

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

DAVID MAYNEZ, *Applicant*

vs.

CITY OF FRESNO; RISICO, *Defendants*

**Adjudication Numbers: ADJ8819897 (MF), ADJ8819898, ADJ9448366,
ADJ9743441, ADJ11087662, ADJ8961622
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings of Fact, Award and Orders of March 26, 2019, the Workers' Compensation Judge ("WCJ") found that applicant was employed by the City of Fresno ("Employer") as a motorcycle patrol officer, assigned to the "motor unit" during his tenure with the Department, from February 1995 until his medical retirement in March 2013. In addition, the WCJ found that applicant "claimed" injury to his neck, back, and right shoulder during a cumulative trauma period of injurious exposure through November 13, 2012 (ADJ8819897), that applicant "claimed" injury to his heart/cardiovascular system, during a cumulative trauma period of injurious exposure through January 21, 2013 (ADJ8819898), that applicant "claimed" injury to his head and neck, resulting from a motorcycle accident on September 13, 2009 (ADJ8961622), that applicant "claimed" injury to his heart and cardiovascular system during a cumulative trauma period of injurious exposure through January 18, 2013 (ADJ9448366), that applicant "claimed" injury to his head and neck arising from a motorcycle accident on July 13, 2003 (ADJ9743441), and that applicant "claimed" injury to his head and neck arising from another motorcycle accident on June 15, 2007 (ADJ11087662). The WCJ also found that the "claimed" injuries to applicant's right shoulder, right hand/arm, and lumbar and cervical spine resulted in permanent disability of 37%, that the injuries to applicant's heart and cardiovascular system resulted in permanent disability of 53%, and that the Combined Value Chart (CVC) ratings of the orthopedic and cardiovascular

disabilities produced an overall permanent partial disability rating of 71%, entitling applicant to a life pension.¹

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends, in substance, that the WCJ erred in not apportioning permanent disability based on applicant's obesity and diabetes, that applicant's various claims of specific and cumulative trauma injuries "should not be melded together," that "applicant's permanent disability should be separated between the various dates of injury" pursuant to *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], and that apportionment of disability between injuries precludes a life pension award.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we agree with defendant that applicant's injuries "should not be melded together" and that the WCJ's injury findings must be amended to correct this. However, the correction does not require amendment of the WCJ's finding that applicant's orthopedic and heart/cardiovascular system injuries resulted in overall permanent partial disability of 71%. Therefore, we will amend the WCJ's findings on injury and otherwise affirm the Award.

We begin with an inquiry into the nature, extent and dates of applicant's various claims of injury. We observe that at trial, the parties stipulated that applicant sustained an industrial injury to his head and neck on July 2, 2003 (ADJ9743441); to his right shoulder on June 15, 2007 (ADJ11087662); and to his head and neck on September 13, 2009 (ADJ8961622). We will amend the WCJ's decision to adopt the foregoing stipulations, consistent with the general rule that stipulations are binding on the parties absent a showing of good cause. (*Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419]; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation merely because new expert had different medical opinion].)

¹ The WCJ also issued a finding that stated, "applicant was evaluated by a psychiatric Panel QME, whose reports rate as: 25% (14.01.00.00-14-[8]-20-490J-29-28) 7:0% -for ADJ9743441, 07/24/2003) and 50% (14.01.00.00-14-[8]-20-490J-29-29) 15:0% [.]". Although this finding is not a model of clarity, it appears that defendant does not challenge it upon reconsideration. Therefore, the ratings of psychiatric disability are waived. (Lab. Code, § 5904.) However, we will amend the WCJ's findings to include findings of psychiatric injury, so that the WCJ's decision makes sense. Further, the WCJ's Award states that applicant was awarded "permanent total disability," which appears to be a typographical error given the WCJ's finding that applicant sustained permanent partial disability of 71%. We will correct the typographical error.

As for applicant's claims of orthopedic injury by way of cumulative trauma, we note that defendant contested this issue only by way of implication. The trial minutes reflect that the only issues specifically recorded as being in dispute included permanent disability, apportionment, medical treatment and attorney's fees. On the other hand, it was not stipulated that applicant sustained any orthopedic injury by way of cumulative trauma, only that he claimed such injury. (Minutes of Hearing, 5/2/18, pp. 2-3.) The only medical opinion concerning the issue is that of Dr. Garland, who concluded in his medical report dated February 8, 2014 that the specific orthopedic injuries sustained by applicant while employed by defendant "melded into one cumulative trauma claim," because "the consequent disability from each [injury] is so intertwined it is impossible to separate the consequences of one injury from the other." (Exhibit 11, p. 2.)

The WCJ apparently followed Dr. Garland's medical opinion that applicant's various orthopedic injuries "melded" together and resulted in one cumulative trauma injury. This was error in several respects. Dr. Garland's statement that the specific orthopedic injuries melded into one cumulative trauma, without any explanation that applicant's job duties resulted in ongoing orthopedic injury over a period of time, is not substantial evidence that applicant sustained orthopedic injury by way of cumulative trauma. Further, although Dr. Garland is entitled to opine on the nature and extent of applicant's orthopedic injuries from a medical standpoint, the WCJ is the ultimate finder of fact and must make determinations that are legally sound. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc) [delineating the roles of WCJs and physicians in the adjudication process].) Most importantly, statutory workers' compensation law provides that an industrial injury may be either specific or cumulative, and that all questions of fact and law must be separately determined with respect to each such injury. (Lab. Code, §§ 3208.1, 3208.2.) The WCJ's unquestioning acceptance of Dr. Garland's medical opinion that applicant's specific orthopedic injuries "melded into one cumulative trauma claim" was error, because the finding of a single cumulative trauma to supplant the other stipulated, specific injuries violates sections 3208.1 and 3208.2.

However, the lack of medical-legal support for a cumulative trauma injury in Dr. Garland's reporting does not end our analysis. In its petition for reconsideration, defendant asserts: "For applicant's cumulative trauma injury through January 18, 2013, the lumbar spine has a value of 5% and the coronary heart disease has a value of 49% based on the Disability Evaluation Unit's ratings." (Petition for Reconsideration, p. 4:10-12, underscoring added.) Although this assertion

is made in the context of disputing the WCJ's permanent disability rating, it includes an apparent admission by defendant that applicant sustained injury to his lumbar spine in a cumulative trauma ending January 18, 2013. Similarly, in reference to applicant's right shoulder, defendant asserts that applicant's medical condition became permanent and stationary from the specific injury of June 15, 2007 "three years before the cumulative trauma injury through November 13, 2012, and four years before the cumulative trauma injury of January 18, 2013." (Petition for Reconsideration, p. 5:26-28, underscoring added.) Defendant also asserts, "it is clear from Dr. Glynn Garland's deposition testimony of September 18, 2015, that some of the orthopedic injuries are specific injuries and some are related to the cumulative trauma injury." (Petition for Reconsideration, p. 6:4-6, underscoring added.) We are persuaded that the above assertions, taken together, demonstrate that defendant only contests the permanent disability rating in this matter, and that the assertions amount to an admission that applicant sustained injury to his lumbar spine and right shoulder during a period of cumulative trauma ending January 18, 2013.² We also note that in his report dated September 13, 2013 report, Dr. Garland concluded that applicant's right arm injury is related to his right shoulder injury. (Exhibit 12, p. 18.) Therefore, the right arm injury should be included in the cumulative trauma injury to the right shoulder.

We also note that applicant's answer concedes his claim of orthopedic cumulative trauma injury through November 13, 2012 is duplicated by his claim of cumulative trauma injury through January 18, 2013. (Answer, p. 3, ¶ (1).) We will dismiss the Application for Adjudication of Claim for orthopedic injury in ADJ8819897 as duplicative of the Application in ADJ9448366, and we will otherwise amend the WCJ's injury findings based on defendant's admissions, as discussed above. (Cal. Code Regs., tit. 8, § 10517, WCAB Rules of Practice and Procedure: "Pleadings may be amended by the [WCAB] to conform to proof.")

Turning to the issue of heart and cardiovascular injury, we note that in ADJ9448366, the parties stipulated that applicant sustained industrial injury to his heart and cardiovascular system in a cumulative trauma ending January 18, 2013; in ADJ8819898, applicant alleged he sustained a specific industrial injury to his heart and cardiovascular system on January 21, 2013. (Minutes

² Defendant alleges that applicant's medical condition from the specific injury to his right shoulder on June 15, 2007 reached maximum medical improvement around August 2009 - almost four years before the cumulative trauma injury ending January 18, 2013. However, the fact that applicant had a specific right shoulder injury that did not reach maximum medical improvement for two years after the specific injury does not mean there was no cumulative trauma during the periods he worked between 2007 and early 2013. As discussed before, defendant implicitly admits the existence of the cumulative trauma injury.

of Hearing, 5/2/18, p. 2.) Concerning the latter claim, Dr. Levine, the Agreed Medical Evaluator (AME) in pulmonary medicine, reported that applicant had a heart attack in “January 2013.” (Exhibit 15, Levine report dated 6/8/13, p. 5.) Upon reconsideration, defendant does not contest applicant’s allegation that he sustained a specific industrial injury to his heart and cardiovascular system on January 21, 2013. Therefore, the issue is waived. (Lab. Code, § 5904.) We will amend the WCJ’s decision to include this finding of injury.

Turning finally to the issues of permanent disability and apportionment, we note the extent of defendant’s argument regarding permanent disability is that defense counsel “disagrees” with the WCJ’s ratings of applicant’s orthopedic and cardiovascular disabilities. (Petition for Reconsideration, pp. 3-4.) However, defendant’s disagreement with the ratings is not supported by reference to evidence specifically rebutting the WCJ’s ratings. Since defendant’s disagreement with the ratings is not evidence, we conclude there is no basis to disturb them and we decline to do so. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [“Legal argument is not evidence”].)

As for apportionment, two issues are relevant here, i.e., whether there should be apportionment between the permanent disabilities resulting from applicant’s various orthopedic injuries, and whether there should be apportionment of permanent disability based on applicant’s obesity and diabetes. On both questions, it is well-settled that defendant has the burden of proving apportionment. (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

In reference to apportionment between injuries, in *Benson v. Workers’ Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] the Court of Appeal concluded that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate permanent disability awards. However, the Court also stated that “there may be limited circumstances...when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee’s overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.” (170 Cal.App.4th at 1560.)

In this case, defendant contends that Dr. Garland’s opinion that the orthopedic injuries became permanent and stationary at different times requires a finding of separate injuries and

separate permanent disability awards. As noted before, defendant has the burden of proving apportionment, yet defendant refers to no evidence that Dr. Garland was able to parcel out, with reasonable medical probability, the approximate percentages to which each of applicant's distinct orthopedic injuries causally contributed to his orthopedic permanent disability. Therefore, we conclude that defendant has failed to meet its burden of proof, and we will affirm the WCJ's combined rating of orthopedic permanent disability. We repeat that in his medical report dated February 8, 2014, Dr. Garland opined that "the consequent disability from each [orthopedic injury] is so intertwined it is impossible to separate the consequences of one injury from the other."

Defendant further alleges that there should be apportionment of permanent disability to applicant's underlying conditions of obesity and diabetes. Defendant's assertion that Dr. Garland should have apportioned permanent disability to applicant's obesity and diabetes is not supported by any medical evidence. As noted before, assertions are not evidence and are insufficient to meet defendant's burden of proof on apportionment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Award and Orders of March 26, 2019 are **AFFIRMED**, except that Findings 3 through 8, and 11 are **RESCINDED**, and the following new Findings 3 through 8, and 11 are **SUBSTITUTED** in their place:

FINDINGS OF FACT

3. The following trial stipulation of the parties is adopted as the WCAB's finding of fact in ADJ9448366: Applicant David Maynez, while employed as a police officer, Occupational Group Number 490, at Fresno, California by the City of Fresno during a period of cumulative trauma ending January 18, 2013, sustained injury arising out of and in the course of employment to his heart and cardiovascular system; it is further found in ADJ9448366 that applicant sustained injury arising out of and in the course of employment to his neck, back, right shoulder and right arm.

4. In ADJ8819898, it is found that applicant, while employed on January 21, 2013 as a police officer, Occupational Group Number 490, at Fresno, California by the City of Fresno on January 21, 2013, sustained injury arising out of and in the course of employment to his heart and cardiovascular system.

5. In ADJ8819897, applicant's claim of injury arising out of and in the course of employment to his neck, back, and right shoulder during the cumulative trauma period ending November 13, 2012 is dismissed, as duplicative of applicant's claim of injury in ADJ9448366.

6. The following trial stipulation of the parties is adopted as the WCAB's finding of fact in ADJ11087662: Applicant, while employed as a police officer on June 15, 2007, Occupational Group Number 490, at Fresno, California by the City of Fresno, sustained injury arising out of and in the course of employment to his right shoulder.

7. The following trial stipulation of the parties is adopted as the WCAB's finding of fact in ADJ8961622: Applicant, while employed as a police officer on September 13, 2009, Occupational Group Number 490, at Fresno, California by the City of Fresno, sustained injury arising out of and in the course of employment to his head and neck; it is further found in ADJ8961622 that applicant sustained injury arising out of and in the course of employment to his psyche.

8. The following trial stipulation of the parties is adopted as the WCAB's finding of fact in ADJ9743441: Applicant, while employed as a police officer on July 24, 2003, Occupational Group Number 490, at Fresno, California by the City of Fresno, sustained injury arising out of and in the course of employment to his head and neck; it is further found in ADJ9743441 that applicant sustained injury arising out of and in the course of employment to his psyche.

11. The approximate percentages to which each orthopedic and heart/cardiovascular injury in Findings 3 through 8 contributed to the applicant's overall permanent disability cannot be parceled out with reasonable medical probability; defendant having failed to meet its burden of proving apportionment, applicant is entitled to a combined award of permanent disability. CVC rating of the orthopedic and cardiovascular disabilities results in a 71:0% permanent disability rating overall, entitling applicant to a life pension.

AWARD

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1. Permanent partial disability, as provided in Findings 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 26, 2022

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

**DAVID MAYNEZ
THOMAS J. TUSAN, ATTORNEY AT LAW
LAW OFFICES OF JANE WOODCOCK**

JTL/ara

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