

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

LARRY TUCKER, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
SUBSTANCE ABUSE TREATMENT
FACILITY, CORCORAN, legally uninsured, *Defendants***

**Adjudication Number: ADJ11237611
Sacramento District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision to correctly identify defendant as recommended in the report, and otherwise affirm the March 2, 2021 Findings and Award.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the March 2, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 2, 2021 Findings and Award is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

* * *

AWARD IS MADE in favor of **LARRY TUCKER** and against **STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND REHABILITATION/SUBSTANCE ABUSE TREATMENT FACILITY, CORCORAN** as follows:

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 7, 2021

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

**LARRY TUCKER
MARCUS, REGALADO, MARCUS & PULLEY
STATE COMPENSATION INSURANCE FUND**

PAG/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. Order Issued: 03/01/2021
2. Identity of the Petitioner: Defendant
3. Verification: The Petition is verified.
4. Timeliness: The Petition is timely.
5. Date of Petition for Reconsideration Filed: 03/20/2021
6. Petition alleges: Applicant's heart trouble did not manifest in time for applicant to fall within the heart presumption and therefore apportionment to permanent disability is warranted.

Pursuant to the stipulations of the parties, applicant sustained an industrial injury to his heart during the continuous trauma period ending on March 1, 2018 while employed as a Correctional Officer. Applicant began his career in 1990 and retired on February 23, 2010. The Court found that applicant was entitled to the heart presumption under Labor Code 3212.2 and hence, sustained 69% permanent disability. Defendant filed its Petition for Reconsideration arguing that applicant's heart's trouble did not manifest or develop within 5 years of his last date of employment and thus apportionment to permanent disability is legally valid. Petitioner also notes that the defendant is incorrectly identified.

Dr. Levy served as the Panel Qualified Medical Examiner. Applicant suffered from an occluded bi-coronary artery which Dr. Levy confirmed as "heart trouble". Dr. Levy provided a multitude of reports, however, the issue of when applicant's heart trouble developed or manifested is primarily discussed in his March 24, 2020 deposition (Exhibit H). Throughout the deposition, questions were posed questioning Dr. Levy about the timeframe of the development and manifestation of applicant's heart trouble.

Q: ... I am more concerned with confirming your opinion as to the period during which his heart trouble was developing. And I-I think what I heard you say just a moment ago is that it would have been developing during his time as a correctional officer while he was exposed to those chronic stressors even if he was asymptomatic. Is that a fair statement?

A: Yes, sir.

Q: Okay. And even though he stopped working in 2010, the *development*, as it were, had already been occurring up until the point that he stopped working. Is that a fair statement?

A: I would say within a reasonable medical probability, yes.

Q: Now, about this development of heart trouble occurring while Mr. Tucker was working as a correctional officer as far back as 2010, is that opinion, or can that opinion be distinguished from some opinion - medical opinion regarding when the heart trouble *manifested* itself? What criteria do you use to determine when the heart trouble manifested itself?

A: So this is going to be a - I'm sure this is going to open up another can of worms, but that's okay. So the presence of progressive coronary artery disease may be asymptomatic. If it is not slowly limiting, then yes, you have pathology, not no, you don't necessarily have heart trouble at that point in time.

The more occluded the artery becomes, which is over time, and with, basically, repeated acute and chronic stresses as well as all the other factors, the more likely he is to develop heart troubles based on that fact that he had a coronary occlusion and subsequent damage, whether he felt it or not. It's within reasonable medical probability that the process started, clearly, while he was a correctional officer. Medically speaking, that's pretty substantive. You can substantiate that.

The---you would like to see EKGs that would corroborate in that time frame, and I don't believe that we did. I believe, you know, again, from the cursory review prior to this deposition, I didn't see the actual dates when the EKGs turned abnormal from normal, and you know, when they were corroborated by Dr. Anton's angiogram. Does that make any sense to you?

Q: Yes, Yes, it does, Doctors. So, you know, based on the evidence we have here, when you talk about this process, it sounds like to me, you're talking about in conjunction with the period. The time frame you're talking about is the process in conjunction with injurious exposure while he was working as a corrections officer; correct?

A: Correct.

Q: Okay, And then for identifying when the actual heart trouble was identified or manifested itself, based on the evidence you have here, we're looking at the EKG that was taken; is that correct?

A: Correct.

(Exhibit H p.19 line 22 - p.22 line 10, emphasis added) Dr. Levy provided opinion that applicant's heart trouble developed during his employment as a correctional officer and manifested around the time of the EKG. Petitioner states that the "first medical evidence of heart trouble is the November 18, 2016 EKG." (Petition for Reconsideration, p. 4 lines 20-21) This statement ignores Dr. Levy's medical opinion that applicant's heart trouble developed during his time as a correctional officer. This is the medical evidence that the Court relied upon when finding that applicant's heart trouble developed during his employment with the defendant.

Based on the above, the Court found that applicant's permanent disability was legally not subject to apportionment to non-industrial causes. However, the Court has no objections to Dr. Levy's apportionment analysis should apportionment be found to be legally viable.

Petitioner also points out a typographical error in the caption of the Findings & Award. The defendant should be named as State of California, Sub Abuse Treat Corcoran and the Award should be addressed as such.

RECOMMENDATION

Based on the foregoing, it is recommended that the Petition for Reconsideration be granted solely for the purpose of identifying the correct defendant as noted above.

Date: March 24, 2021

Darcy Kosta
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Pursuant to the stipulations of the parties applicant sustained an industrial injury to his heart during the continuous trauma period ending on March 1, 2018 while employed as a Correctional Officer. Applicant began his career in 1990 and retired on February 23, 2010.

The parties utilized Dr. Levy as the PQME. Dr. Levy opined that applicant's condition carried a WPI of 30% for coronary artery disease and 8% for arrhythmia. Dr. Levy also noted that 50% of applicant's permanent disability was due to non-industrial stressors. However, the parties disagreed if applicant was entitled to the presumption of compensability per Labor Code §3212.2, hence also disagreeing if apportionment was legal or not.

Specifically, the parties disagreed on if applicant's heart trouble manifested or developed within 5 years after his last day worked (also his retirement date) of February 23, 2010. Applicant's condition became apparent when he had an abnormal EKG in November 2016. (Ex. H p.26) The difficulty of the case was determining when applicant's heart trouble developed. According to the PQME, applicant's heart trouble was due to an occlusion of a coronary artery. Dr. Levy originally opined that applicant's heart trouble developed approximately one year prior to the abnormal EKG (Ex. C) However, when discussed in detail at his deposition, Dr. Levy opines that applicant's heart trouble began to develop while he endured the stressors of employment as a correctional officer. He confirmed that the presence of coronary artery disease may be asymptomatic, specifically stating that the process started when applicant was a correctional officer. (Exhibit H p.20-21). Thus, it is found that applicant's heart trouble developed within the time frames allotted per Labor Code §3212.2 and he is entitled to the heart trouble presumption.

The parties also put applicant's date of injury per Labor Code §5412 at issue. The date of injury for a continuous trauma is when there is a concurrence of knowledge of the industrial injury and disability. Applicant was generally asymptomatic up until his 2016 EKG. Although not specified by Dr. Levy, it is reasonable to assume this is the first time he would have any disability. There is little information as to when applicant had reasonable knowledge that his heart condition was related to his employment. Applicant did testify that he learned he could file a workers compensation claim approximately two and a half months before he filed his claim, on/about January 15, 2018. As this is the first date with the concurrence of knowledge and disability, this is the date of injury per Labor Code §5412. Defendant presented no evidence that Labor Code §5412 affects the presumption per Labor Code §3212.2. In fact, the presumption focuses on the dates of employment and retirement, not the date of injury. Labor Code §3212.2 does not act as a statute of limitations.

Based on the above, applicant's permanent disability rates as follows: 03.02.00.00 - 30 - [1.4]42 - 4901 - 51 - 61%; 03.06.00.00 8 - [1.4]11 - 4901 - 16 - 21% eve = 69%. Applicant is, therefore, entitled to permanent disability payable at the rate of \$290.00 per week for 423.25 weeks totaling \$122,742.50. Applicant attorney is entitled to a reasonable fee of 15% of the permanent disability awarded.

Dr. Levy opined that applicant was in need of future medical treatment.

DATE: March 2, 2021

Darcy Kosta
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE