WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BLAKE LYCETT, *Applicant*

vs.

COUNTY OF SAN MATEO, permissibly self-insured, administered by ATHENS ADMINISTRATIONS, *Defendants*

Adjudication Number: ADJ12253396
San Francisco District Office

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petitions 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, we will grant reconsideration, rescind June 6, 2022 Findings of Fact and Award, and substitute it with a new Findings and Award that strikes Findings of Fact No. 1 for the reasons state below, and otherwise restates the WCJ's decision for the reasons stated in both the Report and Opinion on Decision, both of which we adopt and incorporate except as noted below.

In Findings of Fact No. 1, the WCJ incorporated stipulations from Minutes of Hearing of March 23, 2022. We did not locate Minutes of Hearing from that date. Regardless, all of the issues covered by the stipulations contained in the March 17, 2022 Minutes of Hearing were addressed by the WCJ in Findings of Fact as they should have been. Therefore, Findings of Fact No. 1 is not necessary and could lead to confusion. Generally, the practice of incorporating stipulations into a decision by reference should be avoided. Rather, an award should always be supported by actual findings of fact. (Lab. Code, § 5903(e).)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the June 6, 2022 Findings of Fact and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 6, 2022 Findings of Fact and Award is **RESCINDED**, and **SUBSTITUTED** with a new Findings and Award, as provided below.

FINDINGS OF FACT

1. Blake Lycett, while employed during the period ending on September 30, 2018, as a Deputy Sheriff, Occupational Group Number 490, at Redwood City, California, by County of San Mateo, permissibly self-insured for workers' compensation, sustained injury arising out of and in the course of employment to the neck, low back, and circulatory system (hypertensive cardiovascular disease and coronary artery disease).

2. At the time of injury, applicant's earnings were maximum for purposes of permanent disability indemnity, establishing a permanent partial disability rate of $290.00 per week.

3. Applicant's injury caused permanent disability of 76% after adjustment for age, occupation, etc. and after apportionment, entitling applicant to 529.25 weeks of disability indemnity payable at the rate of $290.00 per week, beginning on December 10, 2019, less credit to defendant for all sums heretofore paid on account thereof, until 529.25 weeks of payments have been made, and thereafter a life pension at the rate of $123.69 per week.

4. There is apportionment of disability of 15% for the cervical spine per Labor Code § 4663.

5. There is apportionment of disability of 30% for the hypertensive cardiovascular disease and coronary artery disease per Labor Code § 4664(b).

6. There is no apportionment of disability for the lumbar spine, pursuant to Labor Code § 4663(e).

7. Applicant will require further medical treatment to cure or relieve from the effects of the injury to the cervical spine, lumbar spine, and circulatory system (hypertensive cardiovascular disease and coronary artery disease).

8. Applicant's attorneys, Rains, Lucia, Stern, PC, provided legal services of the reasonable value of 15% of the permanent partial disability awarded herein, to be adjusted by the parties, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 25, 2022

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

BLAKE LYCETT
LAUGHLIN FALBO LEVY & MORESI
RAINS LUCIA STERN

PAG/oo

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

REPORT AND RECOMMENDATION ON PETITIONS FOR RECONSIDERATION

Farai Alves, Workers' Compensation Judge, hereby submits her Report and Recommendation on the Petitions for Reconsideration filed herein.

Introduction

On June 30, 2022, applicant and defendant each filed a Petition for Reconsideration of my Findings of Fact issued on June 6, 2022. Both Petitions for Reconsideration were timely filed and verified as required under Labor Code section 5902.

It is defendant's contention that the evidence does not justify the findings of fact, the findings of fact do not support the award, and that the court acted without or in excess of its powers. Defendant argues that I erred by finding that applicant sustained one instead of two injuries, and in my application of the duty belt presumption under Labor Code section 3213.2. In his petition, applicant argues that the evidence does not justify Findings of Fact 4 and 6 regarding permanent disability and apportionment, and that the appeals board acted without or in excess of its powers.

The Facts

Applicant alleged a cumulative trauma injury to the neck, low back, and circulatory system (hypertension and coronary artery disease) as a result of his employment with County of San Mateo during the period ending on May 30, 2019. Applicant's actual period of active duty for the County of San Mateo was from February 25, 2013 until September 30, 2018, after which he was on paid administrative leave until he resigned his position effective September 1, 2019.

Prior to his employment by County of San Mateo, applicant received an award of 30% permanent disability ("PD") resulting from an injury on November 29, 2007, while employed by the City of Daly City. At trial, it was applicant's contention that apportionment under Labor Code section 4663 is inapplicable here in light of the presumptive injuries, and that apportionment under Labor Code section 4664 should apply only to applicant's heart injury, not the hypertension.

Defendant denied the claim and argued at trial that the presumptions were inapplicable as the injuries did not develop or manifest during applicant's employment by the County, and that if compensable, applicant's orthopedic and internal injuries arose from two separate cumulative traumas, which would necessitate two separate awards.

In my Opinion on Decision, I found that applicant's employment by the County of San Mateo in an active duty capacity from February 25, 2013 to September 30, 2018, a period exceeding 5 years, met the required length of service for both the heart presumption (Lab. Code § 3212.5) and the duty belt presumption for the lower back (Lab. Code § 3213.2). (Opinion on Decision dated June 6, 2022, p. 12.) I was not persuaded by defendant's argument that applicant is not entitled to the presumptions because his symptoms did not manifest until after his last day of full duty work. (*Ibid*.) Nor was I convinced by defendant's assertion that applicant did not wear a duty belt during the entirety of his employment by the County. (*Id*. at 13.)

I found that applicant sustained a single cumulative trauma injury to the neck, low back, and circulatory system (hypertensive cardiovascular disease and coronary artery disease) during the period ending on September 30, 2018, and that applicant is accordingly entitled to a single award. (*Id*. at 15.) I found that there is apportionment of disability for the cervical spine but not for the lumbar spine under Labor Code 4663, and under Labor Code section 4664(b) with respect to applicant's hypertensive cardiovascular disease and coronary artery disease. (Id. at 16.)

In its Petition for Reconsideration, defendant argued that the duty belt presumption does not apply to applicant's low back injury, and that I failed to address applicant's burden of proof in applying the presumption. (*Id*. at 7, lines 13-16.) Defendant further argued that by reasoning that applicant's period of injurious exposure was the same, as supported by both Dr. Noriega and Dr. Pang, I failed to consider the nature of exposure resulting in the orthopedic and cardiovascular injuries. (Defendant's Petition for Reconsideration dated June 30, 2022, p. 6, lines 25-27.)

In his Petition for Reconsideration, applicant contended that I erred in applying apportionment under Labor Code section 4664 to the applicant's hypertension. (Applicant's Petition for Reconsideration dated June 30, 2022, pp. 1, line 28 – 2, lines 2, 14-22.) It was applicant's assertion that defendant did not establish overlap between prior and present disability with respect to hypertension. (*Id*. at p. 7, lines 21-24; p. 9, lines 14-17.)

Discussion

Low Back / Duty Belt Presumption

Defendant acknowledges in its Petition for Reconsideration that the heart presumption applies to this case, but disputes the applicability of the duty belt presumption, asserting that there was no finding that applicant met his burden of proof and pointing to evidence that applicant did

not wear a duty belt during the year preceding his administrative leave. Accordingly, defendant asserts that apportionment under Labor Code section 4663 would apply to the low back.

Contrary to defendant's argument that no prima facie showing has been made, applicant has established that he was employed by the County at least 5 years, in a qualifying occupation, on a full-time basis, as set forth in Labor Code section 3213.2. There was deposition testimony by the applicant including a gun and a taser were attached to the duty belt, but the question of whether applicant's duty belt qualified under section 3213.2(c) was not raised at trial. (Defendant's Exhibit A, transcript of Applicant's Deposition dated August 16, 2019, at 47:10-15.) Additionally, applicant's condition manifested within the allowed period of time after his active duty ended. (Lab. Code §3213.2(b).) I noted that the orthopedic AME concluded that applicant sustained a low back in jury in part as a result of wearing a gun belt or duty belt. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 6.)

Defendant also disagrees with my reading of the language in the statute requiring that the employee "has been required to wear a duty belt as a condition of employment …." (Lab. Code §3213.2(a).) Consistent with Labor Code section 3202, mandating liberal construction of workers' compensation laws in favor of extending benefits to injured workers, I interpreted the plain language of the statute as requiring 5 years of employment, but not specifying that a duty belt must have been work the entire time. (Opinion on Decision dated June 6, 2022, p. 13.) I referred to the case of Myers v. City of Salinas, which, though not binding, is instructive on this issue. In Myers an applicant who met the requisite length of employment under section 3213.2, but only wore a duty belt for part of the employment, was entitled to the presumption, "as he worked in a covered police position for more than the required 5 years and was required to wear a duty belt for part of that time." (Myers v. City of Salinas (2008) Cal. Wrk. Comp. P.D. LEXIS 13, *6.)

The case cited by defendant in its petition is distinguishable from the instant case, in part because unlike the present matter, the applicant therein lacked the required 5 years of employment before his alleged injury manifested. (Crowson v. Worker's Comp. Appeals Bd. (2005) 70 Cal. Comp. Cases 1160.) Additionally, in Crowson, the question of whether the applicant wore a qualifying duty belt was addressed at trial, including in the applicant's trial testimony, unlike the present case. (*Ibid*.) It is also significant that in the Crowson case the judge relied on medical reporting finding that there was no injury on an industrial basis, whereas the opposite occurred in

the instant case. (*Ibid*.) For these reasons, the reasoning in Crowson is not sufficiently applicable to the facts of the present case.

As such, it remains my opinion that applicant's low back injury falls within the parameters for the duty belt presumption of Labor Code section 3213.2.

Cumulative Trauma Injuries

Defendant contends that the facts support a finding of two cumulative trauma injuries rather than one. Where supported by the evidence, is established that "one exposure may result in two distinct injuries …." (*Western Growers Insurance Co. v. WCAB (Austin)* (1993) 16 Cal. App. 4th 227, 234-235.) However, I found no basis to reach that conclusion in the instant case, after taking into account the similar injurious exposure throughout the employment, and I determined that there was a single cumulative trauma period, the end date of which I based on Labor Code section 5500.5 rather than section 5412, "as that was the earlier date against which to apply the liability under L.C. 5500.5." (*Bass v. State of California* (2017) 82 Cal. Comp. Cases 1034, 1038.)

Defendant also points to a supplemental report by Dr. Noriega, and argues that the doctor opined that applicant sustained a separate injury to his cardiovascular system. (Defendant's Petition for Reconsideration dated June 30, 2022, p. 9, lines 12-24.) In fact, the distinction made by Dr. Noriega was between the applicant's current injury and his 2007 injury. He made no such distinction between exposures resulting in the present internal and orthopedic injuries, but stated:

> The record denotes ongoing unrestricted work as a deputy sheriff from 2013 through December 2017. The 2019 injury constitutes a new injury or on-the-job aggravation – underpinned by preexisting CAD/HCVD. The claimant's continual work exposures have ultimately contributed to an increase in impairment – resulting from the heart trouble worsening.

(Defendant's Exhibit F, report of Dr. Noriega dated December 21, 2020, p. 3. See further discussion on p. 4.) Thus, contrary to defendant's argument, there is no opinion by Dr. Noriega either differentiating between applicant's exposure for the internal and orthopedic claims, or separating the two injuries.

Since applicant sustained his injuries during the same period of exposure, no distinction regarding his exposures has been presented, and there were no periods of treatment or disability during the injurious exposure, I find no basis to conclude that applicant sustained two separate cumulative trauma injuries. (See Western Growers Insurance Co. v. WCAB (Austin) (1993) 16

Cal. App. 4th 227, 237. See also Bass v. State of California (2017) 82 Cal. Comp. Cases 1034, 1038.)

Apportionment

Applicant disagrees with my finding that apportionment under Labor Code section 4664(b) applies to applicant's hypertensive cardiovascular disease (HCVD), asserting that it should apply only to applicant's coronary artery disease (CAD). Applicant disputes that there is sufficient evidence of overlap with respect to hypertension. (See *Kopping v. Workers' Compensation Appeals Bd.* (2006) 71 Cal. Comp. Cases 1229, 1242.)

However, it is clear from Dr. Noriega's internal medicine AME reporting that both applicant's hypertension and his CAD predated his employment at the County and that both were documented in Dr. Levy's AME findings regarding the 2007 injury. (Defendant's Exhibit D, report of Dr. Noriega dated December 27, 2019, pp. 12, 14.) Dr. Levy's report addressed applicant's condition including hypertension / hypertensive heart disease diagnosis. (Defendant's Exhibit J, report of Dr. Levy dated August 10, 2010, at 3, 8-9.) While he did not include a separate rating for applicant's hypertension, Dr. Levy made it clear that it was a factor in applicant's cardiovascular disease, and recommended "aggressive medical treatment" including "vigorous control of his blood pressure" to prevent secondary myocardial infarction. (*Id*. at 10.)

Moreover, as stated in my Opinion on Decision, applicant's settlement by stipulations and award of his 2007 claim at 30% PD, expressly included his "heart attack, heart, cardiovascular, hypertension." (Defendant's Exhibit H, excerpts of WCAB records in ADJ7343546, at 39.) "Where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability relating to the same region of the body, section 4664 requires the apportionment of overlapping permanent disabilities…." (Sanchez v. County of Los Angeles (2005) 70 CCC 1440, 1441-42 (appeals board en banc). See also Lab. Code, § 4664(b).)

Therefore, there is apportionment of disability of 30% for the hypertensive cardiovascular disease and coronary artery disease per Labor Code § 4664(b).

Recommendation

For the foregoing reasons, I recommend that both applicant's and defendant's Petitions for Reconsideration be denied.

DATE: July 13, 2022

Farai Alves
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Opinion on Decision

The matter came on for hearing on March 17, 2022 before Farai Alves, Workers' Compensation Judge on the issues of injury arising out of and in the course of employment, parts of body injured, whether applicant sustained separate orthopedic and internal cumulative trauma injuries, permanent disability, apportionment, entitlement to further medical treatment, and attorneys' fees.

There was no testimony at trial. Documentary evidence was received and the parties, who had each submitted a pre-trial brief, were allowed an opportunity to submit post-trial briefs. Applicant submitted a post-trial brief and the matter was submitted for decision on April 8, 2022.

Factual Background and Arguments

By way of an application and amended application for adjudication filed on June 4, 2019 and July 17, 2019 respectively, applicant has alleged a cumulative trauma injury to the neck, low back, and circulatory system (hypertension and coronary artery disease) as a result of his employment with County of San Mateo during the period ending on May 30, 2019.

Prior to his employment by County of San Mateo, applicant worked as a police officer for City of Daly City from April 9, 1999 to February 22, 2013. While employed by City of Daly City, applicant had a workers' compensation claim for a cardiac injury on November 29, 2007. He settled that case by Stipulations and Award at 30% permanent disability ("PD") on December 22, 2010.

Applicant joined County of San Mateo ("the County") as a sheriff's deputy on February 25, 2013. The parties are agreed that there was no gap between applicant's employment with City of Daly City and with County of San Mateo. Applicant continued on active duty with the County until September 30, 2018. On October 1, 2018, he went on paid administrative leave until he resigned his position effective September 1, 2019.

Applicant alleges that his orthopedic and cardiac injuries resulted from a single period of cumulative trauma through his last day of full duty employment, per the opinions of Dr. Pang and Dr. Noriega. Applicant further asserts that his more than 20 years of combined service with the City of Daly City and with the County of San Mateo qualify him for a heart presumption under Labor Code section 3212.5 and a duty belt/low back presumption pursuant to Labor Code section 3213.2. Lastly, applicant contends that apportionment under Labor Code section 4663 is

inapplicable here in light of the presumptive injuries, and that apportionment under Labor Code section 4664 applies to applicant's heart injury (but not the hypertension) based on the prior award.

Defendant has denied the claim, and argues that the reports of Dr. Pang and Dr. Noriega are not substantial and that applicant did not sustain cumulative trauma injuries while employed by County of San Mateo. Defendant acknowledges the last day of injurious exposure as September 30, 2018, when applicant went on administrative leave, but points to the lack of medical treatment or reporting of an injury before that date. Defendant further asserts that the presumptions are inapplicable as the injuries did not develop or manifest during applicant's employment by the County of San Mateo.

Defendant further argues that applicant's orthopedic and internal injuries, if compensable, arose from two separate cumulative traumas, which had the same last date of injurious exposure only because applicant was placed on administrative leave at that time. It is defendant's further contention that apportionment under Labor Code section 4663 is applicable for the back because applicant wore a duty vest rather than a duty belt for part of his employment, and that Labor Code section 4664 apportionment is applicable for all cardiac injuries, including hypertensive heart disease, based on the prior award.

Medical Evidence

Included in the medical evidence submitted were agreed Medical Evaluator ("AME") reports by Dr. Robert Noriega in internal medicine and Dr. David Pang in orthopedic surgery.

Internal Medicine - Hypertension and Coronary Artery Disease

AME Dr. Robert Noriega saw the applicant for an internal medicine evaluation on December 10, 2019. He noted that applicant was first diagnosed with hypertensive vascular disease and coronary artery disease in 2007. (Defendant's Exhibit D, report of Dr. Noriega dated December 27, 2019, p. 2.) Applicant reported that his hypertension had worsened and that his medications had increased. (Ibid.) Following his evaluation of the applicant and review of medical records, including the August 10, 2010 AME report of Dr. Richard Levy, Dr. Noriega diagnosed applicant with hypertensive cardiovascular disease ("HCVD") and coronary artery disease ("CAD"). (Id. at 12.) He opined that the diagnoses of hypertension and CAD predated applicant's employment with County of San Mateo, but concluded: "It is within reasonable medical probability, the claimant's work exposures are a hypertensinogenic factor added to the burden of preexisting non-industrial covariates causing injury to the cardiovascular system." (Id. at 14.)

Dr. Noriega further stated that the applicant's cardiovascular disease qualifies as heart trouble under Labor Code section 3212, noting that in this case, apportionment would apply because applicant had a prior award for the heart / cardiovascular disease. (Ibid.) He requested updated diagnostic testing in order to distinguish the current disability from the preexisting disability from the 2007 injury. (Id. at 15.)

Dr. Noriega issued a supplemental report dated March 24, 2020, upon review of diagnostic studies. He determined that there was evidence of progression in applicant's hypertensive vascular disease and coronary artery disease. (Defendant's Exhibit E, report of Dr. Noriega dated March 24, 2020, p. 8.) Dr. Noriega opined that applicant's condition was permanent and stationary as of December 10, 2019. (*Ibid*.) He assigned 36% WPI for HCVD, based on Table 4-2 on page 66 of the AMA Guides. (Id. at 9.) Referring to Table 3-6a on page 36 of the AMA Guides, Dr. Noriega assigned 24% WPI for CAD. (Id. at 10.) Dr. Noriega opined that 15% is apportioned to presumptively injurious exposure during the cumulative trauma ending May 30, 2019, while 85% is apportioned to preexisting established cardiovascular disease. (*Id*. at 11.) He recommended future medical care, to include reevaluation in 5 years due to the progressive nature of applicant's condition. (*Ibid*.) Dr. Noriega also noted that there was no lost time due to cardiovascular disease, and determined that applicant is not precluded from his usual and customary work as a result of the CVD. (*Id*. at 12.)

Dr. Noriega issued a further supplemental report dated December 21, 2020. He stated that the 2019 injury was a new injury or industrial aggravation, underpinned by the preexisting HCVD and CAD. (Defendant's Exhibit F, report of Dr. Noriega dated December 21, 2020, p. 3.) He opined that applicant's continued work exposure contributed to an increase in impairment. (*Ibid*.) In Dr. Noriega's opinion, it was medically improbable that applicant's cardiovascular disease would have continued to progress independent of industrial contribution, given the nature of applicant's work. (*Id*. at 4.) Dr. Noriega reiterated his previously stated opinion that applicant's preexisting hypertensive cardiovascular disease and coronary artery disease accounts for 85% of his present disability. (*Ibid*.) For the remaining 15% that is attributed to a cumulative trauma ending May 30, 2019, Dr. Noriega apportioned 65% to non-industrial factors, including aging, diet, physical activity, alcohol and tobacco use, steroids, and other factors. (*Id*. at 5.) The remaining 35% is apportioned to industrial factors. (*Id*. at 6.)

Dr. Noriega issued a final supplemental report dated May 30, 2021. He stated that the last day of injurious exposure for the heart was the last day of full duty work for the County. (Defendant's Exhibit G, report of Dr. Noriega dated May 30, 2021, p. 2.) Dr. Noriega reiterated that the cumulative trauma of the heart meets the criteria for the heart presumption, and opined that the heart was not a compensable consequence of the orthopedic injuries. (Ibid.)

Orthopedic – Cervical Spine and Lumbar Spine

AME Dr. David Pang saw applicant in orthopedic surgery on July 29, 2020. Applicant reported he was on administrative leave from about January or February 2019 through September 2, 2019. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 2.) Dr. Pang reported applicant's account that he developed tightness and stiffness in his neck and lower back for at least 1 to 2 years prior to going out on leave. (*Ibid*.) Dr. Pang also noted that the earliest treatment report he reviewed was dated May 6, 2019, at which time applicant reported onset of low back complaints and left leg symptoms of 2 months duration. (*Ibid*.) Dr. Pang reported that applicant's neck (and right shoulder) complaints were first documented in a June 4, 2019 report. (*Ibid*.)

Dr. Pang diagnosed applicant with chronic low back strain and status post C5-6 and C6-7 anterior cervical discectomy and fusion. (*Id*. at 5.) He concluded that applicant's condition was permanent and stationary and assigned 28% WPI for the cervical spine under DRE category IV and 7% WPI for the lumbar spine under DRE category II. (*Ibid*.) It was Dr. Pang's opinion that applicant's neck and low back injuries resulted from a work-related cumulative trauma. (*Id*. at 6.) He attributed 15% of applicant's cervical spine condition to non-industrial factors, and 10% of the lumbar spine to non-industrial factors. (Ibid.) He recommended further medical care, stated that applicant could not return to the essential job functions of a deputy sheriff, and set forth permanent work restrictions. (*Ibid*.)

Dr. Pang issued a supplemental report dated March 9, 2021 stating that applicant sustained a cumulative trauma injury to the neck and lower back through the last date he worked in a full duty capacity for the County of San Mateo. (Defendant's Exhibit C, report of Dr. Pang dated March 9, 2021, p. 1.)

Other Medical Records

A Doctor's First Report of Occupational Injury or Illness dated July 31, 2019, documented applicant's complaints of neck, right shoulder, and right arm pain and numbness, with onset on May 6, 2019. (Defendant's Exhibit I, Kaiser Occupational Health report dated July 31, 2019, p. 1

of report.) The same report also noted symptoms that began 6 to 12 months prior. (*Ibid*.) The reported exposure was: "21 years law enforcement various duties – motorcycle for years, 3 separate K-9s. Everyday duties, the duty gear, vehicle accidents and physical confrontations." (*Ibid*.) A cervical spine MRI was reviewed, and the diagnosis was spinal stenosis of the cervical spine with myelopathy. (Id. at 2-3.) He was referred for a consult in neurosurgery and given work restrictions, though it was noted that he was already off work for non-industrial reasons. (*Ibid*.)

Also submitted was the report of Dr. Richard Levy who saw applicant as the AME in internal medicine for his November 29, 2007 injury. (Defendant's Exhibit J, report of Dr. Levy dated August 10, 2010.) His diagnoses included status post myocardial infarction, hypertension, and hypertensive heart disease. (*Id*. at 8-9.) Dr. Levy reported that his medical findings were consistent with the injuries claimed by the applicant. (*Id*. at 9.) He assigned impairment for coronary heart disease based on the AMA Guides, Tables 3-6a and 3-6b on page 36. (*Id*. at 11.)

Other Documentary Evidence

Applicant did not testify at trial, and his deposition transcript was submitted into evidence. (Defendant's Exhibit A, transcript of Applicant's Deposition dated August 16, 2019.) At his deposition, applicant testified, in relevant part, as follows. He last worked in January or February of 2019 for San Mateo County sheriff's office. (*Id*. at 12:3-6.) He was on administrative leave until September 1, but testified that even had he not been on leave, he would not have been able to perform his regular duty due to pain, inability to walk, and loss of strength. (*Id*. at 12:25-13:2; 13:18-25.)

Applicant testified that he had a pre-employment physical examination before he was hired by the County in 2013. (*Id*. at 39:24-40:3.) He wore a duty belt for his first 2 years of employment while on patrol, then transitioned to a load-bearing vest. (*Id*. at 47:10-15.) He last wore a duty belt, vest, or combination of the two on December 30, 2017. (*Id*. at 47:22-48:2.) It was his belief that he injured his neck and back as a result of continuous, constant stress over 20 years on the job. (*Id*. at 49:16-23.) He was first diagnosed with high blood pressure after his heart attack. (*Id*. at 50:5-8.) He first saw a doctor at Kaiser for his alleged industrial neck, back, and hypertension injuries on May 6, 2019. (Id. at 53:4-9.) He testified that he was seen in the emergency room after he almost passed out while driving due to pain in his neck, back, shoulder blade, and triceps. (*Id*. at 53:16-21.) He was seen by a surgeon, Dr. Carlisle, who told him he required cervical spine surgery or he might not be able to walk. (*Id*. at 59:2-6.)

Applicant testified that it had been years since he sought treatment under his 2007 case. (Defendant's Exhibit A, supra, at 61:2-6.) He continued to receive hypertension medication through Kaiser. (*Id*. at 62:19-21.)

Additionally, excerpts of Board records pertaining to applicant's 2007 case were submitted into evidence. (Defendant's Exhibit H, excerpts of WCAB records in ADJ7343546, pp. 31, 35 – 42.) The specified portions of the WCAB records included Stipulations with Request for Award between Blake Lycett and City of Daly City resolving the November 19, 2007 claim to the circulatory system (heart, cardiovascular, hypertension) for 30% PD. (*Id*. at 35 – 42.) The Award on Stipulations was signed by Judge David Hettick on December 22, 2010. (*Id*. at 31.)

Exhibit K consisted of an e-mail from Blake Lycett directed to bstrout@athensadmin.com and fsteele@smcgov.org. (Defendant's Exhibit K, e-mail from applicant to Athens and County of San Mateo dated July 27, 2019.) The email stated that it was intended to inform the recipients of an injury to the neck and upper back for which surgery would be needed. It further indicated that applicant's surgeon informed him he would become paralyzed if he did not proceed with two recommended surgeries. Per the email, the exact date of injury was not known, but applicant reported that he had been informed his injury occurred over time due to constant and consistent stress to the neck and spine area. The email detailed applicant's 21 years in law enforcement and concluded that given the urgency of the recommended surgery, he was seeking to accelerate the process. (*Ibid*.)

Applicable Law

Decisions by the Appeals Board 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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (appeals board *en banc*).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on

surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal. Comp. Cases 93, 97].)

It is well established that parties choose Agreed Medical Evaluators (AMEs) due to their expertise and neutrality, and that therefore the opinions of those AMEs should be followed unless there is good reason to find their opinions unpersuasive. (*Power v. Worker's Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775.) "All reasonable doubts as to whether an injury is compensable are to be resolved in favor of the employee. This is consistent with the mandate that the workers' compensation laws 'shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.'" (*Guerra v. Workers' Comp. Appeals Bd*. (2016) 81 Cal. Comp. Cases 324, 330-331. See also *Clemmens v. WCAB* (1968) 33 Cal. Comp. Cases 186; *California Comp. & Fire Co. v. Workmen's Comp. App. Bd*., 68 Cal.2d 157,161; Lab. Code §3202.)

Pursuant to Labor Code sections 3212 and 3212.5, where individuals, including members of a sheriff's office, engaged in active law enforcement service for at least 5 years, develop heart trouble that manifests itself during service or up to 60 months following termination of service, such heart trouble is presumed to arise out of and in the course of the employment. (Lab. Code §§ 3212; 3212.5.) The presumption is "disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it." (Lab. Code § 3212.5.)

Labor Code section 3213.2 establishes a presumption that low back impairment arises out of and in the course of the employment, where it develops or manifests itself in eligible members of law enforcement, who have been employed at least 5 years full time and required to wear a duty belt. (Lab. Code §3213.2.) This presumption is also extended for up to 60 months after the last date actually worked. (Lab. Code §3213.2(b).) This presumption is similarly disputable, but the appeals board is bound to find in accordance with it unless so controverted. (Lab. Code § 3213.2(b).) Where an applicant meets the requisite length of employment under section 3213.2, but only wore a duty belt for part of the employment, applicant is entitled to the presumption, "as he worked in a covered police position for more than the required 5 years and was required to wear a duty belt for part of that time." (*Myers v. City of Salinas* (2008) Cal. Wrk. Comp. P.D. LEXIS 13, *6.)

Labor Code section 5412 establishes that the date of a cumulative injury is "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Labor Code section 5500.5 limits liability for cumulative injury claims to the employer or employers during the year "immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first." (Lab. Code, § 5500.5(a).)

"[O]ne exposure may result in two distinct injuries …. The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received." (*Western Growers Insurance Co. v. WCAB (Austin)* (1993) 16 Cal. App. 4th 227, 234-235.) Factors to consider are whether there was continuous medical care, whether there were distinct periods of temporary disability, whether injurious exposure was similar throughout the employment, and whether the periods of disability resulted from separate specific events. (*Id*. at 237.)

In *Bass v. State of California* an applicant who had a 30-year career as a correctional officer alleged both orthopedic and cardiac injuries arising out of a single period of cumulative trauma. (*Bass v. State of California* (2017) 82 Cal. Comp. Cases 1034.) While conceding that there was a single period of injurious exposure, the defendant in that case asserted that there were 2 separate dates of injury under Labor Code section 5412. The WCJ's reasoning and conclusion, affirmed after reconsideration by the appeals board, was as follows: "Even if there were two different 5412 dates of injury, the liability statute L.C. 5500.5 would still find that liability would be determined based on the last date of injurious exposure rather than the 5412 date of injury as that was the earlier date against which to apply the liability under L.C. 5500.5." *(Bass v. State of California* (2017) 82 Cal. Comp. Cases 1034, 1038.) Therefore, it was concluded that there was one cumulative injury and that the award of the heart disability and the orthopedic disability should be combined in a single award. (*Ibid*.)

For a doctor's opinion on apportionment to constitute substantial medical evidence, the doctor must explain these findings and the causal relationship between the industrial injury and any non-industrial factors. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (appeals board *en banc*).) Apportionment under Labor Code section 4663 does not apply to injuries covered

under the presumptions of sections 3212.5 and 3213.2. (Lab. Code § 4663(e).) However, "[i]f the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury." (Lab. Code, § 4664(b).) It is the defendant's burden to prove overlap between current disability and previous disability as part of its overall burden of proving apportionment. (Kopping v. Workers' Compensation Appeals Bd. (2006) 71 Cal. Comp. Cases 1229, 1242.)

Analysis

I. Injury AOE/COE and Parts of Body Injured

In light of applicant's employment by the County of San Mateo in an active duty capacity from February 25, 2013 to September 30, 2018, a period which exceeds 5 years, I find that applicant has met the required length of service for both the heart presumption (Lab. Code § 3212.5) and the duty belt presumption for the lower back (Lab. Code § 3213.2).

I am unpersuaded by defendant's argument that applicant is not entitled to the presumptions because his symptoms did not manifest until after his last day of full duty work, while he was on administrative leave. Both sections 3212.5 and 3213.2 provide for extension of the presumption following termination of service by 3 months for each full year of service, for up to 60 months. (Lab. Code §§ 3212.5; 3213.2.) In this case, this would amount to an extension of 15 months, which would mean the presumptions apply here even if applicant's last date of full duty is counted as the date of "termination of service" as set forth in the statutes. However, as acknowledged by both sides, applicant was on full pay during his administrative leave, and his termination of service with the County of San Mateo was not until his retirement on September 1, 2019. Either way, the presumptions apply.

Similarly, defendant's assertion that applicant did not wear a duty belt during the entirety of his employment by the County does not negate the application of the presumption. The plain language of section 3213.2 requires that the employee satisfy a 5-year full-time employment requirement, but specifies no required length of time that a duty belt must be used during employment. The statute only requires that the employee "has been required to wear a duty belt as a condition of employment". (Lab. Code § 3213.2. See also *Myers v. City of Salinas* (2008) Cal. Wrk. Comp. P.D. LEXIS 13, *6.) Here, it was applicant's unrebutted deposition testimony that he wore a duty belt during at least part of his employment by the County. (Defendant's Exhibit A, transcript of Applicant's Deposition dated August 16, 2019, at 47:10-48:2.)

From a medical standpoint, injury AOE/COE is also supported based on the opinions of the parties' agreed medical evaluators. I find no basis to determine that the AMEs' reports herein contain errors or are based on facts that are no longer germane or inadequate medical history or examinations. (See *Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 36 Cal. Comp. Cases 93, 97. See *Power v. Worker's Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775.) Accordingly, I find that substantial and uncontroverted medical opinions have been provided by both AMEs herein that applicant sustained injuries to the neck, low back, and circulatory system (hypertensive cardiovascular disease and coronary artery disease) as a result of a cumulative trauma through his last day of work for the County of San Mateo. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 6; Defendant's Exhibit C, report of Dr. Pang dated March 9, 2021, p. 1; Defendant's Exhibit D, report of Dr. Noriega dated December 27, 2019, p. 14; Defendant's Exhibit F, report of Dr. Noriega dated December 21, 2020, p. 3.)

Therefore, having carefully reviewed the evidence and the applicable law, I find that applicant has proved by both substantial medical evidence and based on statutory presumptions that he sustained injury arising out of and in the course of his employment by the County of San Mateo to the neck, low back, and circulatory system (hypertensive cardiovascular disease and coronary artery disease).

II. Whether there are Separate Cumulative Trauma Injuries

By all accounts, the instant case involved a single period of full time employment by the County of San Mateo, with physical duties ending on September 30, 2018, followed by administrative leave until employment ended on September 1, 2019. The medical opinions of both AMEs that applicant sustained injuries based on cumulative injurious exposure through his last day of work for the County of San Mateo are consistent with this timeline. (Defendant's Exhibit C, report of Dr. Pang dated March 9, 2021, p. 1; Defendant's Exhibit G, report of Dr. Noriega dated May 30, 2021, p. 2.)

Defendant urges that 2 separate injuries be found based on applicant's dates of disability and knowledge of the orthopedic and internal injuries, per Labor Code section 5412. The first indication of knowledge seems to be the application for adjudication filed on June 4, 2019 alleging circulatory system injuries and the amended application on July 17, 2019, alleging injuries to the circulatory system, neck, and low back. Notwithstanding applicant's deposition testimony that he could not have continued to work even had he not been placed on administrative leave, there was

no evidence of orthopedic disability until applicant was seen at Kaiser on July 31, 2019, at which time he was given work restrictions. (Defendant's Exhibit A, transcript of Applicant's Deposition dated August 16, 2019, at 12:25-13:2; 13:18-25; Defendant's Exhibit I, Kaiser Occupational Health report dated July 31, 2019, p. 1.) For the internal injuries, Dr. Noriega has reported that there was no lost time and that applicant was not precluded from his usual and customary work. (Defendant's Exhibit E, report of Dr. Noriega dated March 24, 2020, p. 12.)

Therefore, based on the evidence submitted, knowledge and disability are first established between June and July 2019. Since this timeframe falls after the last date of injurious exposure, pursuant to Labor Code section 5500.5(a), the date of injury herein is based on the last day worked –September 30, 2018. Since applicant sustained his injuries during the same period of exposure, no distinction regarding his job duties has been argued, and there were no periods of treatment or disability during the injurious exposure, I find no basis to conclude that applicant sustained two separate cumulative trauma injuries. (See *Western Growers Insurance Co. v. WCAB* (Austin) (1993) 16 Cal. App. 4th 227, 237. See also *Bass v. State of California* (2017) 82 Cal. Comp. Cases 1034, 1038.)

For the foregoing reasons, having carefully reviewed the evidence and the applicable law, I find that applicant sustained a single cumulative trauma injury to the neck, low back, and circulatory system (hypertensive cardiovascular disease and coronary artery disease) during the period ending on September 30, 2018, and that applicant is entitled to a single award as a result.

III. *Permanent Disability and Apportionment*

Having determined that the AME reports of Dr. Pang and Dr. Noriega are substantial evidence and are to be followed herein, I find that applicant's impairment should be rated based on their opinions. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 5; Defendant's Exhibit E, report of Dr. Noriega dated March 24, 2020, p. 9-10.)

Having determined that the Labor Code section 3212.5 and 3213.2 presumptions for heart injuries and low back injuries are applicable here, apportionment under Labor Code section 4663 is not permissible for those body parts. (Lab. Code, § 4663(e).) I must therefore disregard any apportionment of disability for the heart and low back by Dr. Noriega and Dr. Pang on this basis.

However, Labor Code 4663 apportionment for the cervical spine is permissible. I find that Dr. Pang's discussion of apportionment for the cervical spine is well reasoned and supported by the medical record. (See *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (appeals

board *en banc*).) Therefore, based on the opinion of Dr. Pang, I find that there is 15% apportionment of disability for the cervical spine. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 6.)

The parties agree that apportionment under Labor Code section 4664(b) is applicable for the cardiac injury, but disagree as to whether it also applies to the hypertension. Applicant's settlement by stipulations and award of his 2007 claim at 30% PD, expressly stated that applicant sustained injury as follows: "heart attack, heart, cardiovascular, hypertension." (Defendant's Exhibit H, excerpts of WCAB records in ADJ7343546, at 39.) On the other hand, Dr. Levy assigned impairment for coronary heart disease with no reference to hypertension impairment based on the AMA Guides, Tables 3-6a and 3-6b on page 36. (Defendant's Exhibit J, report of Dr. Levy dated August 10, 2010, at 11.)

Since the 2010 settlement did not set forth impairment ratings nor state that it was based (solely or otherwise) on the opinion of Dr. Levy, but it did expressly include heart, cardiovascular, and hypertension, I find that defendant has established overlap with respect to the HCVD and CAD and that apportionment under Labor Code section 4664(b) applies to both. (See *Kopping v. Workers' Compensation Appeals Bd*. (2006) 71 Cal. Comp. Cases 1229, 1242.) This is consistent with Dr. Noriega's opinion that applicant's hypertension and CAD predated his employment by the County of San Mateo. (Defendant's Exhibit D, report of Dr. Noriega dated December 27, 2019, p. 14.)

As such, applicant's cervical and lumbar spine injuries are rated as follows, after apportionment:

Cervical spine: 85% (15.01.01.00 - 28 - [1.4] 39 - 490I - 48 - 50%) 43%

Lumbar spine: 15.03.01.00 - 7 - [1.4] 10 - 490I - 15 - 16%

43% C 16% = **52% PD**

Applicant's hypertensive cardiovascular disease ("HCVD") and coronary artery disease ("CAD") are rated as follows, after apportionment:

HCVD: 04.01.00.00 - 36 - [1.4] 50 - 490I - 59 - 61%

CAD: 03.02.00.00 - 24 - [1.4] 34 - 490I - 43 – 45%

61% C 45% = 79%

79% - 30% = **49% PD**

Based on my finding herein that there is a single period of industrial cumulative trauma, for which applicant is entitled to a single award, the combined impairment for applicant's neck, low back, HCVD and CAD is as follows:

52% C 49% = **76% PD**

Therefore, after having carefully considered all the evidence and the applicable law, I conclude that applicant is entitled to a permanent disability rating of 76% after adjustment for age, occupation and diminished future earning capacity, and after apportionment, payable at the rate of $290.00 per week beginning December 10, 2019 until 529.25 weeks of payments have been made and thereafter a life pension payable at the rate of $123.69 per week, less credit to defendant for all sums heretofore paid on account thereof, and less amounts awarded herein as attorneys' fees.

IV. *Need for medical treatment*

Based on the opinions of Dr. Pang and Dr. Noriega, I find that applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury to the neck, low back, hypertensive cardiovascular disease, and coronary artery disease, and will award same accordingly. (Defendant's Exhibit B, report of Dr. Pang dated July 29, 2020, p. 6; Defendant's Exhibit E, report of Dr. Noriega dated March 24, 2020, p. 11.)

V. *Attorneys' Fee*

Applicant's attorneys, Rains, Lucia, Stern, PC, have provided competent and effective legal services for their client, and are entitled to an attorney's fee of 15% of the permanent partial disability awarded herein to be adjusted by the parties, with jurisdiction reserved.

DATE: June 6, 2022

Farai Alves
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE