

# AB 203: How Global Climate Change and Valley Fever Impact Workers' Compensation

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According to a recent University of California Irvine study, scientists predict that with increasing temperatures and shifting precipitation patterns associated with climate change, the incidence of human coccidioidomycosis (valley fever) will double in the areas where the disease is present and will impact previously untouched communities throughout the West.<sup>1</sup> In addition to these environmental factors, the California Department of Public Health (CDPH) identifies population growth in areas where the fungus is common, along with construction and dust-generating activities, as contributing to the rise of valley fever in California.<sup>2</sup> The CDPH reports that Californians experienced record numbers of reported, suspected, probable, and confirmed annual cases of valley fever, with 6,084 cases in 2016, 8,181 cases in 2017, and 8,298 cases in 2018.<sup>3</sup>

In November 2015 the Centers for Disease Control and Prevention published a study of workers who contracted valley fever while building solar power farms in California during the years 2011 through 2014.<sup>4</sup> The researchers found that

reported cases of coccidioidomycosis and hospitalizations in California increased dramatically, peaking in 2011, particularly in the *Coccidioides*-endemic counties of the southern San Joaquin Valley.<sup>5</sup>

As noted above, that incidence rate has continued to accelerate. The researchers concluded that

unless awareness is emphasized and effective prevention measures are implemented, additional construction in *Coccidioides*-endemic areas, including solar power facility construction, will probably expose workers to *Coccidioides*, thus

leading to additional infections. Awareness and prevention of coccidioidomycosis among all personnel at these and other similar construction sites should be included among the priorities for employee safety.<sup>6</sup>

This conclusion was in keeping with the CDPH's recommendations for preventing and reporting valley fever among workers.

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The conclusions and recommendations just described are served by California's recently passed Assembly Bill 203. In this article we examine how the legislation, and the responsibilities it places on the construction industry in California, will affect workers' compensation claims, particularly serious and willful claims, and planning, as exposure to the fungus increases with population growth and infrastructure development. Included in this discussion is a background review of the relevant standards for civil and workers' compensation cases.

## PASSAGE OF AB 203

On October 10, 2019, Governor Newsom signed into law AB 203, which requires employers with employees working at construction sites where valley fever is highly endemic to annually provide awareness and prevention training to their employees by May 1 of each year, starting in 2020, and before beginning work that is reasonably anticipated to cause exposure to substantial dust disturbance. The bill, which adds Labor Code section 6709 to the California Labor Code, broadly applies

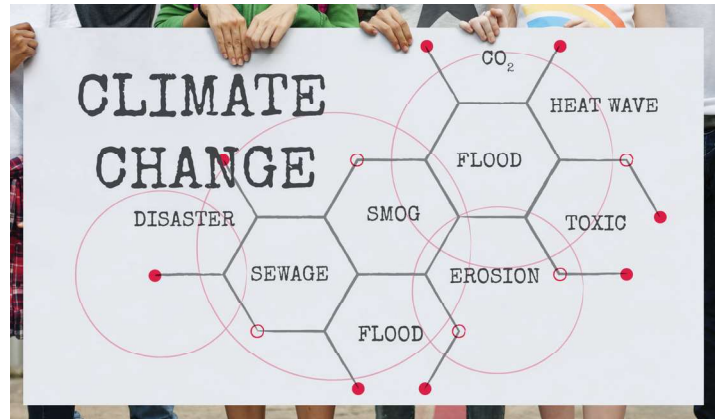
to an employer whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts.

The required training includes exposure prevention, such as water-based dust suppression, wet-cleaning dusty equipment when feasible, and wearing a respirator when exposure to dust cannot be avoided. *Id.* The bill defines *endemic* to include areas where the annual incidence rate of valley fever is greater than 20 cases per 100,000 persons per year. *Id.* An employer subject to Labor Code section 6709 must include at least the following topics in their training and prevention program:

- What valley fever is and how it is contracted
- How to identify high risk areas and the types of work and environmental conditions in which the risk of contracting valley fever is highest
- How to identify personal risk factors that may create increased risk for some employees
- Personal and environmental exposure prevention methods
- The importance of early detection, diagnosis, and treatment to prevent the disease from progressing
- How to identify the common signs and symptoms of valley fever
- The importance of reporting symptoms to the employer and seeking medical attention from a medical professional
- Common treatment and prognosis for valley fever

Valley fever is an infectious disease caused by the *Coccidioides* fungus, which lives in soil and dirt in certain areas of California and the southwestern states.<sup>7</sup> Inhalation of the spores of this fungus can infect the lungs and in some cases spread beyond the lungs to other parts of the body, a condition called disseminated valley fever.

Anyone can become infected, but the risk of contracting the disease increases for those who live in, work in, or visit areas where valley fever has been reported. While it may be impossible to entirely avoid, short of living in a hazmat suit, inhaling the fungus in areas where it is common, the recommended ways to reduce the risk of exposure include staying inside, keeping windows and doors of buildings closed when the air is dusty, and keeping car windows closed while driving in these areas. The ubiquitous nature of the fungus and the inability to identify with certainty where the infectious inhalation occurs is reflected in the separate legal causation standards in civil and workers' compensation litigation.



## CIVIL LITIGATION BURDEN OF PROOF

The civil litigation burden of proof for valley fever is discussed in *Rudy Miranda v. Bomel Construction Co., Inc., et al.* (2010) 187 Cal.App. 4th 1326, where the Court of Appeal affirmed it was appropriate to reject the plaintiff's medical experts' opinions offered at trial that the exposure to the soil was a substantial factor in causing plaintiff's valley fever. Mr. Miranda worked as a locksmith at a university campus and alleged that he contracted valley fever from a construction project's excavated dirt on a vacant lot next to his office. The contractors' expert, a certified industrial hygienist, opined that the exact source of the exposure cannot be determined absent scientific data such as soil tests confirming the existence of the *Cocci* fungus in the soil at the time of exposure. One of Miranda's expert witnesses (his primary treating physician in his accepted workers' compensation case) opined that "to a reasonable degree of medical probability" the stockpiled dirt was a "substantial factor" in causing Miranda's valley fever. *Id.* at p. 542. Holding that the opinions were speculative in light of undisputed facts showing there were other reasonable and likely sources

of the fungal spore that caused Miranda's injury, the trial court granted the general contractor's request for summary judgment on the issue of causation. The Court of Appeal agreed that the contractors met their burden of proving there was no reasonable medical probability that Miranda contracted valley fever by inhaling an airborne *Cocci* spore that originated in the soil from the vacant lot as opposed to another location.

### **WORKERS' COMPENSATION CAUSATION STANDARD**

The *Miranda* case reflects the different causation standards for tort and workers' compensation cases dealing with valley fever. What the court held to be speculative in *Miranda's* civil litigation has been accepted as establishing an industrial injury in workers' compensation. In recent cases, the Workers' Compensation Appeals Board (WCAB) has held that industrial causation is met if the employee's risk of contracting valley fever from employment is medically probable or materially greater than from the general public.

In *Ranulfo Cruz v. Hall Management*, 2019 Cal. Wrk. Comp. P.D. LEXIS 29, the WCAB Panel Qualified Medical Examiner (PQME) concluded that a worker's death resulted from disseminated disease initiated by exposure to *Coccidioides immitis*. The PQME determined that industrial causation was medically probable, based on the prevalence of dust and decedent's significant outdoor exposure at his workplace. On review, the WCAB agreed with the Workers' Compensation Judge's analysis that the PQME's opinion that the decedent was subject to a greater risk of contracting valley fever from his employment in contrast to other environments met applicant's burden of proving the injury arose out of and occurred in the course of employment (AOE/COE).

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However, in *Tim Abernathy v. Harris Wolf California Almonds*, 2015 Cal. Wrk. Comp. P.D. LEXIS 547, the WCAB differentiated industrial causation of injury from industrial causation of disease, finding that applicant failed to establish that he had sustained the industrial illness of valley fever while working as a manager at an almond ranch. The Board explained what it deems necessary to link the disease to the employment:

In regard to industrial causation of a disease, the employee's risk of contracting the disease from the employment must be materially greater than the general public or more common at the place of employment than among the public

(citing *South Coast Framing, Inc. v. WCAB (Clark)* 61 Cal.4th 291). In *Abernathy* the WCAB found that the PQME's report on which the judge relied did not sufficiently address within reasonable medical probability when and where applicant had most likely contracted valley fever, as he stated that applicant could have been exposed at his current employment, prior employment, or where he lived, and did not assess whether the risk of applicant contracting valley fever was made materially greater by his employment at Harris Wolf compared to the general public. The WCAB concluded that while applicants are not required to establish medical certainty, they are required to establish that the employment caused or contributed to their coccidioidomycosis to a reasonable medical probability (see subsequent history *Tim Abernathy v. Harris Woolf California Almonds*, 2017 Cal. Wrk. Comp. P.D. LEXIS 231; after the record was developed, the WCAB found applicant met the burden with a new medical-legal report finding it was more probable than not that the work, rather than general exposure to the environment, caused the valley fever).

### **POTENTIAL IMPACT ON SERIOUS AND WILLFUL CLAIMS**

New Labor Code section 6709 does not create a presumption for the industrial causation standard of valley fever; nor does it directly address the legal causation standard. The training requirements will likely not redefine or change the legal burden of proof for industrial causation. However, employers undertaking construction in endemic areas must be aware that the new legislation may have implications for serious and willful claims pursuant to Labor Code sections 4553 and 4553.1.

Labor Code section 4553 creates an uninsurable risk of a 50 percent increase in all workers' compensation benefits when an industrial injury arises out of the serious and willful misconduct of the employer, manager, or supervisor. A serious and willful misconduct finding, per Labor Code section 4553.1, may be based on the violation of a safety order where:

the safety order, and the conditions making the safety order applicable, were known to, and violated by, a particular named person, either the employer, or a representative designated by Section 4553, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and that the failure of the employer, or a representative designated by Section 4553, to correct the condition constituted a reckless disregard for the probable consequences.

For the training outlined in Labor Code section 6709 to become a Cal/OSHA standard, the Occupational Safety & Health Standards Board (OSHSB) must adopt it.<sup>8</sup> Independent of OSHSB's adoption, Labor Code section 6709 states that the effective awareness training shall be provided to all employees by May 1, 2020. In regard to Labor Code section 4553 serious and willful conduct, the failure, per *Abron v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 232, 237, to comply with Labor Code section 6709's awareness and prevention training alone would not be enough to establish willful misconduct: "The mere failure to perform a statutory duty, in itself, is not willful misconduct." However, failure to comply with safety provisions of the Labor Code, if knowingly and willfully done, constitutes serious and willful misconduct (*Johnson v. Industrial Acc. Commission* (1952) 112 Cal.App.2d 363, 369–370). The injured construction worker may be able, in the right circumstances, to prove that the contracted valley fever resulted from the employer's knowing and willful violation of Labor Code section 6709. If OSHSB adopts the effective awareness training as a standard, a violation of that safety order also may give rise to a serious and willful claim as set forth in Labor Code section 4553.1.

Prior to the enactment of Labor Code section 6709, examples of Cal/OSHA's concern with valley fever, and the risk to employers who ignore the safety standards, are found in two solar farm incidents. In 2017 Cal/OSHA cited one general contractor and five subcontractors at a solar project in Monterey County for violations that included failure to control employee exposure to contaminated dust

at the worksite and failure to provide and ensure use of appropriate respiratory protection after reports that workers contracted valley fever.<sup>9</sup> Further, Cal/OSHA recently cited a construction company after an investigation revealed that the employer did not evaluate the hazard of performing digging work in areas known to contain the *Coccidioides* fungal spores, did not suppress or control harmful dusts, and failed to provide employees with respiratory protection.<sup>10</sup>

In addition to the employer obligations discussed earlier in this article, the legislation sets out additional obligations for employers:

- If a county that was not previously identified in the CDPH report as highly endemic becomes highly endemic, the training must be provided in the year following being identified as highly endemic.
- While the training may be included in the employer's Injury and Illness Prevention Program, it must include all the legislation's topics.
- Training material may include existing material on valley fever developed by a federal, state, or local agency, including but not limited to the federal Centers for Disease Control and Prevention, the State Department of Public Health, or a local health department.

## CONCLUSION

The Department of Industrial Relations lists over half a dozen occupations with increased risk of exposure to valley fever infection. Solar plant construction in the Central Valley is highlighted as a particularly risky venue for work-related cases of valley fever, underscoring the health risks for Californians doing this work.<sup>11</sup> AB 203 reflects the Legislature's conclusion that changing global weather patterns and infrastructure development in increasingly arid areas of California require employers to pay greater attention to protecting their employees from this disease.

We foresee OSHSB's adoption of a regulation that mirrors the substance of Labor Code section 6709. However, even while OSHSB is considering such safety orders, we recommend construction employers working in endemic regions initiate preparation of effective awareness training and its implementation in order to educate and protect their workers. All employers must also continue to diligently enforce compliance with all existing Cal/OSHA Safety Orders to reduce the exposure of their employees and other workers to valley fever.

## NOTES

1. Morgan E. Gorris, et al. *Expansion of Coccidioidomycosis Endemic Regions in the United States in Response to Climate Change*, GeoHealth (Aug. 30, 2019).

2. *Preventing Valley Fever in Construction Workers - a webinar for construction employers and health and safety professionals* CDPH (Aug. 21, 2018) at [www.cdph.ca.gov/Programs/CCDCPHP/DEOC/OHB/Pages/Cocci.aspx](http://www.cdph.ca.gov/Programs/CCDCPHP/DEOC/OHB/Pages/Cocci.aspx).

3. M. Ghaly and S. Fanelli, *Epidemiologic Summary of Coccidioidomycosis in California*, 2018 (July 2019) CDPH:

The incidence of coccidioidomycosis in 2018 was 18.8 per 100,000 population (7,515 case-patients). This is the second highest annual incidence reported in California since coccidioidomycosis became individually reportable in 1995, with the highest incidence of 19.3 per 100,000 population (7,658 case-patients)

occurring in 2017. Some additional cases for 2018 may be reported after April 2, 2019 due to delays in diagnosis and reporting; future reports will have updated case numbers and incidence.

4. *Coccidioidomycosis among Workers Constructing Solar Power Farms, California, USA, 2011–20* (Nov. 2015) EID Journal, Vol. 21, No. 11.

5. *Id.*

6. *Id.*

7. CDPH valley fever Fact Sheet updated August 2019.

8. [www.dir.ca.gov/oshsb/](http://www.dir.ca.gov/oshsb/).

9. *Cal/OSHA Cites Six Employers over \$240,000 for Exposing Workers to Valley Fever* (Nov. 20, 2017) DIR News Release No.: 2017-108.

10. *Cal/OSHA Cites Construction Company after Two Workers Hospitalized for Valley Fever* (Mar. 28, 2019) DIR News Release No.: 2019-31.

11. [www.dir.ca.gov/dosh/valley-fever-home.html](http://www.dir.ca.gov/dosh/valley-fever-home.html)

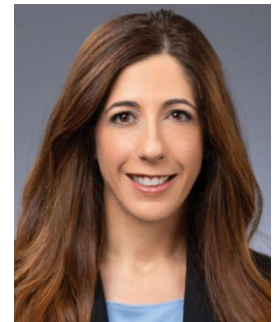
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