

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

**MARK SCOTT, *Applicant***

**vs.**

**COUNTY OF KERN, permissibly self-insured/self-administered, *Defendant***

**Adjudication Number: ADJ9599844**

**Bakersfield District Office**

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.<sup>1</sup>

Defendant seeks reconsideration of the Findings, Orders and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 11, 2019, wherein the WCJ found in pertinent part that applicant sustained a cumulative injury, arising out of and occurring in the course of employment (AOE/COE) to his heart and in the form of hypertensive cardiovascular disease, coronary artery disease, and cancer while employed by defendant during the period from November 11, 1983, through June 15, 2011; that there was good cause to re-open the December 9, 2014 Award; and that the injury caused 78% permanent partial disability, resulting in permanent disability indemnity to be paid at \$270.00 per week commencing April 21, 2017.

Defendant contends that applicant did not show good cause to re-open the injury claim; that the cancer injury was a separate injury and should not have been "merged" with the prior cardiovascular/heart injury; and that if applicant's permanent disability was caused by one injury, then the proper permanent disability indemnity commencement date was April 17, 2014.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

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<sup>1</sup> We granted the Petition to allow further study of the factual and legal issues. Commissioner Lowe was a member of the panel. Commissioner Lowe no longer serves on the Appeals Board and a new panel member has been assigned in her place.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that payment of permanent disability indemnity begins on April 17, 2014 (Finding of Fact #10); to defer the issues of attorney fees (Finding of Fact #12); and commutation of the attorney fees (Finding of Fact #13); and return the matter to the WCJ for further proceedings to address the deferred issues.

### **BACKGROUND**

Applicant claimed injury to his heart in the form of hypertensive cardiovascular disease, and coronary artery disease while employed by defendant as a deputy sheriff from November 11, 1983, through June 15, 2011, the entire period of applicant's employment with defendant. The parties submitted Stipulations with Request for Award on December 9, 2014, stipulating that applicant sustained injury AOE/COE to his heart in the form of hypertensive cardiovascular/coronary artery disease while employed by defendant during the period from November 11, 1983, through June 15, 2011, that the injury caused 69% permanent disability, and that indemnity was to be paid at the rate of \$230.00 per week beginning April 17, 2014. On February 1, 2016, applicant filed a Petition to Reopen, and on February 2, 2016, applicant filed an Amended Application for Adjudication of Claim to include a claim of lymphoma (lymphatic cancer).

The parties proceeded to trial on April 25, 2018. The issues submitted for decision included parts of body injured (the lymphatic cancer claim), permanent disability, and whether there was good cause to re-open the cumulative injury claim. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 25, 2018, p. 2.)

### **DISCUSSION**

Defendant argues that applicant's cancer injury was a separate injury and should not have been "merged" with the prior cardiovascular/heart injury. In his Report, the WCJ explained:

This argument appears to view the Award in ADJ9599844 as a specific injury on June 15, 2011, but it is actually a continuous trauma injury starting on November 7, 1983, and ending on June 15, 2011. It covers the Applicant's entire period of employment with Defendant. ¶ The Opinion found the cancer industrial relying on the Labor Code §3212.1 presumption. That presumption states that a cancer developing or manifesting itself within a specified time during or after employment is presumed to arise out of and occur in the course of employment.

(Report, p. 4.)

Having reviewed the trial record, we agree with the WCJ that based on the reports and deposition testimony of the internal medicine agreed medical examiner (AME) Seymour Levine, M.D., and the Labor Code section 3212.1 presumption, the cause of applicant's lymphatic cancer was his 27 years of employment by defendant as a deputy sheriff. (Report, p. 4; F&A, p. 5, Amended Opinion on Decision.) When multiple body parts are injured contemporaneously, such as during an identical cumulative trauma period, they are considered a single injury. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Hurley)* (1977) 70 Cal.App.3d 599 [42 Cal.Comp.Cases 481]; see also *Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].)

Again, we agree with the WCJ that pursuant to the Labor Code section 3212.1 presumption, applicant's lymphatic cancer, that developed as a result of his employment with defendant, constitutes a cumulative injury during that period. (Report, p. 4.) Since the December 9, 2014, Stipulations/Award, pertaining to applicant's heart injury, covered the entire period of applicant's employment with defendant, the injuries to the two body parts are considered a single injury. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Hurley)*, *supra.*) Thus, the WCJ's conclusion that there was good cause to reopen the December 9, 2014, Award and to "merge" the injuries, is consistent with the applicable statutory and case law and will not be disturbed.

Finally, regarding the issue of whether the payment of the permanent total disability indemnity should commence as of April 21, 2017, the Appeals Board has held that:

Construing sections 4650 and 4661 together, if a defendant paid permanent partial disability payments to an applicant who becomes permanently totally disabled, the defendant must retroactively adjust the permanent disability payments to the correct rate. ... ¶ ... [U]pon an award of permanent disability, 'the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier.' (§ 4650(b)(2).)  
(*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 562 – 563 (Appeals Board en banc).)<sup>2</sup>

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<sup>2</sup> Although *Brower* involved an award of total permanent disability indemnity, its analysis is also applicable to an award of partial permanent disability indemnity and a life pension. In addition to addressing Labor Code section 4650, the analysis in *Brower* relies on section 4661 which provides "Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability." Both section 4650 and section 4661 apply to permanent disability that is less than total.

The Appeals Board has previously agreed with a WCJ's conclusion that if an applicant files a petition to reopen after receiving an award of permanent partial disability and permanent disability is found to be total, the award of permanent total disability is retroactive to the applicant's original permanent and stationary date. (*Villagio Inn & Spa, Vintage Inn v. Workers' Comp, Appeals Bd. (Soto)* (2009) 74 Cal. Comp. Cases 987 [writ denied].)<sup>3</sup> Under the circumstances of this matter, pursuant to the December 9, 2014, Award, it is appropriate that payment of permanent disability indemnity commence on April 17, 2014.

Upon return of this matter, we recommend that the WCJ schedule a conference to give the parties the opportunity to address the attorney fee issues as deferred. If the parties are not able to resolve the issues, then it would be appropriate for the WCJ to conduct further proceedings.

Accordingly, we affirm the F&A except that we amend the F&A to find that payment of permanent disability indemnity begins on April 17, 2014; to defer the issues of attorney fees; and commutation of the attorney fees; and we return the matter to the WCJ for further proceedings to address the deferred issues.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 11, 2019 Findings, Orders and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

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<sup>3</sup> Various Appeals Board panel decisions have been consistent with the *Soto* decision. (See e.g., *Robert Flickinger v. City of El Segundo* PSI, administered by Sedgwick CMS, 2020 Cal. Wrk. Comp. P.D. LEXIS 54 - ADJ8627969, ADJ9506151; *Kenneth Morris v. County of Riverside* PSI, 2019 Cal. Wrk. Comp. P.D. LEXIS 59 - ADJ8386503; *Wallace Garietz v. Vertis Communications* ACE American Insurance Company, administered by ESIS, 2018 Cal. Wrk. Comp. P.D. LEXIS 552 - ADJ3394569, ADJ1459791.) Although panel decisions are not binding precedent and have no stare decisis effect, they may be considered by subsequent panels of the Appeals Board to the extent they find their reasoning persuasive. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

**FINDINGS OF FACT**

\* \* \*

10. The injury caused permanent disability of seventy-eight percent (78%) after adjustment for age, occupation and apportionment, equivalent to 561.25 weeks of indemnity at \$270.00 per week commencing on April 17, 2014, for a total of \$151,537.50 followed by a life pension of \$139.15 per week thereafter.

\* \* \*

- 12. The issue of attorney fees is deferred.
- 13. The issue of commutation of attorney fees is deferred.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**December 29, 2022**

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

**MARK SCOTT  
ADAMS, FERRONE & FERRONE  
JEFFREY N. ESTEY, ESQ.**

**TLH/mc**

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