

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ10455970

CRESENCIO BENITEZ (DECEASED),

Applicant,

vs.

AZITEX TRADING CORP;
EMPLOYERS COMP GLENDALE,
BERKSHIRE HATHAWAY SAN
FRANCISCO;

Defendants.

FINDINGS AND ORDER

TELLERIA, TELLERIA & LEVY

By Randy Levy, Esq.
Attorneys for Applicant

GREENUP HARTSTON ROSENFELD & RIVERA

By Samantha R Fritzel, Esq.
Attorney for Defendant

The above entitled matter having been heard and regularly submitted, the Honorable Isabel Lallana, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. Cresencio Benitez, born August 21, 1977 while employed during the period January 14, 2002 through July 24, 2015 as a Machine Operator at Los Angeles, California by Azitex Trading whose workers' compensation carriers is Employers Compensation administered by Berkshire Hathaway, did not sustain injury arising out of and in the course of employment to the respiratory system, psyche, circulatory system, digestive system.

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

2. Applicant's Exhibit 1, the report of Dr. Pietruszka is inadmissible.

ORDER

IT IS ORDERED THAT APPLICANT CRESENCIO BENITEZ (Deceased) take nothing by way of the application for adjudication filed on June 16, 2016.

DATE: April 25, 2019



Isabel Lallana

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.
By: mvillarín On: 4/25/19

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ10455970

CRESENCIO BENITEZ (DECEASED) v AZITEX TRADING CORP
BERKSHIRE HATHAWAY
EMPLOYERS COMP GLENDALE

DATE OF INJURY: CT 01/14/2002 through 07/24/2015

WORKERS COMPENSATION JUDGE: ISABEL LALLANA

OPINION ON DECISION

Admissibility of Exhibit

Disputed issues in represented cases shall be resolved by the procedure set forth in Labor Code section 4062.2, which states that the "evaluation shall be obtained only as provided in this section." The Board, in an *en banc* decision, held that disputes regarding compensability of alleged industrial injury must be resolved solely by procedure provided in Labor Code section 4062.2. *Ward v City of Desert Hot Springs* (2006) 71 Cal Comp Cases 1313.

Dr. Pietruszka's evaluation was not obtained under section 4062.2's medical-legal evaluation process. As a result, his report, Exhibit 1, is an inadmissible medical report.

Medical Evidence and Burden of Proof

Whether an employee's death occurred as a result of an industrial injury or condition is a medical issue that must be decided based on medical evidence. Dependents have the burden of proof by a preponderance of evidence that the employee's death resulted from employment. *Wehr v WCAB* (1985) 50 Cal Comp Cases 165, 169.

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

There is no medical evidence presented to support industrial causation. As a result, the court finds that the death of Cresencio Benitez is not compensable.

DATE: April 25, 2019

Isabel Lallana

Isabel Lallana
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.
By: *M. Villanueva* On: *4/25/19*

1 **Law Offices Of TELLERIA, TELLERIA & LEVY, LLP**
2 **Anthony F. Telleria, Esq. (Bar No. 35723)**
3 **Matthew J. Telleria, Esq. (Bar No. 232151)**
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5 **828 W. Las Tunas Drive**
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9 **Attorneys for Cresencio Benitez - Death Claim**

10 **BEFORE THE WORKERS' COMPENSATION APPEALS BOARD**

11 **STATE OF CALIFORNIA**

12 **CRESENCIO BENITEZ - DEATH CLAIM)**

CASE NO.: ADJ10455970

13 **Applicant,**

14 **vs.**

15 **AZITEX TRADING CORP.; BERKSHIRE)**
16 **HATHAWAY SAN FRANCISCO,)**

PETITION FOR RECONSIDERATION

17 **Defendants.**

18 A Findings and Order was filed in the above-entitled case and served on 04/25/2019 finding that
19 decedent Cresencio Benitez did not suffer injury AOE/COE to his respiratory system, psychiatric,
20 circulatory system and digestive system and that Exhibit 1 was not admissible. Applicant Beatriz Gaona
21 is aggrieved by said Finding and Order and hereby petitions for reconsideration upon the following
22 grounds:

23 1. The evidence does not justify the findings of fact.

24 2. That by order and decision made and filed by the Workers Compensation Judge the Board
25 acted without or in excess of its powers.

26 In support of the above, Petitioner gives the following details, including a statement of facts
27 upon which Petitioner relies and a discussion of the law applicable hereto:
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STATEMENT OF FACTS

Decedent Crescencio Benitez died on 07/29/2015. The Minutes of Hearing of 04/04/2019 page 2 line13 have an incorrect date of death. An application for death benefits was filed on 06//07/2016 on behalf of applicant Beatriz Gaona, the widow, and the 2 minor children of Mr. Benitez.

The application alleged that decedent died as a result of injurious exposure suffered while working for defendant.

Medical records were reviewed by Dr. Marvin Pietruszka and on 11/07/2017 a report was prepared by him finding that there was a contribution to decedent's death by injurious exposure while decedent worked for defendant. Exhibit 1.

The report was excluded on the basis that Dr. Marvin Pietruszka was not chosen to render that opinion pursuant to LC 4062.2.

Because of the exclusion of Dr. Pietruszka's report, there was a finding of no medical evidence of industrial contribution to decedent's death.

APPLICANT'S CONTENTIONS

Dr. Pietruszka was not an Examiner or Evaluator of Cresencio Benitez.

LC 4060 and 4062.2 apply to the obtaining of reports based on examination of the injured worker.

Dr. Pietruszka's report was also admissible under LC 4605.

ARGUMENT

Labor Code 4060 is in Chapter 7 of the Labor Code as Article 2.

The heading of the chapter is Medical Examinations

Thus the use of "evaluation" in LC 4060 means "examination"

1 The statute clearly refers to disputes over the "compensability of any injury"

2 The statute does not state that it is to be used to determine if there is work related contribution to
3 the death of a worker.

4 Dr. Pretruszka did not examine Crescencio Benetez before preparing his report.

5 LC 4060 and 4062.2 are thus not applicable to review of records and testimony to opine on
6 industrial contribution to the death of a worker.

7 8CCR 10606 states "In death cases the reports of non-examining physicians may be admitted
8 into evidence in lieu of oral testimony"

9 There was no indication at the trial that the report of Dr. Pretruszka would not be admitted, so
10 that Dr. Pietruszka should give oral testimony:

11 LC 4065 allows a party to obtain a report at their own expense

12 The report must be reviewed by a Qualified Medical Examiner and cannot be the sole basis of an
13 award.

14 Dr. Pretsuska's 11/07/2017 report (exhibit 1) was reviewed by Qualified Medical Examiner
15 Michael J. Sachs in a report dated 07/26/2018. Exhibit A.

16 In **Valdez as WCAB 57 Cal 4th 1231** The Supreme Court stated that "such reports may provide
17 some basis for an award, although they cannot be the sole basis of an award of compensation."

18 LC 4065 reports need not comply with LC 4060 through 4062.2 because neither the statute nor
19 the Supreme Court says they must do so.

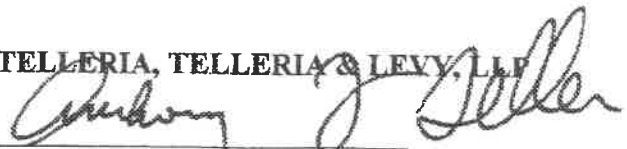
20
21 **CONCLUSION**

22
23 Dr. Pretsuska's opinion and report need not comply with LC 4060 and 4062.2 to be admissible.
24 The report is also admissible because it complied with all the requirement of LC 4065.

25 **WHEREFORE**, applicant prays that the Petition for Reconsideration be granted, the Finding
26 and Order of 04/25/2019 be rescinded and the matter returned to the trial level for further proceedings
27 and for such other relief as is just.

1 DATED: May 14, 2019

TELLERIA, TELLERIA & LEVY, LLP



By: ANTHONY F. TELLERIA

Attorney for Applicant, Cresencio Benitez

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1 **GREENUP, HARTSTON & ROSENFELD, LLP**

2 SAMANTHA R. FRITZEL, ESQ. SBN 286908

3 444 W. Ocean Blvd., Suite 1530

4 Long Beach, CA 90802

5 (562) 432-4959 (Telephone)

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7 Attorney for Defendant

8 **WORKERS' COMPENSATION APPEALS BOARD**

9 **FOR THE STATE OF CALIFORNIA**

10 CRESENCIO BENITEZ (DECEASED),

11 Applicant,

12 vs.

13 AZITEX TRADING CORP.;
14 EMPLOYERS COMPENSATION,

15 Defendants.

CASE NO. ADJ10455970

**DEFENDANT'S ANSWER
TO PETITION FOR
RECONSIDERATION DATED
MAY 14, 2019**

16
17 COMES NOW, Defendant EMPLOYERS COMPENSATION, by and through its attorneys
18 of record, GREENUP HARTSTON & ROSENFELD, LLP, and hereby submits its Answer to
19 Petition for Reconsideration dated May 14, 2019 (hereinafter "the Petition"), as follows:

20 **ARGUMENT**

21 I. **APPLICANT INCORRECTLY ARGUES THAT LABOR CODE 4060 AND**
22 **4062.2 ARE NOT APPLICABLE TO DEATH CASES**

23
24 Labor Code Section 4060 applies to disputes over compensability of an
25 injury. Specifically, Labor Code Section 4060(c) applies to represented cases and states that a
26 medical evaluation to determine compensability shall be obtained only by the procedure set forth
27 in Labor Code Section 4062.2. Applicant attempts to argue that these sections are not applicable
28 to death cases without providing any authority to support the contention. Applicant first claims

1 that the use of the term "evaluation" in Labor Code Section 4060 actually means "examination"
2 and that because Applicant self-procured a report from Dr. Pietruszka who did not "examine"
3 Cresencio Benitez that somehow this fact renders Labor Code Section 4060 inapplicable to this
4 case. No legal authority has been provided to support this contention.

5 II. APPLICANT INCORRECTLY CITES TO 8 CCR 10606 AS SUPPORT FOR
6 THE ADMISSION OF DR. PIETRUSZKA'S REPORT INTO EVIDENCE

7 California Code of Regulations Section 10606 provides that medical evidence in the
8 form of written reports is favored by the Workers' Compensation Appeals Board in lieu of medical
9 witness testimony. With regard to death cases, this section prescribes that reports of non-
10 examining physicians may be admitted into evidence in lieu of oral testimony. Applicant
11 incorrectly infers that this section renders reports not secured in accordance with Labor Code
12 Section 4062.2 admissible into evidence. To read this section as permitting reports on the issue of
13 compensability that were not obtained in accordance with Labor Code Section 4062.2 admissible
14 is to completely circumvent the procedure set forth in Labor Code Section 4062.2 which
15 effectively renders Labor Code Section 4062.2 moot. The drafters of this legislation surely did
16 not intend on such an effect. Rather than reading these sections in contravention of one another
17 they should be read together.
18
19

20 Furthermore, the Board held that disputes regarding the compensability of an injury in
21 represented cases, may only be obtained under the procedure in Labor Code Section 4062.2. *Ward*
22 *v. City of Desert Hot Springs* (2006) 71 CCC 1313. Therefore, any reports obtained on the issue
23 of compensability not in accordance with Labor Code Section 4062.2 are not admissible.
24

25 III. APPLICANT INCORRECTLY ARGUES THAT LABOR CODE SECTION
26 4605 PERMITS THE ADMISSION OF DR. PIETRUSZKA'S REPORT INTO
27 EVIDENCE
28

1 Labor Code Section 4605 permits an employee at his own expense, to provide a
2 consulting physician. The section goes on further to state that any report prepared by a consulting
3 physician shall not be the sole basis of an award of compensation. The Applicant relies on this
4 section to support the contention that Dr. Pietruzka's report is admissible. The Applicant suggests
5 that the fact that Dr. Pietruzka's report was reviewed by the QME Dr. Sachs means the report
6 should be admissible. There is no indication in this section that a report procured by the Applicant
7 under this section is admissible on the issue of compensability. Furthermore, to read this section
8 as permitting self-procured reports admissible on the issue of compensability would render Labor
9 Code Section 4062.2 void.
10

11
12 Furthermore, assuming arguendo that Dr. Pietruzka's report would be admissible under
13 this section, it cannot be the sole basis of an award and there is no other evidence to support
14 compensability in this case. The QME Dr. Sachs did not find the death of Crescencio Benitez to
15 be work related and as such, there is no evidence to support compensability of the death other than
16 Dr. Pietruzka's report which is inadmissible.
17

18 **CONCLUSION**

19 In sum, the Petition fails to state any legal authority supporting the argument that Dr.
20 Pietruzka's report is admissible in this case. For the foregoing reasons, Defendant respectfully
21 requests that the Petition be denied.

22 DATED: May 22, 2019

23 Respectfully submitted,

24 GREENUP, HARTSTON & ROSENFELD, LLP

25 

26 Samantha R. Fritzel for Gina T. Hartston
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FILED
LOS ANGELES
19 MAY 23 AM 9:27
CITY INDUSTRIAL RELATIONS
DMC/WCAB

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VERIFICATION

I, Samantha R. Fritzel, declare that I am a party to the within action, or an authorized representative thereof, and that I have read and know the contents of the attached document described as:

**DEFENDANT'S ANSWER TO PETITION FOR RECONSIDERATION
DATED MAY 14, 2019**

The matters stated in the foregoing document are true and correct to my knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true and correct.

I declare under penalty of perjury under the laws of the state of California that the foregoing statement is true and correct.

DATED: May 22, 2019



SAMANTHA R. FRITZEL

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EPT INDUSTRIAL RELATIONS
DWC/WCAB

CASE No.: ADJ10455970

CRESENCIO BENITEZ,
(DECEASED)

v.

AZITEX TRADING CORP;
BERKSHIRE HATHAWAY
EMPLOYERS COMP
GLENDALE,

DATE OF INJURY :

CT 01/14/2002 to 7/24/2015

WORKERS' COMPENSATION JUDGE: ISABEL LALLANA

**REPORT & RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. Identity of Petitioner: Applicant
- Timeliness: The Petition for Reconsideration is timely.
- Verification: Verification is provided.
2. Date of Issuance of Findings and Order: April 25, 2019
3. Petitioner Contends that the WCJ's ruling that a report obtained outside the medical-legal evaluation process of Labor Code sections 4060 and 4062.2 is inadmissible medical report, is an error.

**II.
DISCUSSION**

PROCEDURAL BACKGROUND:

An Application for Adjudication of Claim (Death Case) was filed by the widow Beatriz Gaona on behalf of the deceased employee – Cresencio Benitez. The Application

asserts CT injury from 01/14/2002 to 7/24/2015 resulting in death on 7/29/2015. EAMS Doc ID 60522680. The death claim is denied. Exhibit. B.

Parties obtained Panel QME, and Michael Sachs became QME in internal medicine. Dr. Sachs performed med-legal evaluation on 4/21/2018, based on medical record review, autopsy reports and interview with the wife of the deceased. The QME found Mr. Benitez's death as non- industrial. Exhibit A. Parties deposed the QME who did not change the conclusions in his reports. Exhibit 2.

Applicant obtained an evaluation from Dr. Pietruszka. The report dated November 7, 2017 is described as a "Comprehensive Medical-Legal Evaluation." Exhibit 1, page 2 of 16. At trial, defense challenged the admissibility of the report of Dr. Pietruszka on the basis that he was neither a treating physician nor a panel QME. Minutes of Hearing 2: 21-23.

The report of Dr. Pietruszka was found to be an inadmissible medical report based on *Ward v. City of Desert Hot Springs* (2006) 71 Cal Comp Cases 1313. Disputes regarding compensability of alleged industrial injury must be resolved solely by the medical-legal process set forth in Labor Code section 4062.2. Opinion on Decision, p.3. *Ward* unequivocally states that the "Legislature intended that this procedure be the exclusive method for obtaining medical evaluations on compensability." 71 Cal Comp Cases at 1316.

APPLICANT'S CONTENTIONS:

In the Petition for Reconsideration, Applicant attempts to create a distinction for death cases. According to applicant, the "disputes over the 'compensability of any

injury” in Labor Code section 4060 does not “state that it is to be used to determine if there is work related contribution to the death of a worker.” Petition for Reconsideration 3: 1-3. In support, Applicant cites Labor Code section 4065. “The report is also admissible because it complied with all the requirement of L[abor] C[ode] 4065. Petition for Reconsideration 3: 23-24. “LC 4065 allows a party to obtain a report at their own expense.” Petition for Reconsideration 3: 11.

LABOR CODE SECTION 4605:

The former Labor Code section 4065 has been repealed.

Applicant may be relying on Labor Code section 4605 (and not section 4065) which allows an employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. In support, applicant cites *Valdez v WCAB* (2013) 57 Cal 4th 1232, 78 Cal Comp Cases 1209.

Valdez is a California Supreme Court decision holding that employees have a right to seek treatment of their choice at their own expense. According to *Valdez*, while the privately retained doctors’ reports are not barred from admission in disability hearings, these reports “shall not be the sole basis of an award of compensation (§ 4605.) The clear import of the language is that such report may provide some basis for an award, but not standing alone:

Applicant’s reliance on *Valdez* is misplaced for two reasons. First, Dr. Pietruszka was not applicant’s treating doctor, but an expert retained by Applicant to provide medical opinion. Second, even if Dr. Pietruszka were a self-procured treating or consulting doctor whose reports are admissible under section 4605, the same section of the Labor Code states that Dr. Pietruszka’s report standing alone, cannot be the sole basis of the

award. The admission of Dr. Pietruszka's report would not be able to support a finding of industrial causation because there is no other report finding industrial causation. The QME found Mr. Benitez's death as non- industrial. Exhibit A.

The ruling on the admissibility of the Pietruszka report is further supported by *Batten v WCAB*, (2015) 80 Cal Comp Cases 1256. The Court of Appeal in *Batten* held that Labor Code section 4605 does not permit admission of a report by an expert retained for medical-legal purposes. While the report of the applicant's expert was reviewed by the QME- that did not make the report admissible. According to *Batten*, the term consulting physician in section 4605 means a doctor consulted for medical treatment and not for medical legal purposes.

It is unclear what is the intent of Applicant in arguing that 8 CCR 10606 states that "In death cases the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony." This section can be harmonized with the exclusive procedures under Labor Code sections 4060 et al. Just like Dr. Pietruszka, the QME did not examine the deceased, but based his opinions on medical reports, the autopsy and the interview with the widow.

The Petition fails to show any legal basis to admit the report of Dr. Pietruszka who is neither a treating physician nor a QME.

III.
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be DENIED.

Date: May 21, 2019



ISABEL LALLANA
Workers' Compensation Administrative
Law Judge

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4 **CRESENCIO BENITEZ (Deceased);
BEATRIZ GAONA (Widow),**

5 *Applicant,*

6
7 **vs.**

8 **AZITEX TRADING; EMPLOYERS
COMPENSATION,**

9 *Defendants.*

Case No. **ADJ10455970**
(Los Angeles District Office)

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

11
12 Applicant Beatriz Gaona, widow of decedent Cresencio Benitez, seeks reconsideration of a
13 workers' compensation administrative law judge's (WCJ) Findings and Order of April 25, 2019, wherein
14 it was found that while employed as a machine operator during a cumulative period ending on July 24,
15 2015, decedent did not sustain industrial injury to his respiratory system, psyche, circulatory system or
16 digestive system. Applicant claims that the decedent passed away as a result of his alleged industrial
17 injury on July 29, 2015. As a result of the findings, the WCJ ordered that the alleged dependents take
18 nothing by way of her claim for death benefits.

19 Applicant contends that the WCJ erred in not finding industrial injury causing death, arguing that
20 the WCJ should have admitted and relied upon the report of Marvin Pietruszka, M.D. Applicant self-
21 procured Dr. Pietruszka's report to rebut the report of panel qualified medical evaluator internist Michael
22 Sachs, D.O. We have received an Answer, and the WCJ has filed a Report and Recommendation on
23 Petition for Reconsideration (Report).

24 For the reasons stated by the WCJ in the Report, which we hereby adopt and incorporate, we will
25 deny applicant's Petition.

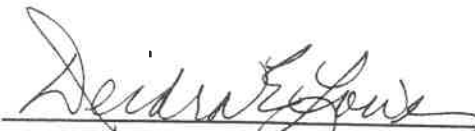
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1 For the foregoing reasons,

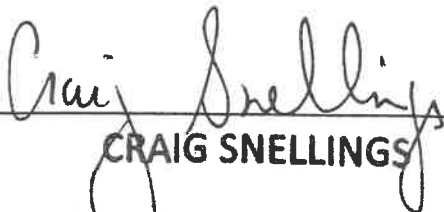
2 **IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Order of
3 April 25, 2019 is **DENIED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **DEIDRA E. LOWE**

9 **I CONCUR,**

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11
12 **CRAIG SNELLINGS**

13 **I DISSENT (See Attached Dissenting Opinion),**

14 

15
16 **MARGUERITE SWEENEY**



17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **JUL 15 2019**

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

21 **BEATRIZ GAONA**
22 **TELLERIA, TELLERIA & LEVY**
23 **GREENUP, HARTSTON, ROSENFELD & RIVERA**

24
25 **DW:oo**

1 **DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY**

2 I respectfully dissent. Although I agree with the WCJ and my colleagues that Dr. Pietruszka's
3 report was not admissible, I also believe that the factual and medical record in this case was woefully
4 undeveloped and that further development of the record is necessary in this matter consonant with our
5 constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp.*
6 *Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].)

7 Decedent passed away at only 38 years old of pneumonia, leaving behind a wife and three
8 children. Panel qualified medical evaluator Michael J. Sachs, D.O. does not list any non-industrial risk
9 factors in his reports or deposition. Decedent had complained a year and a half before his death, when
10 seeking treatment for bronchitis, of "cough that is chronic especially at work where there is a lot of dust."
11 (April 21, 2018 report at p. 4.) Just a month before his death, decedent complained of "dry cough, worse
12 during the day and while at work" with "no cough at night." (April 21, 2018 report at p. 4-5.)

13 In rejecting the notion that industrial byssinosis may have contributed to decedent's death, Dr.
14 Sachs states that decedent "would wear a mask while at work which would have filtered out lung
15 particles that would have entered the lung." However, Dr. Sachs admitted that he was unaware about the
16 specific mask that decedent used (November 8, 2018 deposition at pp. 24-25), and the record also does
17 not disclose how frequently decedent wore a mask. The employer testified at trial that while painters'
18 masks are made available, employees were not required to wear them. (Minutes of Hearing and
19 Summary of Evidence of April 4, 2019 trial at p. 4.) Dr. Sachs also admits that he lacked data regarding
20 the material that decedent was exposed to at work, stating, "there was no data to indicate the textile that
21 was used ... or the degree of Mr. Benitez's exposure...." (July 26, 2018 report at p. 6.)

22 While it is clear that decedent's death was caused by infectious or viral pneumonia, the possibility
23 that industrial factors made decedent more susceptible to pneumonia should have been more fully
24 explored. The Supreme Court affirmed in *South Coast Framing, Inc. v WCAB (Clark)* (2015) 61 Cal.4th
25 291, 289-99 [80 Cal.Comp.Cases 489], that "for the purposes of the causation requirement in workers'
26 compensation, it is sufficient if the connection between work and the injury be a contributing cause of the
27 injury." I am mindful that the "applicant for workers' compensation benefits has the burden of

1 establishing the 'reasonable probability of industrial causation.'" (*LaTourette v. Workers' Comp. Appeals*
2 *Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253]; Lab. Code, § 5705.) However, the
3 burden of proof co-exists with our constitutional mandate to ensure substantial justice in all cases. In
4 accordance with that mandate, "it is well established that the WCJ or the Board may not leave
5 undeveloped matters" within its acquired specialized knowledge. (*Kuykendall, supra*, at p. 404.) I
6 would therefore grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level
7 for further development of the factual record, including more precise information regarding the mask
8 decedent wore and the frequency that he wore it, more precise information regarding the materials that
9 decedent was exposed to, and for this information to be provided to the reporting physician. I also
10 believe that the WCJ should have considered appointing a pulmonologist or occupational disease
11 specialist as an independent medical evaluator.

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1 cases. In accordance with that mandate, "it is well established that the WCJ or the Board may not leave
2 undeveloped matters" within its acquired specialized knowledge. (*Kuykendall, supra*, at p. 404.) I
3 would therefore grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level
4 for further development of the factual record, including more precise information regarding the mask
5 decedent wore and the frequency that he wore it, more precise information regarding the materials that
6 decedent was exposed to, and for this information to be provided to the reporting physician. I also
7 believe that the WCJ should have considered appointing a pulmonologist or occupational disease
8 specialist as an independent medical evaluator.

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1 For these reasons, I respectfully dissent.



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MARGUERITE SWEENEY, COMMISSIONER

7 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
8 JUL 15 2019

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

11 BEATRIZ GAONA
12 TELLERIA, TELLERIA & LEVY
13 GREENUP, HARTSTON, ROSENFELD & RIVERA



16 DW:oo

Court of Appeal
of the
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B_____

Case Name: Beatriz Gaona (widow) v. W.C.A.B.

There are no interested entities or parties to list in this Certificate per California Rules of Court, 8.208

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
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- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.

/s/ Anthony F. Telleria

Signature of Attorney/Party Submitting Form

Anthony F. Telleria, Esq.

Printed Name

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Party Represented: Beatriz Gaona - Petitioner
State Bar No.: 35723

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF REVIEW	11
I. Questions Presented	11
II. Statement of Material Facts.....	11
ARGUMENTS AND AUTHORITIES.....	14
I. The Boards exclusion of Dr. Pietruzka’s report of November 08, 2017 violates Ms. Gaona’s right to equal protection	14
II. The Boards ruling that death claims reports must be obtained thru Labor Code 4060 and 4062.2 procedures impermissibly adds to the wording of those statutes	16
III. Applicant was denied due process by the use of a basis for exclusion of Dr. Patruszka’s report that was not disclosed at or before trial	17
CONCLUSION	18
VERIFICATION.....	20
CERTIFICATE OF COMPLIANCE.....	21
DECLARATION OF SERVICE	

TABLE OF AUTHORITIES

CASES

<i>Brennfleck v. WCAB,</i> (1970) 35 CCC 7	15
<i>Davis vs. Interim Health Care,</i> 65 CCC 1039	17
<i>Department of Rehabilitation/State of California</i> <i>v. WCAB (Lauher),</i> (2003) 68 CCC 831.....	15
<i>Hollingsworth v. Workers' Comp. Appeals Bd.,</i> (1996) 61 Cal.Comp.Cases 715	17
<i>In re Estate of Barnett,</i> (1929 Cal App) 97 Cal App 138	17
<i>Industrial Indemnity Co. v. IAC (Lopez),</i> (1966) 31 CCC 238.....	15
<i>Los Angeles Unified Sch. Dist. v. Workers Comp. Appeals Bd.</i> (1996) 61 Cal.Comp.Cases 1220	17
<i>Sanchez v. Workers' Comp Appeals Bd.,</i> (1998) 63 Cal.Comp.Cases 485	17
<i>Spreckels Sugar Co. v. IAC,</i> (1921) 186 Cal. 256	15

<i>Sycamore Pharmacy, Inc. v. Workers' Comp Appeals Bd. (Reynoso),</i> (1997) 62 Cal.Comp.Cases 1322	17
<i>Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Coker),</i> 45 Cal.Comp.Cases 535	17
<i>U.S. Auto Stores v. Workmen's Comp. Appeals Bd. (Brenner),</i> (1971) Cal.3d 469	17
<i>Van Horn v. IAC,</i> (1963) 28 CCC 187	15

STATUTES

Code of Civil Procedure § 1858	6
Labor Code § 4060	11, 13, 14, 15, 16, 17
Labor Code § 4061	14
Labor Code § 4062	14
Labor Code § 4062.1	14
Labor Code § 4062.2	11, 13, 14, 15, 16, 17
Labor Code § 467	14
Labor Code § 5950	9

OTHER AUTHORITIES

Title 8, California Code of Regulations § 1(h) 14

Title 8, California Code of Regulations § 9793(c)..... 14

Title 8, California Code of Regulations § 10606(15)..... 13

Title 8, California Code of Regulations § 10606(b)(15)..... 15, 16, 17

Title 8, California Code of Regulations § 10689(b) 14

To the Honorable Presiding Justice and Honorable Associate Justices of the Court of Appeal of the State of California, Second Appellate District: Petitioner Beatriz Gaona, petitions this Court for Writ of Review to determine the lawfulness of an Order Denying Petition for Reconsideration filed in the proceeding before the Workers' Compensation Appeals Board entitled *Beatriz Gaona, Applicant, Azitex Trading Corp; Employers Compensation Glendale; Berkshire Hathaway San Francisco, Defendants*. Case number ADJ10455970. In support of this petition, Petitioner alleges:

I.

At all-times mentioned, Azitex Trading Corporation was a corporation duly organized and existing under the laws of the state of California. Employers Compensation Insurance and Berkshire Hathaway are authorized to transact the business of workers' compensation insurance in the State of California, with their principal office and place of business in Los Angeles, California and at the time of the alleged compensable injury, insured Defendant Azitex Trading Corp, against all liability arising under the workers' compensation laws of California.

II.

On June 15, 2016, Applicant Beatriz Gaona ("Applicant") filed an Application for Adjudication of Death Claim alleging injury to

decedent Crecencio Benitez while he was working for Defendant Azitex resulting in his death on July 29, 2015. The case was entitled Beatriz Gaona vs Azitex Trading Corp and Bershire Hathaway. (Exhibit H, page 53 of Exhibit)

III.

After a hearing a Finding was made on April 25, 2019 that Cresencio Benitez did not sustain injury arising out of and in the course of employment while employed by Defendant Azitex Corporation and that the report of Marvin Patruszka was inadmissible (Exhibit E, page 33 of Exhibit)

IV.

Petitioner filed a timely and verified Petition for Reconsideration on May 14, 2019. (Exhibit D, page 23 of Exhibits)

On July 15, 2019 the Board denied reconsideration of the Findings of Fact dated 04/25/2019. (Exhibit A, page 3 of Exhibits). Said decision is now final.

V.

This petition has been filed within the statutory period of 45 days after issuance by Respondent Board of its Order Denying Reconsideration. Petitioner believes that the questions are one of law and that there is no essential dispute over the material facts.

VI.

Petitioner has no right to appeal from the Order Denying Reconsideration and has no plain, speedy or adequate remedy other than by Writ of Review. This petition is authorized by Labor Code Section 5950.

VII.

Petitioned Beatriz Gaona resides in Los Angeles County and is a party beneficially interested in this proceeding. Parties interested whose rights will be affected by this Petition are Petitioners and Respondents named. Respondents other than the Board are the only parties whose interest in the action is adverse to that of the Petitioner.

VIII.

WHEREFORE, Petitioner prays that:

1. Writ of Review issue out of this Court to the Workers' Compensation Appeals Board of the State of California, commanding it to certify fully to this court at a specific time and place, the record and proceedings in this case so that it may inquire into the lawfulness of the Order Denying Reconsideration.
2. The records and proceedings in this case be fully heard and considered by this Court and that the Order Denying Reconsideration be annulled, vacated, and set aside, and

3. The Court order and direct the Workers' Compensation Appeals Board to make such findings and Award or Order as my be consistent with the allegations and contentions set forth in this petition or the dissenting opinion of commissioner Margaret Sweeny of July 15, 2019. (Exhibit A, page 3 of Exhibits.)

4. Other relief be granted that the Court consider proper.

Dated this 22nd of August 2019 at San Gabriel, California.

TELLERIA, TELLERIA & LEVY, LLP

/s/ Anthony F. Telleria

By: ANTHONY F. TELLERIA

State Bar No. 35723

Attorney for Petitioner,

Beatriz Gaona

**POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR WRIT OF REVIEW**

I. Questions Presented

1. Whether the WCAB ruling and decision was in excess of its powers as it deprives Applicant of the right to equal protection of the law as guaranteed by the United States and California constitutions.

2. Whether the Board's interpretation that Labor Code 4060 and 4062.2 apply to medical opinions and reports in death claims is unreasonable as it adds words to the statutes.

3. Whether the Board acted in excess of its powers in excluding Dr. Pietruzka's report on a basis not raised at the Mandatory Settlement Conference or at trial.

II. Statement of Material Facts

Decedent Cresencio Benitez worked for defendant Azitex Trading Corp from January 14, 2002 to July 24, 2015 and it was claimed that he sustained injury as a result of that work. Decedent died on 07/29/2015. (Exhibit F, page 2, line 1-14, Page 37 of Exhibits.)

Applicant Beatriz Gaona was married to decedent at the time of his death. (Exhibit F, page 2, line 14. Page 37 of Exhibits.)

Applicant filed a claim alleging that the work for Azitex contributed to Cresencio Benites's death. Exhibit H. Page 53 of Exhibits.

Dr. Marvin Pietruszka reviewed records, interviewed Beatriz Gaona and rendered a report dated 11/07/17 entitled Pathology/Death Evaluation on page 1, outlining his opinion as to whether the work for defendant Azitex contributed to the cause of death of Cresencio Benitez. (Exhibit 1, page 68 of Exhibits.)

At the Mandatory Settlement Conference of February 25, 2019 defendant objected to Dr. Pietruszka's report being admissible on the ground that Dr. Pietruszka was neither a PTP nor a QME. (Pretrial conference statement page 3, Exhibit G, page 46 of Exhibits.)

At the trial of April 4, 2019, defendant again reiterated its objection to admissibility of Dr. Pietruszka's report on the basis that he was neither a treating physician nor a QME. (Exhibit F, page 37 of Exhibits, page 2, lines 22-23.)

After trial the Workers Compensation Judge, Isabel Lallana made a finding that Cresencio Benites did not sustain injury while working for Azitex and that Dr. Pietruszka's report was not admissible. (Exhibit E, page 33 of Exhibits.)

The opinion in Exhibit E does not explain the basis of the finding of no injury. The opinion states that there was no evidence to support industrial causation of his death. The reason given for the exclusion of Dr. Pietruszka's report was that it was not obtained pursuant to Labor Code 4062.2.

Applicant petitioned for Reconsideration on the basis that the Board acted in excess of its powers in ruling that 4062.2 applied to reports in death claims. (Exhibit D, page 23 of Exhibits.)

In her Report and Recommendation of March 21, 2019 Workers Compensation' Judge Lallana indicated that Labor Code 4060 and 4062.2 applied to reports in death claims although she cited no authority or reasons for the holding other than to quote the statute.

She indicated that any reports of non-examining physicians under 8 CCR 10606 must also comply with Labor Code 4062.2 and 4060 without providing the basis for that conclusion.

The Board denied the Petition for Reconsideration. Exhibit A, page 3 of Exhibit for the same reasons set out by Workers Compensation Judge Lallana.

ARGUMENTS AND AUTHORITIES

I. The Boards exclusion of Dr. Pietruzka's report of November 08, 2017 violates Ms. Gaona's right to equal protection.

A decedent cannot be examined unless the corpse is exhumed.

No exhumtion occurred here.

A physician cannot recommend or provide treatment to someone who has passed away.

Reports of examination or treatment while decedent was alive are not relevant. The cause of someone's death cannot be determined while they are alive.

Thus there cannot be either an examining or a treating physician in a death claim.

8 CCR 1(h) states that Comprehensive Medical Legal Evaluations means a medical evaluation performed pursuant to Labor Code 4060, 4061, 4062, 4062.1, 4062.2 and 4067 and meeting the requirements of section 9793 (c) of Title 8 of the California Code of Regulations.

These sections require an examination of a live human being.

A doctor chosen under Labor Code 4060 and 4062.2 is an examining doctor.

8 CCR 10686 (b) 15 refers to reports of non-examining physician being admissible in death claims. Thus that section could

not refer to physicians, chosen under Labor Code 4060 and 4062.2.

Those physicians are chosen to conduct examinations.

In an inter vivos case an applicant has an opportunity to obtain his or her own medical opinion on compensability thru a treating doctor report since medical opinions often differ on the cause of a medical condition.

Under the boards interpretation of Labor Code 4060, 4062.2 and 8 CCR 10606 (b) (15) a death claim applicant has no such opportunity.

The purpose of a Workers' Compensation Claim is to replace lost income of the worker due to his or her injury or death.

Department of Rehabilitation/State of California v. WCAB (Lauher) (2003) 68 CCC 831.

The purpose of death benefits is to provide the dependents of an employee killed through some hazard of employment compensation for the loss of the support they were receiving from the employee at the time of death. *Spreckels Sugar Co. v. IAC* (1921) 186 Cal. 256, 258; *Industrial Indemnity Co. v. IAC* (Lopez) (1966) 31 CCC 238, 243; *Van Horn v. IAC* (1963) 28 CCC 187, 192; *Brennfleck v. WCAB* (1970) 35 CCC 7, 10.

There is no rational basis for the disparate treatment of persons whose rights are identical.

II. The Boards ruling that death claims reports must be obtained thru Labor Code 4060 and 4062.2 procedures impermissibly adds to the wording of those statutes.

Neither Labor Code 4060 nor Labor Code 4062.2 state that they apply to determinations of industrial contribution to an employee's death.

They are in a section of the Labor Code that provides rules for examinations and reports by other than treating physicians.

8 CCR 10606 (b) 15 does not state that those non-examining physicians in death claims whose reports are admissible must have been chosen under Labor Code 4060 or 4062.2. That section is under subchapter 2, article 9 of the Regulation Rules under Evidence and Reports and has no connection to "examinations" as set out in the section of the Labor Code where Labor Code 4060 and 4062.2 reside.

The Board interpretation of all these statutes injects words into them that the Legislature did not see fit to include.

CCP Section 1858 specifically prohibits inserting words into a statute that the Legislature did not.

The court may not, under the guise of interpretation, read into a statute matters which have been omitted by the legislature particularly where it appears that the omission might have been

intentional. *In re Estate of Barnett* (1929, Cal App) 97 Cal App 138, 275 P 453. 1929 Cal App LEXIS 663.

III. Applicant was denied due process by the use of a basis for exclusion of Dr. Patruszka's report that was not disclosed at or before trial.

The failure to raise an issue at the proper opportunity is fairly construed to be a waiver of the issue. (*U.S. Auto Stores v. Workmen's Comp. Appeals Bd. (Brenner)* (1971) Cal.3d 469 [36Cal.Comp.Cases 173]; *Los Angeles Unified Sch. Dist. v. Workers Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ den.); *Sanchez v. Workers' Comp Appeals Bd.* (1998) 63 Cal.Comp.Cases 485 (writ den.); *Sycamore Pharmacy, Inc. v. Workers' Comp Appeals Bd. (Reynoso)* (1997) 62 Cal.Comp.Cases 1322 (writ den.); *Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (Coker)* 45 Cal.Comp.Cases 535 (writ den.).)

While it is true that in *Davis vs. Interim Health Care* 65 CCC 1039 (en banc) the Board authorized a Workers' Compensation Judge to add issues not raised at trial this could not be done if doing so prejudiced or deprived a party of due process.

If despite the clear plain language of 8 CCCR 10606 (b) 15 that in death claims reports of non-examining physicians are admissible, applicant had been advised that defendant would ask and the Court would overrule the mandate of that section, applicant could have taken steps to prepare to litigate that issue at the trial instead of afterward.

CONCLUSION

Dr. Pietruszka's report was improperly excluded and not considered on the merit of the claim.

Applicant was also not given the opportunity to properly prepare to litigate the issue of exclusion based on Labor Code 4060 and 4062.2 because it was not disclosed before trial.

WHEREFORE, Petitioner prays that:

1. A writ of Review issue inquiring into the lawfulness of the Order Denying Reconsideration, and
2. The Order Denying Reconsideration be annulled, vacated or set aside.

3. The matter be remanded to the Board for proceedings in conformance with the Courts opinion or the well-reasoned dissent opinion of Commissioner Margaret Sweeney of July 15, 2019 in Exhibit A.

Dated: August 22, 2019 Respectfully Submitted,

TELLERIA, TELLERIA & LEVY, LLP

/s/ Anthony F. Telleria

By: ANTHONY F. TELLERIA

State Bar No. 35723

Attorney for Petitioner,

Beatriz Gaona

VERIFICATION

I, the undersigned, certify and declare that I have read the foregoing **PETITION FOR WRIT OF REVIEW** and know its contents. I am an attorney for a party to this action. The matters stated in the document described above are true of my own knowledge and belief except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

Executed on August 22, 2019 at San Gabriel, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Anthony F. Telleria
ANTHONY F. TELLERIA, ESQ.

CERTIFICATE OF COMPLIANCE

Counsel or Record here certifies that pursuant to Rule 8.204 (c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Petition for Writ of Review is produced using 13-point or greater Roman Type, including footnotes, and contains 2,104 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 22, 2019 Respectfully Submitted,

TELLERIA, TELLERIA & LEVY, LLP

/s/ Anthony F. Telleria

By: ANTHONY F. TELLERIA

State Bar No. 35723

Attorney for Petitioner,

Beatriz Gaona

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION

CRESENCIO BENITEZ (Deceased)
BEATRIZ GAONA (Widow),

Petitioner,

v.

THE WORKERS' COMPENSATION
APPEALS BOARD OF THE STATE
OF CALIFORNIA; Respondent,
AZITEX TRADING, EMPLOYERS
COMPENSATION, Real
Parties in Interest,

Respondents.

CASE NO. ADJ10455970

**AZITEX TRADING;
EMPLOYERS
COMPENSATION
RESPONSE TO PETITION
FOR WRIT OF REVIEW;
MEMORANDUM OF
POINTS AND
AUTHORITIES**

From the Opinion and Decision of the WCAB Case No.: ADJ10455970

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TABLE OF CONTENTS

Certificate of Interested Entities 2

Table of Authorities 4

Statement of Material Facts 5

Arguments and Authorities 7

A. Petitioner’s Equal Protection Argument Was Not
Raised Below And Therefore Is Waived 8

B. The WCAB Did Not Err By Finding a Medical Report
Obtained Outside of Labor Code Sections 4060 and 4062.2
Is Inadmissible..... 9

C. Petitioner Was Not Denied Due Process 14

Conclusion 15

Verification 17

Certificate of Word Count..... 18

Proof of Service by Mail..... 19

TABLE OF AUTHORITIES

CASES:

Batten v. WCAB (2015)
80 Cal.Comp. Cases 1256 13

Green v WCAB (2005)
127 Cal.App.4th 1426..... 8

Ralphs Grocery Co. v. WCAB (1995)
38 Cal.App.4th 820..... 9

Ward v. City of Desert Hot Springs (2006)
71 Cal.Comp.Cases 1313 10

STATUTES:

Labor Code § 4060 5,8,9,10,11, 13

Labor Code § 4062.2..... 5,8,9,10,11, 13, 15

Labor Code § 4605..... 13, 14

Labor Code § 5904..... 8

Labor Code § 5952..... 7

Labor Code § 5953..... 7

OTHER AUTHORITIES

Title 8, California Code of Regulations § 10606..... 12

TO THE HONORABLE PRESIDING AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

Respondent, Azitex Trading and its insurance carrier, Employers Compensation, by and through their attorney of record, respectfully answer Petitioner Beatriz Gaona (widow) Petition for Writ of Review.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF MATERIAL FACTS.

Petitioner Beatriz Gaona (widow) seeks to overturn the April 25, 2019 final findings and order of the Workers' Compensation Administrative Law Judge, and the Opinion and Order Denying Petition for Reconsideration by the Workers' Compensation Appeals Board (WCAB) on July 15, 2019. Among the issues raised relate to the application of Labor Code sections 4060 and 4062.2 (the QME process) to Workers Compensation death cases. The WCAB thoroughly reviewed this matter, affirmed and committed no error. There is no basis to grant extraordinary relief.

The dispute arises out of a death claim filed by Petitioner, Beatriz Gaona, the widow of Cresencio Benitez (deceased) who was employed by Azitex Trading as a machine operator from January 14, 2002 through July 24, 2015. Mr. Alvarez passed away on July 27, 2017 and the death claim was filed. The claim was subsequently denied based on the death certificate and autopsy report. Parties then proceeded with the QME process under Labor Code 4060 and 4062.2 and secured a medical-legal report from Dr. Michael Sachs to address the issues of

compensability on the disputed death claim. Dr. Sachs found the death to be unrelated to the deceased's occupation as a machine operator. Applicant's Attorney secured a medical report outside the QME process from a Dr. Marvin Pietruszka. The report was provided to the QME, Dr. Sachs, who did not change his findings. Parties went to trial on April 4, 2019. In the Findings and Order, the workers compensation administrative law judge found:

1. Mr. Cresencio Alvarez did not sustain injury arising out of in the course of employment to his respiratory system, psyche, circulatory system, digestive system.
2. The report of Dr. Marvin Pietruszka was not admissible.

Petitioner filed a Petition for Reconsideration on May 14, 2019 arguing Dr. Pietruszka's report was admissible and the QME process does not apply to death claims. The WCJ responded with a Report & Recommendation on Petition for Reconsideration filed on May 21, 2019 and again found:

1. There was no legal basis to find Dr. Pietruszka's report to be admissible.

In its Opinion and Decision After Reconsideration, on July 12, 2019, the WCAB affirmed the WCJ decision, finding, after thorough review, and incorporating the findings of the WCJ's report and findings, that the petition failed to show any legal basis to admit the report of Dr. Pietruszka who is neither a treating physician nor a QME.

ARGUMENT AND AUTHORITIES

Labor Code section 5952 provides that writ review in a workers compensation case shall not be extended further than to determine whether the Worker's Compensation Appeals Board (WCAB) acted without or in excess of its powers; or the order, decision, or award was procured by fraud, was unreasonable, or was not supported by substantial evidence; and, if findings of fact are made, such findings of fact support the order, decision, or award under review. Labor Code section 5952 further provides: "[n]othing in this section shall permit the court to hold a trial de novo, or take evidence, or to exercise independent judgment on the evidence." Labor Code section 5953 additionally confirms that the findings and conclusions of the WCAB on questions of fact are conclusive and final and are not to subject to review.

There is nothing to suggest that the WCAB acted in excess of its powers, that its decision was procured by fraud, was unreasonable, or was not supported by substantial evidence, or that the findings of fact in the record do not support its decision. There simply is no basis for extraordinary relief in this case.

Importantly, Petitioner never raised an equal protection argument below, either at or before trial or as part of the petition for reconsideration. This argument should be deemed waived and not considered for the first time in this writ proceeding. Additionally, Petitioner's statutory interpretation seeking to create a new system for the determination of medical issues in workers compensation death cases separate from the exclusive statutory methodology set forth in the Labor Code is

fundamentally flawed and is not an appropriate basis for writ review. The trial court and the WCAB appropriately followed the Labor Code and determined the report of Dr. Pietruszka was inadmissible. Finally, no due process concerns are raised in this case. Objections to the admissibility of the medical report were timely made. For all these reasons stated, this Writ should be dismissed.

A. PETITIONER'S EQUAL PROTECTION ARGUMENT WAS NOT RAISED BELOW AND THEREFORE IS WAIVED.

Legal arguments omitted from the petition for reconsideration before the WCAB and raised for the first time on review are waived under Labor Code section 5904. *See* Labor Code § 5904 (“The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.”); *see also Green v. WCAB* (2005) 127 Cal.App.4th 1426, 1446.

In the petition for reconsideration, Petitioner offered only novel statutory construction arguments. Specifically, Petitioner argued that Labor Code sections 4060 and 4062.2 setting forth that the exclusive means to resolve disputes requiring a comprehensive medical evaluation shall be the qualified medical evaluator (QME) process when employee is represented by an attorney, are not applicable in death cases. Petitioner, however, never raised an equal protection argument below.

Having failed to raise with the WCAB the legal theory now raised here, that exclusion of Dr. Pietruszka's report violates Petitioner's right to equal protection, the argument is waived. This legal argument was raised for the first time in Petitioner's writ petition to this Court. By failing to raise this issue with the WCAB, the argument has been waived.

Nevertheless, Petitioner's equal protection claim necessarily fails because the Labor Code sections at issue do not distinguish between workers compensation claims where the applicant is alive compared to death claims. The same rules and procedures apply in both case types. The QME process set forth in Labor Code section 4060 and 4062.2 applies equally in both case types.

B. THE WCAB DID NOT ERR BY FINDING A MEDICAL REPORT OBTAINED OUTSIDE OF LABOR CODE SECTIONS 4060 AND 4062.2 IS INADMISSIBLE.

Determination of medical issues in workers compensation cases where it is disputed that the injury arose out of and in the course of employment is set forth in a detailed statutory scheme. Petitioner's interpretations of the applicable Labor Code sections seek to circumvent the QME process and are not reasonable, and Petitioner cites no cases in support of the novel interpretations. The statutes must be interpreted consistent with their plain language and consistent with the WCAB's interpretation where it is not clearly erroneous. *See Ralphs Grocery Co. v. WCAB* (1995) 38 Cal.App.4th 820, 828 (WCAB's construction is entitled to great weight unless clearly erroneous). The WCAB did not err by

finding that the medical report of Dr. Pietruszka obtained outside of the QME process was inadmissible.

Labor Code Section 4060(a), related to comprehensive medical-legal evaluation, states that “[t]his section shall apply to disputes over the compensability of any injury.” Labor Code Section 4060(c) states that “a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2.”

Labor Code section 4062.2 is equally unambiguous and sets forth the exclusive process of selecting a qualified medical evaluator (QME) to serve as the medical evaluator in represented workers compensation cases where compensability is at issue. The QME process is intended to be the exclusive method for obtaining medical evaluations on compensability where the applicant is represented by an attorney, as is the case here. Labor Code section 4062.2(a) provides, “[w]henver 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.*” Labor Code § 4062.2(a) (emphasis added); *see also Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313, 1316 (“Legislature intended that this procedure be the exclusive method for obtaining medical evaluations on compensability.”)

Petitioner’s argument that sections 4060 and 4062.2 do not apply in death cases both flies in the face of the plain and ordinary meaning of the statutory language, and is contrary to

the interpretation of the WCAB. It is not surprising that Petitioner does not cite any authority for the novel and unfounded argument that the QME process should be deemed inapplicable in death cases. Although it is not entirely clear, Petitioner's argument appears to be based on four flawed interpretations that each contradict the plain language of the controlling statutes.

First, Petitioner argues that the statutory language does not specifically call out the applicability of the QME procedure to death claims, arguing that interpreting the statute to apply to death claims requires adding words to the statute. Of course, no such language specifically referencing death claims is necessary. The compensability of death claims based on alleged industrial injury necessarily includes alleged compensable workplace injuries, and therefore falls within the unambiguous statutory language "any injury" and "any dispute arising out of an injury or a claimed injury" in sections 4060 and 4062.2. There are no missing words in the statute.

Second, Petitioner appears to argue that the Legislature intended the language "comprehensive medical-legal evaluation," "comprehensive medical evaluation," "medical evaluation," and "medical evaluator" in these Labor Code sections to mean "*examination*" instead of "*evaluation*." Petitioner reasons that if these sections were read to require an actual physical examination of the applicant, then the QME process could not apply to deceased applicants. Again, Petitioner cites no support for this theory, which contradicts the plain language of the

statutes. In fact, the QME process is regularly used for comprehensive review and evaluation of medical records in death cases, and was used in this case without objection. The record reflects that the parties followed the QME selection process and obtained Panel QME Michael Sachs who performed medical-legal evaluation based on medical record review, autopsy reports and interview with the wife of the deceased. The QME found the death as non-industrial. The QME was deposed, and Petitioner did not object to the admissibility of the QME report. Petitioner obtained an independent medical evaluation by Dr. Pietruszka (which also was an “evaluation,” not an “examination”) and this report too was considered by the QME who did not change the conclusions in his report. Petitioner’s argument that the QME process requires an actual physical examination of the applicant is incorrect, contradicts the unambiguous language of the statutes, and was waived by failing to timely object to admissibility of the QME report in this case.

Third, Petitioner incorrectly relies on 8 C.C.R. 10606, which explains the preference for the production of medical evidence in the form of written reports, explains what medical reports should include, and notes that reports of non-examining physicians in death cases may be admitted into evidence in lieu of oral testimony. 8 C.C.R. §10606. This regulation does not concern the QME process, and merely explains the preference for written medical reports in lieu of oral testimony. Contrary to Petitioner’s assertion, this regulation does not create an entirely separate system for resolving disputes over injuries in death

cases compared to non-death cases, allowing the admissibility of physician reports outside the QME process. Rather, the regulation must be harmonized with the Labor Code including the exclusive procedures under Labor Code sections 4060 and 4062.2. These sections unambiguously require the QME process to be followed where a comprehensive medical evaluation is required to resolve disputes arising out of a claimed injury and the employee is represented by an attorney. Indeed, in this case as is typical the QME report (which was a report of a non-examining physician) was admitted into evidence in lieu of oral testimony without objection. A regulation that notes the preference for written reports in lieu of oral testimony does not and cannot create the admissibility of medical reports not otherwise admissible under the Labor Code.

Fourth, although not raised in the writ petition, Petitioner argued below that Labor Code 4605 (incorrectly cited as 4065) “allows a party to obtain a report at their own expense.” As explained by the WCAB, however, section 4605 too is not an exception to the QME process, and while an applicant may obtain a report in an appropriate case by a consulting or attending physician, the statute provides that any such report “shall not be the sole basis of an award of compensation” and must be provided to the QME for consideration. Further, according to *Batten v. WCAB* (2015) 80 Cal.Comp. Cases 1256, section 4605 refers to a doctor consulted for medical treatment and not for medical-legal purposes. Labor Code section 4605 thus does not provide a basis for Petitioner’s arguments, and arguments based on this section

have been waived by not being argued in the writ petition. It is worth noting that, nevertheless, in this case, the QME considered Dr. Pietruszka's report and did not change his findings. Even if the report had been considered as a report by a consulting physician, section 4605 mandates that it could not be the sole basis of an award and there was no other evidence to support compensability in this case.

Petitioner cites no authority for the novel and incorrect statutory interpretation that the QME process does not apply in death cases, and each of Petitioner's arguments are fundamentally flawed. Consistent with the WCAB's interpretation and the plain language of the Labor Code, the QME process is the exclusive method of resolving disputes regarding compensability of injuries where the employee is represented by an attorney. The WCAB did not err by finding a medical report obtained outside the QME process by a non-treating physician is inadmissible.

C. PETITIONER WAS NOT DENIED DUE PROCESS

In the writ petition, Petitioner acknowledges that objections were timely made to admissibility of the medical report of Dr. Pietruszka both at the Mandatory Settlement Conference on February 25, 2019 and at the time of trial on April 4, 2019. The objections were made on the basis that Dr. Pietruszka was not a treating physician or a QME in the matter.

In the Findings and Order, the Workers Compensation Judge determined that the report of Dr. Pietruszka is inadmissible, and

specifically set forth her reasoning in her Opinion on Decision, explaining, “[d]isputed issues in represented cases shall be resolved by the procedure set forth in Labor Code section 4062.2, which states that the “evaluation shall be obtained only as provided in this section.” The judge went on to explain, “Dr. Pietruszka’s evaluation was not obtained under section 4062.2’s medical-legal evaluation process. As a result, his report, Exhibit 1, is an inadmissible medical report.”

The Opinion and Order Denying Petition for Reconsideration also was clear. All three Commissioners agreed with the Workers Compensation Judge that Dr. Pietruszka’s report was not admissible because Dr. Pietruszka was not a QME or a treating physician.

There is no basis to find due process concerns implicated here. Objections to the admissibility of the report were timely made below both at trial and as part of the denial of reconsideration. Further, due process concerns were not raised as part of the reconsideration petition and thus have been waived.

II. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Writ be denied.

WHEREFORE, Respondent Azitex Trading and Employers Compensation, respectfully request that the Petition for Writ of Review be dismissed.

DATED: September 16, 2019 Respectfully Submitted,

**GREEHUP, HARTSTON &
ROSENFELD**

By: /s Gina T. Hartston
GINA T. HARTSTON
Attorney for Respondent

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VERIFICATION

I, the undersigned declare:

I am the attorney for Respondent Azitex Trading and Employers Compensation. I verify this document for Respondent. The foregoing petition is true of my own knowledge, except as to the matters stated on my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed on September 16, 2019, at Long Beach, California.

Respectfully Submitted,

**GREEHUP, HARTSTON &
ROSENFELD**

By: /s/ Gina T. Hartston

GINA T. HARTSTON

Attorney for Respondent

CERTIFICATION OF WORD COUNT

I hereby certify that the text of this Response is proportionally spaced, fully justified, that the type used herein is 13 point Century School Book, and that the text of this Response and its Memorandum of Points and Authorities combined, from Introduction through the Response and to the end of the Conclusion consists of 2739 words as counted by the Microsoft Word program used to generate this document.

Dated: September 16, 2019

Respectfully Submitted,

GREEHUP, HARTSTON &
ROSENFELD

By: /s/ Gina T. Hartston

GINA T. HARTSTON
Attorney for Respondent

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Blvd., Ste 900, Los Angeles, CA 90017. On September 16, 2019 I served **AZITEX TRADING EMPLOYERS COMPENSATION RESPONSE TO PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Service List attached

(BY MAIL)I am readily familiar with the firm’s practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 16, 2019, at Los Angeles, California.

Fernando Mercado
PRINT NAME

/s/ Fernando Mercado
SIGNATURE

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT ~~COURT~~COURT

DIVISION TWO

CRESENCIO BENITEZ et. al.,

Petitioners,

v.

WORKERS' COMPENSATION
APPEALS BOARD and AZITEX
TRADING,

Respondents.

No. B300130

(W.C.A.B. No. ADJ10455970)

ORDER

THE COURT:

The petition for a writ of review filed herein has been read and considered.

The petition is denied.


ASHMANN-GERST, Acting P. J.,


CHAVEZ, J.,


HOFFSTADT, J.