

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

GAMAL HABIB, *Applicant*

vs.

LITHIA MOTORS, INC./DCH TOYOTA OF TORRANCE; CORVEL, *Defendants*

**Adjudication Number: ADJ12304191
Marina del Rey District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Pursuant to our authority, we accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.) Based on our review of the record, and for the reasons stated below, we find our time to act on applicant's petition tolled. For the reasons stated in the WCJ's Report, which we adopt and incorporate, we will grant reconsideration, rescind the WCJ's decision, substitute it with new Findings of Fact, as recommended in the report, and otherwise affirm the WCJ's findings. We will also return this matter to the trial level for further proceedings as the WCJ determines necessary for the calculation of a life pension, the commutation of attorney fees, and the reissuance of the award.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice" (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no

fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on applicant's petition within 60 days of its filing on September 20, 2021, through no fault of applicant. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was tolled.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the August 31, 2021 Findings of Fact, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 31, 2021 Findings of Fact, Award, and Order is **RESCINDED** and **SUBSTITUTED** with new Findings of Fact, as provided below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

1. Gamal Habib, while employed on January 31, 2019 as a finance manager, Occupational Group Number 251, at Los Angeles California, by Lithia Motors, Inc./DCH Toyota of Torrance; administered by CorVel, sustained injury arising out of and in the course of employment in the form of hypertension, heart attack, and carpal vascular.
2. At the time of the injury, the employee's earnings were \$2,400 per week, warranting indemnity rates of \$1,252 for temporary disability and \$290 for permanent disability.
3. Applicant has been adequately compensated for all periods of temporary disability claimed through September 3, 2019 in the amount of \$9,832.27, paid by EDD which Defendants reimbursed in full.
4. The permanent and stationary date is September 12, 2019.
5. The injury herein caused 80% permanent disability. There is no basis for apportionment.

6. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.
7. The issue of attorney fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 25, 2022

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

**GAMAL HABIB
LAW OFFICES OF BERKOWITZ & COHEN
MISA STEFEN KOLLER WARD, LLP**

PAG/ara

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

**JUDGE'S REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1.	Applicant's Occupation	Finance Manager
2.	Date of Injury	1/31/2019
3.	Identity of Petitioner:	Applicant Gamal Habib
4.	Timely	Yes
5.	Verification	Filed
6.	Date of Findings and Orders:	August 31, 2021
7.	Body Parts:	hypertension, heart attack, and carpal vascular.

Petitioner Applicant's Contentions:

A. That the PQME reporting on nonindustrial apportionment did not constitute substantial evidence.

B. That applicant is entitled to an unapportioned disability award at 80%, per the CVC, for both his hypertension at 55% and heart attack (coronary artery disease) at 55%.

C. That the PQME failed to distinguish between causation of injury and causation of disability, failed to provide his medical conclusion of apportionment based upon reasonable medical probability, and failed to explain the basis for his how and why nonindustrial factors for causing disability at the time of his exam.

The Petition for Reconsideration should be granted.

**II.
SUMMARY OF FACTS**

Applicant worked for Lithia Motors as a finance manager and sustained injury on January 31, 2019: hypertension, heart attack, and cardiovascular system. On September 12, 2019 Applicant was examined by QME Dr. R. Hyman. Applicant testified that he had a heart attack on January 31, 2019¹. Dr. Hyman apportioned 40% industrial due to cardiac artery disease with 30% impairment and 55% of Applicant's hypertension disability is industrial with 30% impairment. (Exhibit CC medical report of Dr. Hyman dated 9/16/2019). This WCJ found that Dr. Hyman's medical reports were substantial medical evidence and issued a Finding of Fact, Award and Order

¹ Upon further review, it appears that Dr. Hyman's medical reports are based on an incorrect date of injury for Applicant's injury. Dr. Hyman used 1/19/2019 as the date of injury which is incorrect. For this reason and others Dr. Hyman's medical reports are not substantial medical evidence.

based on Dr. Hyman's apportionment. It is from this WCJ's Finding of Fact, Award and Order that Applicant filed this Petition for Reconsideration.

The Petitions for Reconsideration should be granted.

III. THIS WCJ'S RESPONSE TO PETITIONERS' CONTENTIONS

Labor Code Section 3600 provides that to be compensable, an injury must arise out of and in the course of employment. This 2-prong requirement is the cornerstone of the workers' compensation system. (**Maier v. Workers Comp Appeals Board** (1983) 33 Cal 3rd 729, 48 CCC 326, 328.)

It has long been settled that for an injury to arise out of employment, it must occur by reason of a condition or incident of the employment. That is the employment and the injury must be linked in some causal fashion. However the causal connection between the employment and the injury need not be the sole cause of the injury. It is sufficient if the employment is a contributory cause. (**Mayer supra at 329**).

Apportionment is a term of art for determining the liability of an employer for permanent disability caused by an industrial injury and relationship to permanent disability by other factors, if any. Labor code section 4663 states apportionment of permanent disability shall be based on causation. Labor code section 4660 3(c) requires the evaluating physician's to determine the approximate percentage of permanent disability caused by the direct result of the industrial injury and the percentage of permanent disability caused by other factors occurring both before and after the injury. **José Reyes v. Hart Plastering** (2005) 70 CCC 223 (WCAB significant panel decision).

The case at bar represents a lighting up scenario where a work related injury aggravated pre-existing condition. In such cases, the causation of injury and the causation of disability are different. For the purpose of determination of causation of injury, employers take employees as they find them, including the pre-existing conditions. But with respect to causation of disability from the aggravation of pre-existing conditions, it is anticipated that employer's will be entitled to apportionment. **Person v. WCAB** (2020) 83 CCC 627.

Escobedo v. Marshalls (2005) 70 CCC 604 requires Dr. Hyman to thoroughly explains the "how" and "why" of his opinion on apportionment. In his medical report dated 9/12/19 Dr. Hyman stated the following:

"Causes for hypertension including being slightly overweight and not doing regular exercise with very occasional alcohol consumption. Work stress would be more significant so that 55% of his disability is industrial... The gentleman suffered a myocardial infarction. The industrial contribution would be work-related stress. On a nonindustrial basis, he is a male, of the proper age, who smoked, is slightly overweight, didn't exercise and had elevated cholesterol. Nonindustrial causation is stronger so that 40% of his disability is industrial." (Joint Exhibit CC at page 5.)

Dr. Hyman further stated the following:

“These records confirm his nonindustrial causes for coronary artery disease. They add no additional information concerning hypertension. My comments and conclusions therefore remain unchanged that 40% of the disability due to coronary artery disease is industrial with a 30% impairment and that 55% of his disability due to hypertension is industrial with 30% impairment.” (Joint Exhibit BB at page 2).

Dr. Hyman does not explain the basis for “how” any nonindustrial medical condition or risk factors were causing disability at the time of his 9/12/19 initial examination. He fails to explain “why” any nonindustrial medical condition or risk factors were causing disability at the time of his 9/12/19 initial examination. Dr. Hyman does not explain “how” the nonindustrial factors were responsible for approximately 45% of the hypertensive disability or “why” any nonindustrial factor or risk factors were responsible for 45% of the hypertension disability as a 9/12/2019. Dr. Hyman does not explain “how” the nonindustrial factors were responsible for approximately 60% of the heart or “why” any nonindustrial factors or risk factors are responsible for the 60% of the heart disability as of 9/12/19. There is no substantive explanation or correlation of these factors as they relate to the permanent disability found in this case by PQME at his initial exam on 9/12/2019.

Dr. Hyman’s medical reports are not substantial evidence on grounds that his reports refer to the wrong date of injury and further his discussion of apportionment does not satisfy Escobedo.

Defendants have failed to sustain their burden of proof on nonindustrial causation. PQME Dr. Hyman failed to distinguish between causation of injury and causation of disability. Further, Dr. Hyman’s reports are not based on reasonable medical probability. Applicant is entitled to an unapportioned disability award at 80% per CVC for both his hypertension at 55% and heart attack (coronary artery disease) at 55%.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration should be granted.

DATE: 12/28/2021

Yvonne R Jones
Workers’ Compensation Administrative Law Judge