WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SEAN PRATT, ***Applicant***

vs.

KERN COUNTY SHERIFFS OFFICE;
COUNTY OF KERN, ***Defendants***

Adjudication Numbers: ADJ10573852; ADJ10937269
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

On February 23, 2023, the Workers' Compensation Administrative Law Judge (WCJ) issued a Ruling Admitting Evidence, Finding of Fact, Award and Opinion on Decision (F&A).

On March 3, 2023, applicant filed a Petition for Amendment of the F&A.

On March 14, 2023, the WCJ issued Notice of Intention to Amend Ruling Admitting Evidence, Findings of Fact, Award and Opinion on Decision (NIT).

Defendant now seeks reconsideration of the February 23, 2023 F&A by petition dated March 20, 2023. Defendant contends that the F&A impermissibly merges multiple injuries, and that the record does not support the percentages of permanent disability awarded by the WCJ.

We have received an Answer from Applicant. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report), recommending we grant the Petition and issue an Amended Findings and Award as proposed in the WCJ's NIT.

We have considered the allegations of the Petition, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant defendant's Petition for Reconsideration (Petition), we will deem the WCJ's March 14, 2023 NIT to be a rescission of the February 23, 2023 F&A, exercise our authority under Labor Code section 5907, and issue new Findings of Fact and Award as recommended by the WCJ.

BACKGROUND

Applicant has two pending Applications for Adjudication. In Case No. ADJ10573852, applicant alleges injury to the neck, back and left hip while employed as a Deputy Sheriff by defendant County of Kern on June 7, 2016. Defendant admits injury to the claimed body parts.

In Case No. ADJ10937269, applicant alleges injury to the bilateral upper extremities, and in the form of hearing loss, tinnitus, and hypertension, while employed a Deputy Sheriff by defendant County of Kern from May 8, 1990 through March 28, 2017. Defendant admits injury to the bilateral upper extremities, but contests injury in the form of hearing loss, tinnitus, and hypertension as arising out of the same cumulative trauma injury.

The parties are subject to an Alternate Dispute Resolution process which utilizes Independent Medical Examiners (IMEs) in lieu of Qualified or Agreed Medical Evaluators. The parties have selected IMEs Bruce Fishman, M.D., in orthopedic medicine, Edward O'Neill, M.D. in internal medicine, and Andrew Berman, M.D. in otolaryngology. Linh Ngo, M.D. has acted as applicant's primary treating physician.

On February 2, 2021, the parties proceeded to trial. In Case No. ADJ10573852, the parties placed in issue permanent disability, apportionment and attorney fees. (Minutes of Hearing and Summary of Evidence and Order of Consolidation and Order to File Exhibits (Minutes), dated February 2, 2021, at 3:24.) In Case No. ADJ10937269, the parties placed in issue parts of body injured (hearing loss, hypertension and tinnitus), permanent disability, apportionment and attorney fees. (*Id*. at 5:5.)

On April 16, 2021, the WCJ rescinded the order submitting the matter for decision, to allow for clarification of the benefits paid to applicant. (Order Rescinding Submission, dated April 16, 2021, at p. 2.)

On November 29, 2022, the parties moved additional evidence into the record, and submitted both cases for decision.

On February 23, 2023, the WCJ issued her F&A, finding in relevant part that with respect Case No. ADJ10573852, the specific injury of June 7, 2016, applicant had sustained 40% permanent disability. The WCJ further determined that with respect to Case No. ADJ10937269, the cumulative trauma ending March 28, 2017, applicant had sustained injury to the bilateral upper extremities, and in the form of bilateral hearing loss, hypertension and tinnitus. The WCJ awarded 76% permanent disability, which was based on the addition of the bilateral orthopedic disabilities,

followed by the combination of the orthopedic disability with that of the hearing loss, tinnitus and hypertension. The WCJ's Opinion on Decision explained that while "generally impairments are combined rather than added together…when there is a synergistic effect between extremities, those ratings may be added together rather than combined." (F&A, Opinion on Decision, at p. 8.) The WCJ relied on the reporting of IME Dr. Fishman to support adding the orthopedic disability prior to combining it with non-orthopedic disabilities. (*Ibid.*)

On March 3, 2023, applicant filed a Petition for Amendment of Finding and Award due to Mistake/Error (Petition for Amendment) with respect to Case No. ADJ10937269, requesting changes to the WCJ's attorney fee commutation order, and correction of clerical error in the initial rate of the life pension, the commencement date of cost of living adjustments (COLA), and the attorney fee calculations. (Petition for Amendment, dated March 3, 2023, at 3:41.)

On March 14, 2023, the WCJ issued her Notice of Intention to amend the F&A, noting applicant's March 3, 2023 request constituted good cause therefor. (NIT, dated March 14, 2023, at p. 3.) The NIT indicated an Amended F&A would issue unless good cause to the contrary was filed and served within ten days.

On March 20, 2023, defendant filed its Petition, contending the F&A impermissibly merged applicant's injury to the bilateral upper extremities with applicant's separate injuries in the form of bilateral hearing loss/tinnitus, and hypertension.[1] (Petition, at 5:1.) Defendant further asserts the WCJ erred in finding that the Permanent Disability Rating Schedule was rebutted, and adding rather than combining certain impairments, resulting in the award of 76% permanent disability. (*Id*. at 8:1.)

On March 27, 2023, applicant filed his Answer, averring that the WCJ appropriately determined there to be a single cumulative trauma, and that the addition of the orthopedic ratings, as endorsed by IME Dr. Fishman, was appropriate and supported in the evidentiary record.[2] (*Id*. at 6:136.)

The WCJ's Report observes that the medical evidence supports the existence of but one cumulative trauma. (Report, at p. 4.) The WCJ observes that internal medicine IME Dr. O'Neill attributes applicant's hypertension to long-term usage of NSAID medications and to occupational

[1] The Petition does not raise specific objection to the WCJ's March 14, 2023 NIT.
[2] The Answer acknowledges the pending March 14, 2023 NIT, and confirms that "the changes in the Amended Ruling of March 14, 2023 address the issues raised in [applicant's] March 3, 2023 Petition, and no additional changes are required to amend the ruling." (Answer, at 3:47.)

stress. Similarly, otolaryngologist IME Dr. Berman attributes applicant's permanent disability to work exposures over the length of his career. (*Id*. at p. 5.) The Report also observes that the medical record appropriately supports the addition of applicant's orthopedic disabilities, prior to combination with the non-orthopedic disabilities. (*Id*. at p. 7.) The WCJ recommends we grant defendant's Petition to issue an Amended Findings and Awards as requested in applicant's March 3, 2023 Petition for Amendment.

DISCUSSION

We first address the procedural posture of this matter. Following the issuance of the February 23, 2023 F&A, applicant filed a Petition requesting several amendments to the decision based on clerical error. (Petition for Amendment, dated March 3, 2023.) WCAB Rule 10961 provides that within 15 days of a timely filing of a petition for reconsideration, a WCJ may (a) prepare a Report in accordance with WCAB Rule 10962, (b) rescind the entire order, decision or award and initiate further proceedings within 30 days, or (c) rescind the order, decision or award and issue an amended order, decision or award. (Cal. Code Regs., tit. 8, §10961.)

Here, following a review of applicant's March 3, 2023 Petition for Amendment, the WCJ opted to provide the parties with notice of her intention to amend the F&A as requested. (NIT, dated March 14, 2023, at p. 3.) Pursuant to Rule 10961(c), a WCJ may amend an award within fifteen days of a petition for reconsideration, but the WCJ must also *rescind* the underlying order, decision or award. Accordingly, we will treat the WCJ's March 14, 2023 NIT as a rescission of the February 23, 2023 F&A. Additionally, insofar as defendant's Petition objects to the nature and number of injuries identified, and the corresponding percentages of permanent disability awarded, we will treat defendant's March 20, 2023 Petition as an objection to the WCJ's NIT to issue an amended F&A.[3]

Defendant's Petition avers the award of disability in ADJ10937269 (cumulative trauma through March 28, 2017) improperly merged applicant's injuries to the bilateral upper extremities, hearing loss/tinnitus, and hypertension. (Petition, at 5:1.) Defendant contends there is no evidence that applicant sustained injury as of the end date of the claimed cumulative trauma on March 28, 2017, but that there is evidence that applicant sustained injury as of October 25, 2017, when

[3] Defendant's Petition does not contest the WCJ's Findings of Fact and Award with reference to Case No. ADJ10573852 (June 7, 2016 specific injury).

applicant filed a DWC-1 claim form. Defendant notes that it assigned a separate claim number to the hypertension claim, paid benefits on that claim number, and that the reporting of primary treating physician Dr. Ngo addressed the hypertension issue in reports referencing a date of injury of October 25, 2017. (Petition, at 5:5.) Defendant further asserts that internal medicine IME Dr. O'Neill fails to identify a date of injury, and that applicant's hypertensive condition was not diagnosed until October, 2017. (*Id*. at 5:17.)

Regarding applicant's claimed hearing loss/tinnitus, defendant concedes that the DWC-1 claim form for alleged hearing loss was filed at the same time as the claim for upper extremity injury, "albeit with separate DWC-1 claim forms." (Petition, at 6:10.) Citing to *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (2003) 16 Cal.App.4th 227, 234 [20 Cal. Rptr. 2d 26, 31; 58 Cal. Comp. Cases 323], defendant observes that "one exposure may result in two distinct injuries, posing another question of fact." (Petition, at 13.) The Petition observes that with respect to applicant's claim for hearing loss/tinnitus, applicant filed a separate claim form, that defendant assigned a claim number, that treating physicians reflect treatment for "hearing loss exclusively," and that defendant paid separate indemnity in connection with the claim. (Petition, at pp. 6-7.)

Defendant also contends that the F&A does not comply with Labor Code section 3208.2, which requires the WCJ to separately determine all questions of fact and law with respect to each claimed injury.[4] Accordingly, the "WCALJ's merger of three separate and distinct injuries should be reversed and vacated." (Lab. Code, § 3208.2.)

It has long been the law that separate disabilities arising out of a single injury are rated together, even if those disabilities do not become permanent and stationary at the same time. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] [chef suffered specific back injury but, as a result of blood transfusions given during later back surgery, contracted hepatitis; employee's spinal disability and liver disability were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [149 Cal. Rptr. 736, 43 Cal.Comp.Cases 1116] *(Morgan)* [police officer suffered a cumulative injury causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d

[4] All further statutory references are to the Labor Code unless otherwise stated.

720 [127 Cal. Rptr. 688, 41 Cal.Comp.Cases 81] [employee's chest and left knee injuries rated together].)

Accordingly, the relevant question before us is whether applicant has sustained one or more cumulative injuries. The general rule is that where an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury. For example, in *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618 [169 Cal. Rptr. 33, 45 Cal.Comp.Cases 1098] *(Norton)*, a deputy sheriff suffered trauma to his back from July 22, 1968 through November 9, 1977 and trauma to his esophagus and stomach from 1974 to November 1977. The Court of Appeal found a single cumulative injury, stating among other things: "we conclude that the cumulative back injury and cumulative esophagus and stomach injury cannot be said to be truly successive injuries, they must be treated as contemporaneous and therefore rated as multiple factors of disability from one injury." (*Norton, supra,* 111 Cal.App.3d at p. 629.) Similarly, in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Hurley)* (1977) 70 Cal.App.3d 599 [139 Cal. Rptr. 41, 42 Cal.Comp.Cases 481] *(Hurley),* a welder employed from April 30, 1959 to January 5, 1973 suffered trauma to his eyes due to the heat and flashes of the welding torches, to his ears due to the noises of the shop, and to his lungs due to exposure to dust and fumes he inhaled. The Court of Appeal found a single cumulative injury, stating among other things: "From all of the foregoing we conclude that Hurley suffered repetitive physically traumatic experiences extending throughout his employment … the combined effect of which resulted in bodily injury, and permanent disability. (See Lab. Code, § 3208.1.)." (*Hurley, supra,* 70 Cal.App.3d at pp. 606.) The Court further held that the disabilities had to be rated together because the various traumas the employee had suffered were not "separate and independent," but "instead suffered contemporaneously." (*Hurley, supra,* 70 Cal.App.3d at pp. 605; *cf. Morgan, supra,* 85 Cal.App.3d 710 [police officer employed from November 1, 1946 through April 30, 1974 suffered trauma causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award].)

Section 3208.1 defines a "cumulative" injury as one that "occur[s] as [the result of] repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412."

In turn, section 5412 states; "The date of injury in cases of … cumulative injuries 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." Therefore, in cumulative injury cases, there is no "date of injury" until there is a concurrence of both disability and knowledge. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1110 [252 Cal. Rptr. 868, 53 Cal.Comp.Cases 502].) As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1002–1004, 1005–1006 [14 Cal. Rptr. 3d 793, 69 Cal.Comp.Cases 579]; *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473–474 [286 Cal. Rptr. 600, 56 Cal.Comp.Cases 631].)

Section 3208.2 provides:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

Section 5303 provides, in pertinent part:

> There is but one cause of action for each injury coming within the provisions of this division. … [N]o injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

The issue of how many cumulative injuries an employee sustained is a question of fact for the WCAB. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234–235 [20 Cal. Rptr. 2d 26, 58 Cal.Comp.Cases 323] *(Austin); Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329, 341 [110 Cal. Rptr. 780, 38 Cal.Comp.Cases 720] *(Coltharp)*.)

In *Coltharp,* applicant's initial work duties, which he described as "heavy labor," caused cumulative trauma resulting in disability and a need for medical treatment, including back surgery. After the applicant returned to work, he was assigned "lighter work" but he still had to do some lifting as well as crawling through pipe. He said of his post-return work duties, "regardless of

everything I did, it was aggravating on my back." A physician stated that applicant's post-return cumulative work activities were "the immediate precipitating factor that necessitated" another back surgery. Based on these facts, the *Coltharp* court found that the applicant had sustained two separate cumulative injuries, i.e., one before and one after the initial period of disability and need for treatment, and that to conclude otherwise would violate the anti-merger provisions of sections 3208.2 and 5303.

In *Austin,* applicant's increasing work responsibilities precipitated a major depression, resulting in temporary disability and a need for treatment, including psychiatric hospitalization. After receiving psychiatric treatment and being off work for a period of time, the applicant returned to work. However, when the applicant returned to work, he had not fully recovered from his depressive episode, he remained under a doctor's care and on medication, and he became progressively worse. It was the same stress that resulted in the initial hospitalization that further exacerbated applicant's problem after he returned to work. Based on these facts, the *Austin* court concluded the applicant had only one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not "distinct."

When the holdings of *Austin* and *Coltharp* are harmonized and read in conjunction with the section 3208.1 definition of "cumulative injury" and the anti-merger provisions of sections 3208.2 and 5303, the following principles are revealed: (1) if, after returning to work from a period of industrially-caused disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma—i.e., if the employee's occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment—then there are two separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code, §§ 3208.1, 3208.2, 5303; *Coltharp, supra,* 35 Cal.App.3d at p. 342); and (2) if, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are not injurious—i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an exacerbation of the original injury—then there is only a single cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Austin, supra*, 16 Cal.App.4th at p. 235.)

Here, however, defendant's petition for reconsideration fails to cite to evidence in the record establishing that, during the May 8, 1990 through March 28, 2017 period of cumulative injury found by the WCJ, applicant's employment caused compensable temporary or permanent disability, after which he returned to work (or continued to work) thereby causing new and additional temporary or permanent disability. Rather, applicant continued to work without restrictions per PTP Dr. Ngo throughout much of 2017, until finally going off work on or about September 11, 2017 following the first of his carpal tunnel surgeries. (Ex. 1, report of IME Bruce Fishman, M.D., dated November 12, 2019, at p. 35.) Applicant did not return to work thereafter.

Additionally, defendant has not offered a competing theory of a separate injurious exposure, nor have the reviewing IMEs in this matter endorsed multiple discrete cumulative trauma injuries. To the contrary, internal medicine IME Dr. O'Neill makes clear in his November 21, 2019 report that applicant sustained no periods of temporary disability as a result of his hypertension, and that applicant's condition was caused by his long-term use of NSAID medications for orthopedic pain and applicant's "potentially stressful duties as a police officer." (Ex. 5, report of IME Edward O'Neill, M.D., dated November 21, 2019, at p. 5.) Similarly, otolaryngologist Dr. Berman identifies no periods of temporary disability in his November 15, 2017 report, and attributes applicant's hearing loss and tinnitus to "the cumulative noise trauma he incurred while working in a noisy environment for the Kern County Sheriff's Department." (Ex. 4, report of IME Andrew Berman, M.D., dated November 15, 2017, at p. 9.)

We acknowledge that defendant assigned separate claim numbers to both the hypertension and hearing loss claims, and that defendant paid benefits in each claim based on the claim numbers it assigned. However, this appears to be evidence of claims management and handling procedures, rather than medical evidence in support of a separate period of injurious exposure. The WCJ's Report observes:

> The bodily systems were not from three separate people or divided by distinct facts that related to one to the exclusion of the others. The filing of separate claim forms does not restrict an applicant to the information contained therein. If that were true, Defendant would be required to accept as stated all the body parts listed in a claim form and there would be no cause for discovery. Rather, the claim form serves as a trigger to the parties. It puts defendant on notice to begin discovery with the opportunity to deny within 90 days. Should defendant accept the claim and later decide to deny it, the basis/bases for denial must be evidence that could not have been obtained within those 90 days. Further, if indemnity is not timely paid, defendant must pay the automatic penalty pursuant

> to Labor Code section 4650(d). The claim form does not define the injury, it merely serves as notice for the parties to find out, to discover, what the injury is, if anything. Therefore, when a defendant gives an allegedly injured worker a claim form, the information may evolve, and usually does. In this case, the one cumulative trauma injury has been found to be dated from May 8, 1990 through March 28, 2017. There were not three distinct injuries that were merged in violation of the anti-merger rule. (Report, at p. 6.)

We are thus persuaded that the medical evidence supports the existence of but one cumulative trauma period. Additionally, defendant has not established that during the May 8, 1990 through March 28, 2017 cumulative trauma period applicant's employment caused compensable temporary or permanent disability, after which he returned to work (or continued to work) thereby causing new and additional temporary or permanent disability. Accordingly, we agree with the WCJ's determination that applicant sustained one cumulative trauma injury to the bilateral upper extremities, and in the form of hypertension and hearing loss/tinnitus.

Defendant also contends that the WCJ erred in adding the bilateral orthopedic disability as recommended by IME Dr. Fishman, prior to combing the orthopedic disability with non-orthopedic disability. Defendant contends that the WCJ's reliance on the opinion of Dr. Fishman was erroneous, because the opinion of Dr. Fishman is not substantial evidence. Defendant avers Dr. Fishman "produced no documentation of an actual synergistic effect causing increased disability for Applicant Pratt, and simply spoke in general terms that any individual who suffers injury to both extremities will experience a synergistic effect and should have their impairment added as opposed to combined." (Petition, at 8:15.)

Following the enactment of section 4660.1, ratings for permanent disability have continued to issue pursuant to the 2005 PDRS with the replacement of the future earnings capacity (FEC) factor by the fixed 1.4 adjustment factor.[5] The PDRS provides that the ratings for multiple body parts are generally combined using the Combined Values Chart (CVC), which is appended to the PDRS.[6]

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[5] Section 4660.1 provides that the administrative director may "formulate a schedule of age and occupational modifiers and may amend the schedule for the determination of the age and occupational modifiers," but also provides that "[u]ntil the schedule of age and occupational modifiers is amended, for injuries occurring on or after January 1, 2013, permanent disabilities shall be rated using the age and occupational modifiers in the permanent disability rating schedule adopted as of January 1, 2005." (Lab. Code, § 4660.1(d).)

[6] Neither party challenges the application of the 2005 PDRS, modified by the 1.4 adjustment factor as the proper method of calculating permanent disability in this post 1/1/2013 case. As such we need not address whether the use of the 2005 PDRS is proper.

However, an evaluating physician may determine that the injured employee's WPI or permanent disability is more accurately measured by adding rather than combining WPI or permanent disability ratings under the CVC. (*Los Angeles County Metro. Transp. Authority v. Workers' Comp. Appeals Bd. (La Count)* (2015) 80 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47] (*La Count*); *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34] (writ denied) (*Kite*).)

In *Kite*, applicant underwent industrial bilateral hip replacement surgeries, and the evaluating orthopedic QME opined that "there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body," and that "the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (*Kite*, *supra,* 78 Cal.Comp.Cases 213, 214.) And while the QME in *Kite* used the term "synergistic," the term is not an indispensable factor to adding rather than combining disabilities. Rather, the most salient metric is whether substantial medical evidence supports the physician's opinion that adding the disabilities will result in a more accurate rating of applicant's level of disability than the rating resulting from the use of the CVC. (*De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567, 571 [2017 Cal. Wrk. Comp. P.D. LEXIS 533].)

Here, defendant contends that "[t]he evidence is lacking of any type of synergistic effect or disproportionate permanent disability specific to Applicant Pratt and his upper extremities. Instead, we just have Dr. Fishman making blanket, generalized statements about injury to both upper extremities as compared to just one extremity, without reference to Applicant Pratt himself." (Petition, at 9:9.)

However, we observe that Dr. Fishman's opinions made specific reference to applicant's symptoms and resulting impairment. In his Pain Assessment discussion of the report of November 12, 2019, Dr. Fishman opined that:

> Officer Pratt is noted to have deficiencies in his activities of daily living, as a direct result of his bilateral wrist / hand injury, and residual symptomatology. Utilizing table 1-2 (page 4 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition), activities of daily living, and instrumental activities of daily living, there are eight specific, and individual activity categories. Officer Pratt's bilateral wrist / hand symptoms affect five of the eight categories of instrumental activities of daily living.

> Officer Pratt has interference with self-care and personal hygiene, in that he has difficulty brushing his teeth and dressing. He has difficulty with non-specialized hand activities, specifically grasping, lifting, and tactile discrimination. The patient also has difficulty with traveling, in that prolonged driving gives him bilateral wrist / hand discomfort. He has interference with his tactile feeling, specifically tactile discrimination. Officer Pratt also has interference with his sleep activities. His bilateral wrist / hand pain symptoms do interfere with restful nocturnal sleep patterns. (Ex. 1, report of IME Bruce Fishman, M.D., dated November 12, 2019, at p. 71.)

Based on these findings of severe compromise of activities of daily living, Dr. Fishman concluded:

> It is noteworthy that Officer Pratt exhibits involvement with respect to his bilateral wrists / hands, which has resulted in significant curtailment in his ADLs, based on the symmetrical bilaterality of the injuries sustained, functional deficits incurred, and the inability for one upper extremity to synergistically compensate for the other.
>
> Based on *Kite versus E.B.M.U.D.*, it is this examiner's opinion that the addition of the bilateral upper extremity regional impairments represents a more accurate calculation of this worker's level of disability. (Ex. 2, report of IME Bruce Fishman, M.D., dated November 12, 2019, at p. 70.)

Additionally, Dr. Fishman's testified at his June 22, 2020 deposition:

> Q. And it's your understanding that *Kite* is an offshoot of a *Guzman* analysis. It's an opportunity if a physician finds a disability to be more accurate by adding as opposed to combining, they can so ascribe; correct?
>
> A. Correct. I don't think -- I think they can be used separately for different reasons. But, in this particular case, I felt that the analysis with the grip strength loss, the way we've described, was sufficient in description. So I didn't need to talk about *Almaraz/Guzman* although I could have. And either way, the fact that both extremities are involved, it's very clear that adding them based to the *Kite* case, it's allowed as long as there is bilaterality that allows significant curtailment of the function due to the applicant losing one. Normally one makes up for the other, but you can't do that here with both involved.
>
> Q. And it's your conclusion that to accurately rate the upper extremity, once we rate out the impairment and get to the final disability numbers, that's when the addition would occur; correct?
>
> A. Correct.

Dr. Fishman further explicated his analysis in his June 13, 2022 deposition, explaining in detail how the removal of several bones in applicant's left wrist and hand resulted in significant loss of function. (Ex. X1, Transcript of the Deposition of IME Bruce Fishman, M.D., dated June 13, 2022, at 13:21.) Dr. Fishman then discussed the overarching impact of applicant' bilateral wrist and hand injures:

> Okay, so now we have loss of motion. We have loss of strength. The dexterity is a little fishy, but primarily because the combination of the strength, the affect that the wrist has some silence, combined with the fact we have a medial nerve that's no longer working, which affects some of the dexterity. So we have lost part of the nerve, part of the wrist, part of the carpel tunnel, part of the distal radius. This has allowed a significant functional deficit for this patient, Mr. Pratt, with regard to his left upper extremity. Now, lucky for him, on the right side we only have a neurologic deficit, but because of the extreme loss of ability or the extreme disability from essentially having had the wrist taken out combined with the nerve trouble, your contra lateral is your opposite extremity, has to be able to make up for those deficits. In the case of this patient, he has a carpel tunnel which although now is a severe disability on the left, has to make up for that deficiency. If he's going to lift -- you lift with two hands. I lift with two hands. Guess what hand is going to take the brunt of the lift? The opposite right hand, which already has a nerve injury. Personally I anticipate if he does too much, as you put forward, I'm waiting for this guy to come back with a new and future disability for this right side, because he's going to over-use it, because the left side cannot keep up with the demands that you've just told me he's doing up north, whatever he's doing, and so I anticipate a greater problem in the future, if he's doing that. He's going to require a significant use of the right upper extremity to make up for a significantly deficient left. As a result -- that's why I mentioned that I thought the judge's words that inability of one extremity to compensate with the opposite similarly injured extremity, is what is providing the impetus. We have two injured extremities. One much more severe than the other, requiring a much more significant compensation with the right because of the left problem, and that is the reason this is the perfect case set up for Mr. Pratt to have an accurate impairment and disability rating by adding, as opposed to combining his specific extremity abnormalities, injuries and pathology. (Ex. X1, Transcript of the Deposition of IME Bruce Fishman, M.D., dated June 13, 2022, at 15:3.)

Dr. Fishman's testimony describes in detail how the bilateral compromise of applicant's upper extremity-related activities of daily living have resulted in greater disability than either side individually. The analysis addresses applicant's surgical history and resulting symptoms with particularity, and the analysis finds support in the admitted medical record. We are thus persuaded that Dr. Fishman's analysis is appropriately based on applicant's presenting symptomatology, and

provides an individualized assessment of the most accurate measure of applicant's permanent disability. (*De La Cerda v. Martin Selko & Co., supra,* 83 Cal.Comp.Cases 567, 571.)

Accordingly, we concur with the WCJ's reliance on the opinions of IME Dr. Fishman, and that the evidentiary record supports adding applicant's the bilateral wrist/hand impairment prior to combining that impairment with applicant's non-orthopedic disabilities.

In summary, we note that there is no dispute with respect to the WCJ's determination of permanent disability as it relates to Case No. ADJ10573852 (specific injury of June 7, 2016). With respect to Case No. ADJ10937269, we agree with the WCJ that the evidentiary record describes but one period of injurious exposure, and that defendant has not established that applicant sustained separate injuries in the form of hearing loss or hypertension. Finally, we find the analysis offered by IME Dr. Fishman to be individualized and specific to applicant, and that it appropriately relied on the admitted medical evidence to conclude that the most accurate rating of applicant's disability involves the addition of his bilateral wrist and hand disabilities.

The WCJ recommends we issue an Amended Decision essentially conforming to the proposed Findings of Fact and Award in the March 14, 2023 NIT. However, as was discussed above, WCAB Rule 10961(c) requires that any amendment to an order, decision or award be accompanied by a rescission of the underlying order, decision or award. Accordingly, we will treat the March 14, 2023 NIT as a rescission of the February 23, 2023 F&A. Because the WCJ has rescinded the February 23, 2023 F&A, we may no longer amend the decision.

However, section 5907 provides:

> If, at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking further testimony, the appeals board may affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case.

Additionally, "it is settled law that a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [218 P. 1009] [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [270 P.2d 55] [19 Cal.Comp.Cases 98].)

Accordingly, and based on our review of the entire record, including the Petition, the Answer, and the WCJ's Report, we will exercise our authority under section 5907 to enter Findings of Fact and Award as recommended by the WCJ in the March 14, 2023 NIT. (*George, supra,* 125 Cal.App.2d 201, 203.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of February 23, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board that the following Findings of Fact and Award are entered pursuant to Labor Code section 5907:

FINDINGS OF FACT

ADJ10573852 (MF) – June 7, 2016 Date of Injury

1. The following stipulations of the parties found in the Minutes of Hearing and Summary of Evidence dated February 2, 2021, p. 2, lines 36-45 and p. 3, lines 1-9 and found in the Minutes of Hearing dated October 19, 2021, p. 2, lines 7-17 and lines 23-26 are herein adopted as Findings of Fact:
    a. Sean Pratt (Applicant Pratt), age 45 at the time of his injury on June 7, 2016, while employed as a Deputy Sheriff, Occupational Group Number 490, at Bakersfield, California by the County of Kern, sustained injury arising out of and in the course of employment to his neck, back, and left hip.
    b. On June 7, 2016, Defendant County of Kern was permissibly self-insured for workers' compensation purposes.
    c. On June 7, 2016, Applicant Pratt's earnings were $1,979.33 per week, warranting indemnity rates of $1,319.55 for temporary disability and $290.00 for permanent disability.
    d. Defendant County of Kern paid Labor Code section 4850 benefits to Applicant Pratt at $1,979.33 per week for the period of June 26, 2018 through June 26, 2019.
    e. Defendant County of Kern paid permanent disability indemnity to Applicant Pratt at $290.00 per week for the period of June 26, 2019 to November 10, 2020.

2. Applicant Pratt was permanent and stationary from the effects of the industrial injury on November 19, 2019.
3. Applicant Pratt sustained 40% permanent partial disability, after applicable adjustments and apportionment, as a result of the injury sustained on June 7, 2016.
4. Applicant Pratt is in need of further medical treatment that is reasonably required to cure or relieve him from the effects of the injury dated June 7, 2016.
5. Applicant Pratt received valuable legal services from the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP equal to 12% from the permanent partial disability for a total of $6,994.80.

FINDINGS OF FACT

ADJ10937269 – Cumulative Trauma through March 28, 2017

6. The following stipulations of the parties found in the Minutes of Hearing and Summary of Evidence dated February 2, 2021, p. 4, lines 16-36 are herein adopted as Findings of Fact:
    a. Applicant Pratt, age 46, while employed during the period from May 8, 1990 through March 28, 2017, as a Deputy Sheriff, Occupational Group Number 490, at Bakersfield, California by County of Kern, sustained injury arising out of and in the course of employment his upper extremities.
    b. Defendant County of Kern was permissibly self-insured for workers' compensation purposes during the period of May 8, 1990 through March 28, 2017.
    c. Applicant Pratt's average weekly earnings were $1,979.33 per week, warranting indemnity rates of $1,319.55 for temporary disability and $290.00 for permanent disability.
    d. Defendant County of Kern paid 4850 benefits to Applicant Pratt at the weekly rate of $1,979.33 for the period of September 11, 2017 through August 1, 2018.
    e. Defendant County of Kern paid permanent disability to Applicant Pratt at the weekly rate of $290.00 for the period of August 2, 2018 through November 18, 2020.
7. Applicant Pratt also sustained injury arising out of and in the course of employment in the form of bilateral hearing loss, hypertension, and tinnitus.

8. Applicant Pratt was permanent and stationary from the effects of the cumulative trauma injury dated through March 28, 2017 on November 12, 2019.
9. Applicant Pratt is in need of further medical treatment reasonably required to cure or relieve him from the effects of the cumulative trauma injury dated through March 28, 2017.
10. Applicant Pratt sustained 76% permanent disability as a result of the cumulative trauma injury dated through March 28, 2017.
11. Applicant Pratt received valuable legal services from Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP equal to 15% of the permanent disability and 12% of the Life Pension for a total of $34,784.18.

AWARD

AWARD IS MADE in favor of Applicant Sean Pratt and against Defendant County of Kern as follows:

a. Permanent partial disability indemnity of $58,290.00, payable for 201 weeks at the weekly rate of $290.00 beginning November 12, 2019, less credit to Defendant County of Kern for sums previously paid as permanent disability, less the sum of $6,994.80 as approved attorneys' fees to the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP, to be commuted from the far end of the award, if necessary.
b. Permanent partial disability indemnity of $153,482.50, payable for 529.25 weeks at the rate of $290.00, beginning November 12, 2019, less the sum of $23,022.38 as approved attorneys' fees to the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP, to be commuted from the far end of permanent disability, before payment of life pension; and thereafter, with a life pension at the weekly rate of $123.69 per week, commending the day after the 529.25 weeks of permanent disability is paid, subject to adjustment pursuant to Labor Code Section 4659, less the sum of $21.85 per week, representing payment for 12% approved attorneys' fees in the sum of $11,761.80 from the life pension, payable to the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP. The total sum of attorneys' fees is $34,784.18.
c. Such additional further medical treatment that is reasonably required to cure or relieve the Applicant Sean Pratt from the effects of the injury on June 7, 2016, and from the cumulative trauma injury dated from May 8, 1990 through March 28, 2017.

d. The lien claim of the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP in ADJ10573852 (MF) is allowed in the amount of $6,994.80 and payable by the County of Kern.

e. The lien claim of the Law Offices of Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, LLP in ADJ10937269 is allowed in the amount of $34,784.18 and payable by the County of Kern.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 19, 2023

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

SEAN PRATT
GORDON, EDELSTEIN, KREPACK, GRANT, FELTON & GOLDSTEIN
KERN COUNTY COUNSEL

SAR/abs

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