

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

**JOHN FRYE, *Applicant***

**vs.**

**CITY OF NORCO, Permissibly Self-Insured, Administered By ADMINISURE, *Defendant***

**Adjudication Number: ADJ12199445  
Riverside District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of August 23, 2021, wherein it was found that, while employed during a cumulative period ending on March 27, 2019 as a fire chief, applicant sustained industrial injury to the heart, causing permanent disability of 39% after Labor Code section 4663 apportionment. While the WCJ found industrial injury to the heart, he found that the Labor Code section 3212 "heart trouble" presumption did not apply to the applicant because the applicant did not actively fight fires. Injuries coming under the ambit of Labor Code section 3212 are exempt from Labor Code section 4663 apportionment (Lab. Code, § 4663, subd. (e).) Applicant's overall disability before apportionment is 87%. However, because he found that applicant did not come under the protection of the heart trouble presumption, the WCJ found that the majority of applicant's permanent disability was subject to 65% apportionment to non-industrial factors.

Applicant contends that the WCJ erred in finding that Labor Code section 3212 presumption did not apply and in consequently applying apportionment to his permanent disability. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting that applicant is covered by the heart trouble presumption and is entitled to an unapportioned award of 87% permanent disability.

Labor Code section 3212 states, in pertinent part, as follows:

[I]n the case of members of fire departments, **except those whose principal duties are clerical, such as stenographers, telephone operators, and other officeworkers**, and in the case of county forestry or firefighting departments, except those whose principal duties are clerical, such as stenographers, telephone operators, and other officeworkers, and *in the case of active firefighting members of the Department of Forestry and Fire Protection whose duties require firefighting*, ... the term “injury” includes pneumonia and heart trouble that develops or manifests itself during a period while the member is in the service of the office, staff, department, or unit.

(Emphasis added.)

Thus, any “member of a fire department” qualifies for the heart trouble presumption other than those “whose principal duties are clerical, such as stenographers, telephone operators, [or] other officeworkers.” (*California Horse Racing Bd. v. Workers’ Comp. Appeals Bd. (Snezek)* (2007) 153 Cal.App.4th 1169, 1175-1176 [72 Cal.Comp.Cases 903].) Contrary to the WCJ’s analysis, Labor Code section 3212 does not require that a member of a fire department be an active firefighting member to come under its protection. (*City and County of San Francisco v. Industrial Acc. Comm. (Bamford)* (1956) 142 Cal.App.2d 492 [21 Cal.Comp.Cases 200] ; *City of Santa Ana v. Workers’ Comp. Appeals Bd. (Sargent)* (1996) 61 Cal.Comp.Cases 1188 [writ den.]) As noted in both *Bamford* and *Sargent*, section 3212 requires Department of Forestry and Fire Protection employees to be “active firefighting members ... whose duties require firefighting” to come under the protection of section 3212, but there is no similar requirement for city or county fire department employees. If the Legislature had wanted to restrict the protection of section 3212 to active firefighters in city and county fire departments, it knew how to say so.

The WCJ incorrectly conflated the exclusion for those “whose principal duties are clerical, such as stenographers, telephone operators [or] other officeworkers” with the requirement those working only for the Department of Forestry and Fire Protection be active firefighters. These categories are not synonymous, and the Legislature would have utilized the identical language if these categories were identical. The Oxford English Dictionary defines clerical as “Of or pertaining to a clerk or penman” (“Clerical” <[https://www-oed-com /view/Entry/34195](https://www-oed-com/view/Entry/34195)>) and refers to the definition of “clerk” meaning “One employed in a subordinate position in a public or private office, shop, warehouse, etc., to make written entries, keep accounts, make fair copies of documents, do the mechanical work of correspondence and similar ‘clerkly’ work.” (“Clerk” <<https://www-oed-com./view/Entry/34212>>.) Given the examples in section 3212 to

stenographers and telephone operators, this definition of “clerk” is consonant with the intent of the Legislature. A fire “chief” is clearly not a subordinate position coming within such a definition.

Thus, the WCJ erred in finding that applicant did not come under the Labor Code section 3212 presumption. As a member of a city fire department whose principal duties were not clerical, applicant is entitled to the heart trouble presumption. Thus, pursuant to Labor Code section 4663(e), applicant is entitled to an unapportioned award. We thus grant reconsideration rescind the WCJ’s decision, and issue a new decision reflecting that applicant is entitled to an unapportioned award of 87% permanent disability.<sup>1</sup>

For the foregoing reasons,

**IT IS ORDERED** that Applicant’s Petition for Reconsideration of the Findings and Award of August 23, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision after Reconsideration of the Workers’ Compensation Appeals Board the Findings and Award of August 23, 2021 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. The Applicant, John Frye, while employed during the period May 30, 2004 through March 27, 2019, as a fire chief (occupational group number: 490) by the City of Norco, sustained injury arising out of and in the course of employment to his heart and in the form of hypertension.

2. The claim is not barred by the statute of limitations.

3. The Applicant is entitled to a permanent disability award of 87% equivalent to 705.25 weeks of indemnity payable at the rate of \$290.00 per week to be paid from November 11, 2019 to present and continuing equaling \$204,522.50, less any permanent disability indemnity previously paid, and less a reasonable attorney’s fee of \$26,691.37 payable out of amounts accrued to the applicant, with any remainder to be commuted through the award of permanent disability indemnity, with any details to be adjusted by the parties, with the WCAB retaining jurisdiction in the event of a dispute.

4. Upon expiration of the permanent disability award, applicant is entitled to a life pension in the amount of \$208.73 per week continuing for the

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<sup>1</sup> In the Opinion on Decision, the WCJ explained that applicant’s factors of disability before apportionment were a 74% hypertensive heart disease disability, a 45% atrial fibrillation disability and a 9% skin disability (which was not apportioned in the original award). Utilizing the Combined Values Chart (2005 Schedule for Rating Permanent Disabilities at pp. 8-1 – 8-4), applicant’s combined disability is 87%.

duration of applicant's life, subject to increase pursuant to Labor Code section 4659(c), less an attorney's fee in the amount of \$1,042.61. This amount is to be commuted out of applicant's award of a life pension, using the uniform reduction method, and be paid as a lump sum to Lewis, Marenstein, Wicke, Sherwin & Lee LLP. Applicant's future payments of life pension (scheduled to commence in May 2033) are to be reduced to \$177.46 per week, not taking into the account any increase in this amount due to the provisions of Labor Code section 4659(c).

5. To the extent that there is any increase in the amount payable to the applicant on the life pension due to the provisions of Labor Code section 4659(c), which provides for a yearly increase of the life pension in the amount of the increase in the state average weekly wage, unless and until ordered otherwise, the defendant shall reserve 15% of the amount of life pension payments over \$177.46 per week. The reserved amounts shall be payable to the Lewis, Marenstein, Wicke, Sherwin & Lee, LLP twice annually on January 1 and July 1 of each year. Applicant's counsel may seek commutation of an estimate of the Labor Code section 4659(c) increases.

6. The Applicant is entitled to further medical treatment to cure or relieve from the effects of the injury herein.

7. The Labor Code section 3212 presumption of compensability for the Applicant's heart and hypertensive heart disease applies to the injury herein. As a result, applicant's heart and hypertensive heart disease disability is not apportionable pursuant to Labor Code section 4663(e).

8. A reasonable attorney's fee relating to the Applicant's permanent disability and life pension awards is found to be \$27,733.97 and 15 percent of any future increase in the life pension due to the applicant pursuant to Labor Code 4659(c), payable as outlined above. Jurisdiction is reserved over commutation of the attorneys' fee based on a reasonable estimate of Labor Code section 4659(c) increases.

### **AWARD**

AWARD IS MADE in favor of John Frye against the City of Norco, Permissibly Self-Insured, as follows:

(a) Permanent disability award of 87% equivalent to 705.25 weeks of indemnity payable at the rate of \$290.00 per week to be paid from November 11, 2019 to present and continuing, less any permanent disability previously paid and less a reasonable attorney's fee of \$26,691.37 payable out of amounts accrued to the applicant, with any remainder to be commuted through the award of permanent disability indemnity, with any details to be adjusted by the parties, with the WCAB retaining jurisdiction in the event of a dispute.

(b) Upon expiration of the permanent disability award, applicant is entitled to a life pension in the amount of \$208.73 per week continuing for the duration of applicant's life, subject to increase pursuant to Labor Code section 4659(c), less an attorney's fee in the amount of \$1,042.61. This amount is to be commuted out of applicant's award of a life pension, using the uniform reduction method, and be paid as a lump sum to Lewis, Marenstein, Wicke, Sherwin & Lee LLP. As a result of the commutation, applicant's future payments of life pension (scheduled to commence in May 2033) are to be reduced to \$177.46 per week, not taking into the account any increase in this amount due to the provisions of Labor Code section 4659(c).

(c) Further medical treatment to cure or relieve from the effects of the injury herein.

(d) Interest at the legal rate from the filing and making of this Award.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 15, 2021**

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

**JOHN FRYE  
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE  
DIETZ, GILMOR & CHAZEN**

**DW/oo**

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