

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

CHRISTOPHER KOZAK, *Applicant*

vs.

**CITY OF TORRANCE,
permissibly self-insured, *Defendant***

**Adjudication Numbers: ADJ8996494; ADJ8996352
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2022

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

**CHRISTOPHER KOZAK
BAZIAK & STEEVENS
SORIANO LAW**

PAG/abs

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

**JOINT REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
JUDGE ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

Applicant, while employed during the period of April 4, 2012 through April 4, 2013 as a police officer in Torrance, California, by the City of Torrance, sustained an admitted injury to his low back and both hips. The Applicant has a prior Award wherein the parties stipulated to fifty percent (50%) permanent disability equating to \$62,387.50. The Award issued April 26, 2017. The Applicant filed a Petition to Reopen. The case was tried with the Findings and Award issued December 28, 2021. It was found that the Applicant had new and further disability and that his permanent disability was now seventy-four percent (74%). Defendants have filed a timely and verified Petition for Reconsideration contending that the Applicant does not have a seventy-four percent (74%) permanent disability, that the Applicant's impairment should have been combined and not added and, in light thereof, contend that the evidence does not justify the findings of fact, that the findings of fact do not support the order decision, or Award and that by the order, decision or award that the board acted without or in excess of its powers. Defendant's Petition for Reconsideration also lists ADJ8996352, another case that the parties resolved by way of stipulation with request for Award, however Applicant chose only to pursue the petition to reopen as to ADJ8996494, so ADJ8996352 will not be addressed other than requesting that the Petition for Reconsideration be denied as to ADJ8996352 as there is nothing to appeal as to that case.

**II
FACTS**

The Applicant while employed during the period of April 4, 2021 through April 4, 2013 as a police officer in Torrance, California by the City of Torrance sustained an admitted continuous trauma injury to his back and both hips. The parties utilized Dr. Luciano as their panel qualified medical evaluator and jointly offered his reports of January 10, 2019, January 23, 2019, January 25, 2019, March 14, 2019, March 12, 2021 and March 31, 2021 (Joint Exhibit 2) and his deposition transcript of August 27, 2020 (Joint Exhibit 3). The parties submitted the case with no testimony taken at their request. The case was initially set September 21, 2021. As some exhibits were missing, additional exhibits needed and clarification required from the parties, the case was set for further hearing December 7, 2021. The Findings and Award and Opinion on Decision issued December 28, 2021. It was found given the reporting of Dr. Luciano, his deposition transcript and the case law that the Applicant had a permanent disability of seventy-four percent (74%). This took into consideration adding the Applicant's impairment as to his hips and then combining his back impairment. Defendants contend that all of the impairment should be rated combining the Applicant's disability or in the alternative that the record should be developed. They now contend that the qualified medical evaluator's reporting was erroneous because the doctor should not have relied upon *Athens Administrators v. WCAB (Kite) 2013 78 CCC 213 (writ denied)* hereafter referred to as "Kite", that specific activities of daily living were not addressed by the doctor (Petition for Reconsideration page 7, line 1) that the Applicant's restrictions did not increase or decrease after the initial MMI report of April 2015 (Petition for Reconsideration Page 6, line 22).

Please note this report was not offered into evidence. Defendants request that the WCAB either reverse the assessment of permanent disability utilizing Kite or in the alternative develop the record.

III **DISCUSSION**

Defendants contend that the Applicant did not have an increase in his complaints, that there was no change in his activities of daily living and that the doctor did not discuss the same. In part, to support their contention, Defendants reference the doctor's deposition conducted in February of 2017. This deposition was not offered into evidence. In any event, the doctor does discuss activities of daily living, and this is not the only means that may be taken into consideration in determining permanent impairment consistent with the provisions of the AMA Guides and the legislative intent in how to determine the proper level of impairment. It is only one of the means that may be utilized in determining what is an accurate depiction of one's actual level of impairment. As discussed in Kite the Guides do not require that impairments must be combined, and allow that impairment may be added. Neither the Labor Code nor the AMA guides require combining impairment and where appropriate impairment may be added. For example, where there is a synergistic affect? Moreover, despite Defendants asserting that the ADLs are determinative, they are not and even were they so, the Applicant per the medical reporting did have progressive complaints and his activities of daily living were impacted and there was an increase in his limitations subsequent to the Award. The progressive complaints were also objectively verified, for example, Dr. Luciano in his deposition on page 113, (Exhibit 3) notes that the range of motion in his left hip had decreased, that the hip was being more arthritic and that the arthritis was progressing. On page 120 the doctor noted that the Applicant was having progressive complaints. Per the doctor's March 31, 2021 report (page 3, paragraph 6) the doctor notes a history of the Applicant complaining of having to adjust his activities of daily living due to his pain, and also made adjustments to such things as performing personal grooming and hygiene. On page 4, first paragraph of his March 31, 2021 report, the doctor references that when the Applicant was seen March 12, 2020 that he complained of pain in both hips that increased with ambulation, stiffness in his hips, that he was careful when walking on uneven ground, stair climbing and squatting. The Applicant also had decreased range of motion and motor strength to both hips. It should be noted that the Applicant has had bilateral hip surgeries. Dr. Luciano on page 4, paragraph 4 of the March 31, 2021 report gives the Applicant prophylactic preclusions in regards to the left hip from running, jumping, squatting, repetitive stair-climbing, walking on uneven ground and prolonged walking/standing. As to the right hip he was given prophylactic restrictions which included a preclusion from running, jumping, squatting, repetitive stair-climbing, walking on uneven ground and prolonged walking/standing. For his lumbar spine he was precluded from heavy work.

Dr. Luciano both in his deposition and in his report of March 31, 2021 (page 6, paragraph 3) notes that it is his opinion that the "bilateral hip impairment should be added, rather than combined, due to the synergistic effect of the bilateral lower extremity condition". The doctor has taken a complete history, acted as the panel QME for years, his reporting is thorough and addresses all issues. His reporting is substantial evidence. Defendants seem to assert that since the doctor is now informed as to Kite that somehow he cannot change his earlier finding of impairment or is somehow erroneous in applying Kite which is exactly on point with the current case as Kite also involved a bilateral hip injury.

Kite, in fact, discussed as in this case, utilizing a combining method and in Kite the doctor found that as there is a synergistic effect of an injury to the same body parts bilaterally versus body parts from different regions of the body that the addition method would most accurately reflect the Applicant's impairment. The Guides are to provide for an accurate reflection of impairment, and the Applicant's impairment would be falsely lowered if the combined values chart were utilized given the bilateral injury. The Guides as referenced in Judge Miller's Report and Recommendation on Petition for Reconsideration in Kite notes that there is no scientific formula that has been established to combine multiple impairment and that various options are utilized and that nowhere in the rating schedule of the AMA Guides is it required that multiple disabilities must be combined. Different methods may be utilized and alternative methods have been supported by cases such as *Milpitas Unified School District v. Workers Compensation Appeals Board (Guzman) (2010) 187 Cal. App. [4th 808][75 CCC 837]* and *County of Los Angeles v. WCAB (Le Cornu) (2-9) 74 CCC 645 (writ denied)* both cases held that the trial judge has discretion to take into consideration the Guides and the MDT, but that they are guides and the judge is not required to strictly follow the guides. The intent is to determine what will most accurately determine level of impairment.

Defendants on page 5 of their Petition for Reconsideration line 18 through 23 state that Applicant attorneys advocate for the application of Kite in almost every case and that somehow applying Kite in this case increases the rating without increasing the level of impairment. This argument is unclear to the undersigned when in fact the Applicant does have increased impairment, increased restrictions and has a fact pattern virtually identical to Kite. The Applicant subsequent to the prior Award had left hip surgery and subsequent to the prior Award has increased restrictions and complaints. There is not a conflict and respectfully, Defendant's reliance upon the activities of daily living (page 6, lines 8 through 10 and referenced throughout their petition) belies the fact that activities of daily living are only part of the consideration given to determining impairment. The Applicant did have an increased impact on his activities of daily living, but he also had increased objective factors and per Kite, the Applicant cannot compensate with his opposite member. The most accurate reflection of the Applicant's impairment is to add rather than combine his impairment.

The prior Award that issued April 26, 2017 was based upon stipulation of the parties and a negotiated resolution. Defendants now seem to argue that the Applicant had a higher level of impairment at that time as they resolved combining rather than adding the impairment or since they combined before that they should not add now. This is irrelevant. As stated above, the parties negotiated a settlement. The medical record also shows an increase in the level of impairment. Defendants argue that there is no increase in the level of impairment, however, Dr. Luciano's reports and his deposition do show that the Applicant has had an increase both in subjective complaints and objective factors.

Defendants assert that the medical reports are erroneous. Respectfully they are not. Furthermore, Defendants themselves offered the reports. The record is not incomplete nor is there a need to develop the record. The issue really is, should the impairment(s) be added or combined. Based upon Labor Code Section 3202, the medical reports, the Kite case, and the AMA Guides which do not require a strict interpretation, but rather what is equitable and an accurate reflection of impairment, respectfully, the Findings and Award is supported by the evidence, the evidence does justify the Findings and the Judge did not act in excess of her powers.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration **BE DENIED**.

DATE: February 4, 2022

Sallie G. Doyle
WORKERS' COMPENSATION JUDGE