bound to accept the uncontradicted and unimpeached findings of the medical experts where they constitute substantial medical evidence to support industrial causation for the employee's injury.

Therefore, we will rescind the F&O and issue a new decision finding that the employee sustained injury AOE/COE to his internal system and digestive system causing colon cancer. The reporting of Dr. Azizad and Dr. Reynolds will be found to constitute substantial medical evidence. We will also make a finding that Dr. Reynolds' reporting and deposition testimony are admissible and order these exhibits be admitted into the record. All other findings of fact in the new decision are in accordance with the parties' stipulations at trial. (Minutes of Hearing and Summary of Evidence, August 30, 2018, p. 2.) An award for applicant will be issued with the amounts to be paid to be adjusted by the parties and jurisdiction reserved. We expressly make no comment on the amount of benefits owed to applicant or the employee's three children.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on February 4, 2019 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Francisco Banuelos, while employed through October 9, 2015, as a maintenance technician, occupational group number 380, at Los Angeles, California, by Time Warner Cable, now Charter Communications, sustained injury arising out of and in the course of employment to his internal system and digestive system causing colon cancer.

2. At the time of injury, the employer's workers' compensation carrier was New Hampshire Insurance Company, administered by ESIS.

3. At the time of injury, the employee's earnings were sufficient to warrant maximum rates for benefits.

4. No attorney fees have been paid and no attorney's fee arrangements have been made (excepting possible section 5710 fees).

5. The employer has furnished no medical treatment.

6. Applicant's Exhibits Nos. 1-3 are admissible as evidence.

7. The reporting of Dr. Azizad and Dr. Reynolds are substantial medical evidence.

ORDER

IT IS ORDERED that applicant's Exhibits Nos. 1-3 are admitted into the record.

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AWARD

AWARD IS MADE in favor of applicant, MICHELE BANUELOS, against defendant, TIME WARNER CABLE (NOW CHARTER COMMUNICATIONS), for workers' compensation benefits in amount(s) to be determined to applicant and the other claimed dependents less an attorney's fee of 15% payable to ROWEN, GURVEY & WIN from the award. The amount(s) to be paid shall be adjusted by the parties with jurisdiction reserved at the trial level in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 4, 2020

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

MICHELE BANUELOS
PEARLMAN, BROWN & WAX, LLP
ROWEN, GURVEY & WIN

AI/*pc*

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