

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

MARK MASTRO, *Applicant*

vs.

**CALIFORNIA DEPT. OF CORRECTIONS, *Legally Uninsured*;
STATE COMPENSATION INSURANCE FUND, *Defendant***

**Adjudication Number: ADJ8081881
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant Mark Mastro seeks reconsideration of the December 4, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a correctional officer, sustained an industrial cumulative trauma injury to his heart and psyche over the period February 2, 2007 through September 24, 2011, resulting in 75% permanent disability, after apportionment. The WCJ awarded applicant permanent disability indemnity at the rate of \$270.00 per week for 513.25 weeks, in the total sum of \$138,577.50, and a life pension of \$115.96 per week thereafter, increased annually per Labor Code section 4659(c). Applicant's attorney was awarded a fee of 15% of the permanent disability and life pension.

Applicant raises five issues in his Petition for Reconsideration. First, applicant contends the rate at which permanent disability was awarded failed to follow the parties' September 20, 2018 stipulation that a 15% increase in permanent disability would begin as of September 29, 2012, which would increase the permanent disability rate to \$310.50 per week in the sum of \$159,364.12. Second, applicant contends the WCJ erred in failing to specify how the award of attorney fees is to be paid, and whether the fees are to increase with the increase in the life pension. Third, applicant contends the WCJ erred in apportioning applicant's hypertensive cardiovascular impairment, asserting the anti-attribution clause in Labor Code section 4663(e) prohibits

apportionment to causation for injuries entitled to the presumption in Labor Code section 3212.2. Fourth, applicant contends, assuming the apportionment is found permissible, the WCJ erred in finding the opinion of the Agreed Medical Examiner to be substantial medical evidence to support apportionment. Finally, applicant contends he was denied due process by the WCJ's failure to consider and address whether the submitted vocational evidence rebuts the scheduled permanent disability rating.

We have received and reviewed defendant's Answer. A newly assigned WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to amend the Findings and Award to include the parties' stipulation regarding the 15% increase in permanent disability and to award attorney fees on the increase in permanent disability and the life pension, to be commuted from the far end of the Award, but to otherwise affirm the Findings and Award.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. As applicant is entitled to a final decision that considers and addresses all of the issues raised on the submitted evidence, we will return this matter for further proceedings on the issue of permanent disability and whether the vocational evidence is sufficient to rebut the scheduled rating under the theory that applicant is not amenable to participate in vocational rehabilitation due to the effect of his industrial injury.

The parties submitted the vocational reports of George Hodson, M.S. and Howard Goldfarb, M.A., for the purpose of determining whether applicant's permanent disability is greater than the rating derived from application of the permanent disability rating schedule, per *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]. These reports were admitted into the record on September 20, 2018.

Labor Code section 5313 requires that together with findings of fact, orders, and/or awards, a WCJ shall serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22.) The WCJ's Opinion on Decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (2001)

66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) A final decision must be based on the admitted evidence (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In the December 4, 2020 Findings and Award and the Opinion on Decision, the WCJ made no reference to whether this evidence was considered when she made her final determination on the extent of applicant's permanent disability.

As applicant asserts in the Petition for Reconsideration, he is entitled to have all of the evidence considered and addressed by the WCJ when making a determination on all outstanding issues. The only consideration of this evidence is a brief review in the Report and Recommendation on Petition for Reconsideration, which does not afford applicant the opportunity to seek review of its merits.

Accordingly, we will grant reconsideration, amend the Findings and Award to defer the findings on applicant's permanent disability and attorney fees, and return this matter for further proceedings to include consideration of the vocational evidence and for a new final determination. We do not make findings on the other issues raised in the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the December 4, 2020 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award is **AMENDED** as follows:

FINDINGS OF FACT

4. The determination of the extent of applicant's permanent disability is deferred.
- ...
6. The determination of a reasonable attorney's fee is deferred.

AWARD

AWARD IS MADE in favor of **MARK MASTRO** and against **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION**, Legally Uninsured, of:

Further medical treatment to cure or relieve applicant of the effects of his industrial injury.

ORDER

IT IS FURTHER ORDERED that this matter be **RETURNED** to the trial level for further proceedings on the extent of applicant's permanent disability and for a new final decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2021

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

**MARK MASTRO
MASTAGNI HOLSTEDT
STATE COMPENSATION INSURANCE FUND**

SV/pc

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