BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TAMMIE A. LAPLANT	)	**DOCKET NO. 19 24791**
	)	
	)	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING THE APPEAL FOR FURTHER PROCEEDINGS**
CLAIM NO. SL-21075	)	

The claimant, Tammie A. LaPlant, worked at the Hanford site between 1982 and 1985, performing clerical work. She filed a claim for an occupational disease under RCW 51.32.187 alleging that she had developed Wegener's Granulomatosis, asthma, chronic obstructive pulmonary disorder (COPD), and/or chronic bronchitis due to her time spent working at Hanford. The Department allowed the claim and the employer, Department of Energy, appealed. After hearing the Department of Energy's evidence, the claimant moved to dismiss for failure to make a prima facie case. The industrial appeals judge agreed with the claimant and dismissed the appeal. The employer filed a Petition for Review which we have granted. We find that, when viewing the evidence in the light most favorable to the non-moving party, the employer has made a prima facie case that Ms. LaPlant's conditions are either not covered by RCW 51.32.187 or did not arise naturally and proximately out of the distinctive conditions of her employment at Hanford. The Proposed Decision and Order of February 16, 2021, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

RCW 51.32.187, also known as the Hanford presumption, provides that certain enumerated diseases and conditions will be considered occupationally related unless rebutted by "clear and convincing evidence." Ms. LaPlant's claim was allowed under the so-called Hanford presumption.

In support of its appeal of claim allowance, the Department of Energy presented the testimony of Steven Simons, M.D., a board-certified internal medicine and pulmonary disease specialist, and Lawrence K. Yearsley, an industrial hygienist employed by the Department of Energy.

After the employer's presentation of evidence, the claimant moved to have the appeal dismissed for failure to present a prima facie case under CR 41(b)(3). A prima facie case means that a party must present substantial evidence which, if unrebutted or uncontradicted, would convince an unprejudiced, thinking mind of the truth of the issues on appeal.[1] Another definition for prima facie case is one that "will prevail until contradicted and overcome by other evidence."[2] A mere scintilla of

[1] *In re William Morgan*, Dckt. No. 91 3417 (January 14, 1993).
[2] *Black's Law Dictionary*, 1189 (6th ed. 1990)

evidence is insufficient to meet this burden.[3] In addition, when ruling on a motion brought pursuant to CR 41(b)(3), the court should accept the non-moving party's evidence as true and consider it in the light most favorable to the non-moving party.[4]

This intersection of "clear and convincing evidence," "substantial evidence," and "reviewing evidence in the light most favorable" creates an issue of first impression for us: what evidence is required from an employer in order to make a prima facie case such that dismissal is inappropriate under CR 41(b)(3) when the employer has appealed the allowance of an occupational disease claim under RCW 51.32.187.

Based on his review of records, Dr. Simons testified that Wegener's Granulomatosis, also known as granulomatosis with polyangiitis, (GPA) is not a respiratory disease because the primary cause is not respiratory. GPA is an autoimmune condition that can cause inflammation in different organs, including those involved in the respiratory system. Dr. Simons also explained that Ms. LaPlant had a genetic predisposition to the development of GPA due to an HLA gene that can be triggered by certain viral infections, including staph infections. Dr. Simons noted that Ms. LaPlant's medical records showed that she had a staph infection in her sinuses and airways at some point in her medical history.

In addition, Dr. Simons thought Ms. LaPlant did not have COPD and believed instead she suffered from chronic recurrent bronchial infections due to sinus disease. Dr. Simons does not consider sinus disease to be a primary respiratory disease. Ultimately, Dr. Simons testified that it was his opinion that Ms. LaPlant did not have any primary respiratory diseases. Further, he believed it was highly unlikely that her sinus disease, chronic bronchitis, and/or GPA would be due to the distinctive conditions of her employment at Hanford.

Mr. Yearsley testified that Ms. LaPlant worked in the 2750 East building, approximately one mile west, or upwind, of the Purex Building. The Purex Building is where fuel rods from the plutonium reactors were extracted using a chemical process. Given the location of her building, Mr. Yearsley felt it was highly unlikely that any effluence (such as nitrous oxides or radiological isotopes) being emitted out of the Purex stacks would travel to Ms. LaPlant's building. Based upon weather modeling during the time Ms. LaPlant worked at Hanford, Mr. Yearsley testified there was a one in a million

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[3] *In re Peter Kim*, BIIA Dec. 00 21147 at 2 (2002) citing *Omeitt v. Dep't of Labor & Indus.*, 21 Wn.2d 684 (1944).
[4] *See for example, In re Donald W. Wright*, Dckt. Nos. 14 16368, 14 16568, & 15 10063 (November 23, 2015) citing *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914 (1982), *after remand*, 39 Wn. App. 751 (1985).

risk of breathing something in from the Purex plant that would result in a negative health exposure. Mr. Yearsley testified that monitoring performed at Hanford between 1982 and 1985 did not detect any radioactive material being discharged from the Purex plant. Accordingly, Mr. Yearsley felt it was extremely unlikely that Ms. LaPlant had been exposed to radioactive or toxic elements during her time at Hanford.

Accepting the opinions of Dr. Simons and Mr. Yearsley as true, we find that the Department of Energy has made a prima facie case that Ms. LaPlant's contended conditions were either not respiratory in nature or were highly unlikely to have been caused by her work at the Hanford site between 1982 and 1985. Accordingly, Ms. LaPlant must present her evidence in support of claim allowance under RCW 51.32.187.

Finally, we want to address the claimant's argument that the employer needed to present clear and convincing evidence in order to establish a prima facie case. They rely on *Spivey v. City of Bellevue*,[5] as controlling when deciding if the Department of Energy has met its burden. *Spivey* involved two appeals brought under a similar statute, RCW 51.32.185, which provided for a legal presumption that occupational disease claims brought by firefighters for melanoma should be allowed unless the employer could show, based on a preponderance of the evidence, that the condition was not occupationally related. Notably, in *Spivey*, both of the underlying cases being appealed involved situations where the claim had been fully litigated; that is, both the employer and the worker had put on evidence in support of their respective positions. The *Spivey* Court was asked to determine what effect the statutory presumption had when evaluating the totality of the evidence, not what evidence was necessary for the employer to make a prima facie case in light of the statutory presumption. Because this appeal has not yet been fully litigated, we do not find *Spivey* applicable. However, once the claimant and/or Department has presented evidence in support of claim allowance, the industrial appeals judge will be able to consider which party bears the burden of proof as well as the burden of persuasion in light of the purpose of RCW 51.32.187 and the Court's direction in *Spivey*.

ORDER

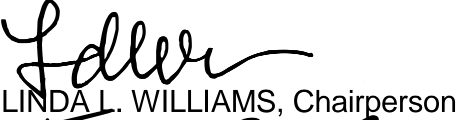
This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new

[5] 187 Wn.2d 716 (2017).

Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: August 13, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Addendum to Order
In re Tammie A. LaPlant
Docket No. 19 24791
Claim No. SL-21075

Appearances

Claimant, Tammie A. LaPlant, by Smart Law Offices, per Christopher L. Childers

Self-Insured Employer, US Department of Energy, by Wallace Klor Mann Capener & Bishop, P.C., per Lawrence E. Mann

Department of Labor and Industries, by Office of the Attorney General, per Bryan M. S. Ovens

Department Order Under Appeal

In Docket No. 19 24791, the employer, US Department of Energy, filed an appeal with the Board of Industrial Insurance Appeals on October 3, 2019, from an order of the Department of Labor and Industries dated August 12, 2019. In this order, the Department affirmed a prior order allowing the claim as an occupational disease under RCW 51.32.187.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of the Proposed Decision and Order issued on February 16, 2021. The claimant filed a response to the Petition for Review.