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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

COUNTY OF SACRAMENTO,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS
BOARD and JONATHON SCOTT
McCARTNEY,

Respondents.

C082282

(WCAB No. ADJ9510323)

Petitioner County of Sacramento (the County) sought a writ of review to annul the decision of respondent Workers' Compensation Appeals Board (the Board) that overturned the finding of its hearing officer, who had concluded that respondent Jonathon Scott McCartney's skin lesions ("actinic keratosis," which may or may not be a precursor of skin cancer) could not be causally tied to sun exposure *during* his employment as a deputy sheriff with the County¹ with a reasonable medical probability. We issued an

¹ McCartney's employing entity is a County subdivision ("County of Sacramento Contracts"); as his counsel put it, "It's a technical thing. [He]'s still paid by the County of Sacramento."

order directing the writ of review to issue. On our plenary review of the record, we shall annul the Board's award and remand with directions that it enter a new order denying McCartney's petition for reconsideration of the hearing officer's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Our focus on appeal is narrowly focused on the testimony of the qualified medical examiner (QME) on this issue. Perforce, we have few facts to provide beyond this.

McCartney was diagnosed with actinic keratosis in October 2013. In his June 2014 application for benefits, he alleged that this injury arose out of the course of his employment. The County requested that he submit to the QME (a dermatologist) for an evaluation.

In her initial and supplemental reports, the QME noted that McCartney had been a surfer/body surfer growing up in Southern California. He described his skin as burning easily, and he had experienced blistering sunburns. During most of his 21 years working for the County, he was on motorcycle patrol, with his arms and face exposed to UV radiation (though he had used sunscreen from 1991 on). In his leisure time, he also was active outdoors with sports, exercise, and golf. At the time of the QME examination, the County had contracted his services to the City of Rancho Cordova, where he was out of doors 70 percent of the time. In 2013, he began noticing scabbed and crusty red lesions on his face and arms; a biopsy showed these to be actinic keratosis, which is not itself a form of cancer. After an extensive review of medical literature, the QME could not find any documented support for a 51 percent certainty linking the on-job sun exposure to the manifestation of the skin condition, because medical literature had not identified any particular dosage of sunlight as triggering it. Therefore, attributing the skin condition to any contribution from workplace sunlight—as opposed to the sun exposure McCartney received throughout his life or during his pursuit of outdoor activities in his leisure time—would simply be pure speculation. The QME recommended a return to work with

appropriate sun precautions. In response to a request from McCartney's counsel to consider some information from a source on the Internet, the QME observed that this information simply reiterated the fact that not all keratoses will eventually become cancer, and it did not establish that any particular dosage would trigger the skin condition such that workplace sun exposure could be identified as a contributing cause after a lifetime of exposure to the sun.

In a subsequent deposition, the QME offered the same opinion over and over on this point. McCartney did have actinic keratosis, but did not have skin cancer. Sunlight is but one of the factors leading to development of these lesions, which also include aging, genetics, and the responses of the immune system. McCartney's light skin would be a contributing genetic factor of unquantifiable weight; it is difficult to calculate any contribution his immune system may have made in failing to hold the development of the lesions in check; and having reached his late forties, his age made it more likely that the condition would develop after a lifetime in the sun. However, "there's no way to assign a dose-response relationship to any discreet period of time, whether it be the 20 years he spent in the police force versus his childhood blistering sunburns versus his teenage sun exposure. There's no way to—it would be speculation, based on the literature, to assign any discreet value to the time that he had on the police force." She disagreed with counsel's suggestion that sun exposure at a younger age is less of a factor: "[I] really haven't seen that." She agreed that sun exposure could be a cumulative process, but there was not any basis for determining *when* the tipping point of dosage resulting in the ultimate development of the lesions had been reached; "[t]he literature does not have any values that say[] your time period between [ages] 20 and 40 is more important than your time period between zero and 20 . . .," and noted this is a "hotly debated topic" at academic meetings. While McCartney may have spent more years in the sun while on the job, "we can't say that that contributed to the genesis of his [condition]."

McCartney's counsel struggled with this opinion: "I can't quite wrap my head around the fact that—you've said that sun exposure is cumulative and is a factor in the development" of the condition; "[s]o if . . . Mr. McCartney had approximately 20 years of sun exposure as a police officer, why does that not have some contribution to the cumulative effect of damage to the skin that resulted in" his condition? The QME pointed out there is sun exposure from his youth, from nonindustrial pursuits, and on the job; the latter "may be somewhat of a factor, but we can't say that that particular time period caused his" condition. "[Y]ou're trying to say[, counsel,] that the 20 years on the job . . . caused his" condition; "I can't say that." She pointed out, "his blistering sunburns he achieved in childhood . . . may have done more DNA damage at that time that may have eventuated in his actinic keratosis. We just can't—we just don't know." The sun exposure while employed as a deputy *might* have played some role, but even assigning a 1 percent contribution would be speculation.² Thus, "we can't say that it's necessarily a causative factor." In responding to the same question asked in yet another way, the QME testified that McCartney may well have developed his condition even absent *any* work-related sun exposure; she had patients who had avoided sunlight for 20 years and still developed actinic keratoses. After the County's attorney objected once more that the issue had been asked and answered multiple times, the QME again asserted that *any* sun exposure is a risk factor, "and I cannot say that specifically his time on the police force is any more important than his time prior to working . . . in terms of sun exposure."

At the hearing before the Board's hearing officer, all issues were deferred except the determination of whether the injury arose out of the course of employment. The parties submitted the QME's reports and deposition as exhibits. McCartney's testimony detailed his work conditions, which do not add anything of consequence to the summary

² We do not read this testimony in the same manner as does the dissent in its point No. 5. (Dis. opn., *post*, at p. 2.)

above of the reports and deposition. He pointed out that the affected areas on his body were limited to the sun-exposed portions of his arms and his face (though not the back of his neck). He acknowledged that as a light-haired, blue-eyed, fair-skinned person of Irish descent, he sunburned easily, but the sunburns of his youth were rarely on his arms. He started regularly using sunscreen at work in 1991.

In his opinion, the hearing officer concluded that work-related sun exposure was not proven to be a contributing factor to McCartney's condition by a reasonable medical probability. The QME had determined there was an absence of scientific evidence to ascribe any particular level of causation to on-job sunlight, making it speculation to assign it as a contributing factor. McCartney petitioned the Board for reconsideration, contending the recent case of *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291 (*South Coast*) compelled a contrary conclusion. In its decision on granting the petition, the Board characterized the QME evidence we have summarized at length above as *agreeing* the on-job sun exposure contributed to McCartney's condition, but as being unable to specify the particular extent to attribute to this industrial cause. The Board thus concluded that the QME applied the wrong legal standard, as set forth in *South Coast*, and therefore the Board "amended" the hearing officer's order to find that there was an injury arising out of the course of employment. The Board denied the County's subsequent petition for reconsideration, in which the County pointed out that the QME testified she could *not* determine with reasonable medical certainty that work-related sun exposure contributed to McCartney's condition. The Board concluded that because the QME testified that on-job sunshine *could have* contributed to the injury, this was sufficient to bring it within the legal standard of *South Coast*.

DISCUSSION

In *South Coast*, the decedent was taking three drugs as a result of an injury on the job; his personal physician prescribed two other drugs for anxiety and sleeplessness. He

was found dead of respiratory failure with all five of the drugs present in his system, the autopsy attributing the cause to the synergistic effect of the medications and early stages of pneumonia. (*South Coast, supra*, 61 Cal.4th at pp. 294-295.) One physician concluded the drugs separately and in combination could cause respiratory depression or arrest. The agreed QME did not believe one of the injury-related drugs had any effect and thought a second was present in too low a dose; the QME concluded the cause of death was solely from the effect of the personal medications. (*Id.* at p. 295.) In a later deposition, the QME now thought that one of the injury-related drugs may have had a *small* role in causation, more than zero but certainly less than 20 percent. The presence of the third injury-related drug was no more than crumbs in a causation pie; its absence would not even be noticed. (*Id.* at p. 296.) The hearing officer awarded death benefits because the injury-related drugs had some role in causation, and the personal drugs were related to effects of his injury as well. (*Ibid.*)

For injury to arise out of employment, it must be linked in some causal fashion, which an applicant must prove with reasonable probability. (*South Coast, supra*, 61 Cal.4th at p. 297.) “The question here is the required nature and strength of the causal link” (*Ibid.*) All that is required under the workers’ compensation law is proof that employment provided a contributing *but for* cause of the injury. (See *id.* at pp. 298-299.) This is distinct from the *substantial factor* test under tort law, which requires more than an infinitesimal or theoretical factor. (See *id.* at p. 299.) Since there was evidence that two of the injury-related drugs played *some* role in the death, uncertainty regarding the *degree* to which it played a role did not make this evidence of causation insubstantial. (*Id.* at pp. 299, 303-306.) *South Coast* also found it was proper to award death benefits on the hearing officer’s alternative theory that the medication for sleeplessness (which was an undisputed cause of death) was a function of the pain the decedent felt from the injury, and thus causally related to the work injury. (*Id.* at pp. 306-307.)

The present case is distinguishable. Both respondents misapprehend the QME testimony. The QME *never* acknowledged that there was a causative role of unknown degree arising out of McCartney's employment. Rather, she took great pains to explain (repeatedly) that it was not possible to attribute the cause of McCartney's condition to *any* particular period of exposure to the sun, and therefore it was nothing more than speculation to identify the work-related exposure as a contributing cause. Just because the effects of sun exposure are cumulative does not mean McCartney could not have reached a toxic dose before coming to work for the County (when he in fact became a regular user of sunscreen). It is just as probable that the trigger was set back in DNA damage from the severe sunburns of his youth, the QME noting she had many patients who avoided the sun for decades and still developed the condition. On this evidence, the hearing officer properly concluded that McCartney failed to establish that work-related sun exposure contributed to his condition by a reasonable probability.

DISPOSITION

The Board's opinion on reconsideration is annulled and the matter is remanded to the Board with directions to deny McCartney's petition for reconsideration. The County is awarded its costs in this proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

_____ BUTZ _____, J.

I concur:

_____ BLEASE _____, Acting P. J.

MAURO, J., Dissenting.

The workers' compensation system is not based on fault, and the concept of proximate cause is less restrictive than in tort law because workers' compensation policy favors an award of employee benefits. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 298 (*South Coast*)). In general it is sufficient if there is a contributing causal connection between the work and the injury. (*Id.* at pp. 298-299.) This is so even if the work merely accelerates or aggravates a preexisting condition. (*Id.* at p. 301.)

Whether the work was a contributing cause of the injury is a question of fact. (*South Coast, supra*, 61 Cal.4th at p. 302.) We review whether the Board's decision on factual matters is supported by substantial evidence in light of the entire record. (*Ibid.*) We do not exercise our independent judgment. (*Id.* at p. 303.)

In *South Coast*, the California Supreme Court rejected a Court of Appeal analysis which emphasized a doctor's inability to offer a precise percentage for a drug's contribution to a resulting death. (*South Coast, supra*, 61 Cal.4th at p. 305.) The Supreme Court noted it had rejected a similar argument in *McAllister v. Worker's Comp. Appeals Bd.* (1968) 69 Cal.2d 408. (*South Coast, supra*, 61 Cal.4th at p. 306.) In *McAllister*, the Court said such a percentage value would be desirable but is not a prerequisite to recovery; placing such a burden on applicants to prove a percentage value would often be unbearable. (*South Coast, supra*, 61 Cal.4th at pp. 305-306, quoting *McAllister, supra*, 69 Cal.2d at p. 417.)

In this case, the qualified medical examiner (QME) testified to the following, among other things:

1. Sun exposure is a causative factor for the development of actinic keratosis.
2. Respondent Jonathon Scott McCartney was definitely exposed to sun during his years on the police force.

3. Although there is no way to assign a “dose response relationship” to any discreet period of time, sun exposure has a cumulative effect on the skin.

4. The sun exposure McCartney received throughout his life, including his years on the police force, was cumulative and contributory.

5. The sun exposure McCartney received while employed as a law enforcement officer played some role in the development of actinic keratosis, but the QME cannot give a definitive percentage of how much it caused.

6. It is a reasonable medical probability that each factor (including sun exposure) had some causative bearing on the development of actinic keratosis.

7. The QME stands by the QME report as supplemented by the QME’s deposition testimony.

The foregoing testimony is substantial evidence supporting the Board’s decision. The concept of causation is less restrictive in this context, and workers’ compensation policy favors an award of employee benefits. The above evidence establishes a contributing causal connection between McCartney’s sun exposure during his years on the police force and his actinic keratosis. Although a percentage value might be desirable, it is not a prerequisite to recovery.

MAURO, J.