

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

**GARY BRADLEY, *Applicant***

**vs.**

**STATE OF CALIFORNIA, *Legally Uninsured, Defendant***

**Adjudication Number: ADJ10800441  
Sacramento District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 22, 2021 wherein it was found that, while employed during a cumulative period ending on October 28, 2016 as a correctional officer, applicant sustained industrial injury to his knees, lumbar spine, cervical spine, wrists, ears (in the form of hearing loss) and in the form of skin cancer, but not to the shoulders, hips, elbows or heart, causing permanent disability of 90%. In finding permanent disability of 90%, it was found that applicant sustained 85% orthopedic disability, 23% skin disability and 17% hearing disability. These disabilities were combined utilizing the Combined Values Chart in the 2005 Schedule for Rating Permanent Disabilities. (2005 Schedule for Rating Permanent Disabilities at pp. 8-1 – 8-4.)

Applicant contends that the WCJ erred in not finding permanent total (100%) disability, arguing that the WCJ erred in utilizing the Combined Values Chart to combine applicant's orthopedic, skin, and hearing loss disabilities rather than adding the values. We have not received an Answer from the defendant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we affirm the WCJ's use of the Combined Values Chart to combine applicant's orthopedic and hearing loss disabilities for the reasons stated by the WCJ in the Report, the relevant portions of which we quote below, and for the additional reasons in this opinion. However, we will grant reconsideration and defer the issue of industrial injury in the form of skin cancer in order for the parties and the WCJ to institute proceedings treating the skin condition as

a separate injury, in accordance with the opinion of panel qualified medical evaluator dermatologist Stuart Shear, M.D.

With regard to the issue of adding the hearing loss permanent disability to the orthopedic permanent disability rather than combining them utilizing the Combined Values Chart, we affirm the WCJ for the reasons stated in the portions of the Report quoted below. Applicant's Petition is based mostly on the fact that applicant's disabilities do not "overlap." Under the prior 1997 Schedule for Rating Permanent Disabilities (and schedules preceding the 1997 Schedule), permanent disability ratings were often based on prophylactic work restrictions, and the disability caused by separate body parts would frequently overlap. For instance, the same injury could cause a cardiac disability limiting the injured worker to semi-sedentary work (60% standard) and an orthopedic disability precluding heavy lifting (10% standard). Under this scenario, the preclusion from heavy lifting was said to overlap the preclusion to semi-sedentary work, and only the semi-sedentary preclusion would be rated because the heavy lifting preclusion would be subsumed into, and duplicative of, the preclusion to semi-sedentary work.

Under the 2005 Schedule and the AMA Guides, impairments that are used as a basis for ratings are tied to a specific condition or body part, and thus do not usually overlap with any other condition or body part. The Guides contain instructions regarding which impairments overlap with others, and these duplicative impairments are generally not utilized unless a medical evaluator states that they do not overlap in a particular case. Thus, the issue of "overlap" is generally not relevant to the issue of whether to add or combine disabilities. It is assumed that AMA ratings do not overlap with one another. If there is overlap, the duplicative rating is not included in the calculation of compensable permanent disability. This is not an issue which generally involves the Combined Values Chart.

In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.), we held that adding, rather than combining, two different impairments better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments in effect combined and the resultant impairment was more than the sum of the two impairments. In *Kite*, the evaluator explained why the disparate impairments were not actually disparate, and the impairments in question were all under the physician's expertise. In contrast, to the extent panel qualified medical evaluator otolaryngologist Michael Kearns, M.D. is even recommending that the hearing loss permanent disability be added to the orthopedic permanent

disability, questions beyond applicant's hearing loss impairment are beyond Dr. Kearns's expertise. (*Applied Materials v. Workers' Comp. Appeals Bd. (D.C.)* (2021) 64 Cal.App.5th 1042, 1093 [86 Cal.Comp.Cases 331] ["A medical opinion that is beyond the physician's expertise is not substantial evidence."])

However, with regard to the skin injury and permanent disability, we will grant reconsideration, and amend the decision to defer the issue of skin injury so that it may be treated as a separate injury.<sup>1</sup> At his deposition, Dr. Shear testified that he believed the skin injury was a separate injury:

Q. So is it -- am I right that you think the most accurate way is to add the skin body parts with the orthopedic body parts and the hearing loss body parts?

A. That's -- I feel just the opposite of that. That the skin parts should be left on their own as an individual issue and not combined or added to other issues.

Q. Do you mean the skin should be a separate injury by itself?

A. Yes.

Q. Okay. Mr. Bradley alleged a CT injury to orthopedic body parts, to hearing loss, and to skin cancer. Is it your opinion that the skin cancer itself should be a separate cumulative trauma claim, a separate claim from CT to orthopedic injuries or CT to hearing loss?

A. Yes.

...

Q. Can you explain why you think skin cancer is by itself a separate cumulative trauma injury?

A. This is a separate issue because the causation is separate.

---

<sup>1</sup> Although applicant did not directly raise this issue in his Petition for Reconsideration, it is raised indirectly by the statement that "Dr. Shear was of the opinion the skin impairment should be a stand-alone CT claim" (Petition at p. 11) and "applicant would be better off with 2 separate cumulative trauma claims [if we do not find permanent total disability by adding all of the permanent disabilities.]" (Petition at p. 12.) In any case, "it is settled law that a grant of reconsideration has the effect of causing 'the whole subject matter [to be] reopened for further consideration and determination' (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of '[throwing] the entire record open for review.' (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. [Citations.]" (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [Appeals Bd. en banc].)

Q. Why do you think the causation is separate?

A. Because the causation of the skin cancer is exposure to the sun.

Q. Is it exposure to the sun while at work --

A. Yes.

Q. -- throughout the years of working at the prison?

A. Yes.

(June 18, 2021 Deposition at pp. 6-7.)

At the conclusion of the deposition, Dr. Shear reiterated that “What I would say is that skin cancer is a separate causation, it’s taken separately.” (June 18, 2021 deposition at p. 26.)

As the Court of Appeal wrote in *Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]:

In any given situation, there can be more than one injury, either specific or cumulative or a combination of both, arising from the same event or from separate events. (*Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1271; *City of Los Angeles v. Workers’ Comp. Appeals Bd.* (1978) 88 Cal.App.3d 19, 29; *State Comp. Ins. Fund v. Workmen’s Comp. App. Bd.* (1969) 1 Cal.App.3d 812, 819.) The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB. (*Aetna Cas. & Surety Co. v. Workmen’s Comp. Appeals Bd.* (1973) 35 Cal.App.3d 329, 341; *LeVesque v. Workmen’s Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) For example, if an employee becomes disabled, is off work and then returns to work only to again become disabled, there is a question of fact as to whether the new disability is due to the old injury or whether it is due to a new and separate injury. (See *Assurance Corp. v. Industrial Acc. Com.* (1922) 57 Cal.App. 257, 259-260; *Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856.) In addition, one exposure may result in two distinct injuries, posing another question of fact. (*Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.*, supra, 219 Cal.App.3d at p 1271.) If a worker not only suffers a nervous breakdown but also develops an ulcer as a result of work-related stress, there would be two distinct injuries from one exposure. The nature and the number of injuries suffered are determined by the events leading to the injury, the medical history of the claimant, and the medical testimony received.

The WCJ found that the skin injury was not a distinct injury because it was sustained during the same period of employment as the orthopedic and hearing loss injury. However, as the

foregoing passage from *Austin* makes clear, the fact that different body parts sustained injury during the same period is not dispositive, and the nature and number of injuries is a question of medical fact. In this case, there was unrebutted medical evidence that the skin injury constituted a different injury.

The WCJ also found a single cumulative injury due to the parties' stipulation that all body parts were injured "while employed during the period April 19, 1982 through October 28, 2016." However, this stipulation to injury and period of exposure is not a clear stipulation to only one injury. As noted above, although the body parts had the same period of exposure, the exposures were different. In any case, stipulations can be disregarded for good cause. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1119 [65 Cal.Comp.Cases 1].)

Accordingly, we will grant reconsideration, and amend the decision to find only orthopedic and hearing loss disability in the instant case, and defer the issue of injury in the form of skin cancer so that proceedings can be instituted to give a new case number and issue a separate award. Applicant's orthopedic and hearing loss disabilities combine to cause 87% permanent disability. We reject applicant's call to add the orthopedic and hearing loss permanent disabilities for the reasons stated above and for the reasons stated by the WCJ in the following quoted portion of the Report:<sup>2</sup>

## II FACTS

Applicant sustained a cumulative trauma injury through October 28, 2016 while working as a correctional officer for the Department of Corrections and Rehabilitation. He sustained injuries to the bilateral knees, lumbar spine, cervical spine, bilateral wrists, ears (hearing), and skin (skin cancer) and claimed additional injuries to the heart, bilateral shoulders, bilateral elbows, and bilateral hips.

The case went to trial and an opinion issued incorporating the stipulations of the parties and finding as follows: The injuries caused permanent disability of 90%. A reasonable attorney fee is 15% of the permanent disability. The impairment of right knee should be added with the impairment of the left knee, and the impairment of the right wrist should be added with the impairment of the left wrist when combining disabilities for the purposes of determining permanent

---

<sup>2</sup> Footnotes have been omitted and the Report has been edited to account for the fact that the skin disability is not rated as part of this injury.

disability per *Kite*, the impairments should otherwise be combined using the Combined Values Chart. Skin cancer is not a separate cumulative trauma claim. Applicant did not sustain an industrial injury to the bilateral shoulders, bilateral hips, bilateral elbows, or heart.

Applicant was awarded permanent disability of 90% payable at the rate of \$290 per week for 753.25 weeks totaling \$218,442.50, less credit for permanent disability advances paid, plus a life pension thereafter at the rate of \$231.92 per week, and less attorney's fees payable to Eason Tambornini. The parties were instructed to obtain a commutation from the DEU to determine the exact amount of attorney fees based on 15% of the permanent disability and life pension awarded which was to be commuted from the award and subject to 3% for future State Average Weekly Wage increases. Applicant was awarded future medical treatment to cure or relieve from the effects of the industrial injury to bilateral knees, lumbar spine, cervical spine, bilateral wrists, ears, and skin cancer.

Applicant filed a Petition for Reconsideration. The petition references newly discovered material evidence but does not identify the evidence. The petition references a supplemental report by Dr. Joel Renbaum dated March 28, 2021 that was served April 14, 2021. The petition indicates the report was not added as an exhibit by mistake. The report was neither listed on the Pre-Trial Conference Statement dated June 29, 2021 nor offered at trial on September 13, 2021.

### III DISCUSSION

In the Petition for Reconsideration, Applicant focuses on the issue of whether the permanent disability of skin cancer, hearing loss, and orthopedic injuries should be added under *Kite*. The parties agreed to add the right knee with the left knee and to add the right wrist with the left wrist. Applicant has the burden to prove with substantial evidence that another method is a more accurate reflection of the level of disability than the Combined Values Chart.

#### ***Dr. Renbaum (Orthopedic AME)***

Orthopedic surgeon and AME, Dr. Renbaum was deposed on September 23, 2019. He testified in pertinent part as follows: He adds disabilities according to the *Kite* decision when there are bilateral disabilities like both knees. Without further information, he would not apply *Kite* unless there is a bilateral condition. He agreed that there could be overlap between the lumbar spine and knees based on potential lift restrictions affecting both. He applies *Kite* when there is bilateral impairment such as a knee and a knee, or a shoulder and a shoulder. (Joint Exhibit GG)

In his report dated September 1, 2020, Dr. Renbaum applied *Kite* to the right

and left knee. He explained that when impairment is present in the same body part bilaterally, there is a synergistic effect and the impairment is more disabling and logically requires addition rather than reduction per the Combined Values Chart. He found the right and left knee should be added rather than combined. (Joint Exhibit BB)

Dr. Renbaum further addressed *Kite* in a supplemental report dated November 27, 2020. He opined that the opposite extremities involving the same joint should be added which applies to the right and left wrist and to the right and left knee. He opined that *Kite* did not apply to the cervical spine and lumbar spine. He has not used *Kite* to add orthopedic, internal, hearing, or cancer issues. (Joint Exhibit CC)

Dr. Renbaum addressed *Kite* again in his supplemental report dated March 7, 2021. He opined that when there is an opposite extremity involving the same joint there is a synergistic effect making the impairment worse. He explained these body parts have the same function and when both are impaired there is a higher level of impairment that exists compared to if only one side is affected. He opined that applying *Kite* is an accurate reflection of Applicant's impairment and the proper way to rate the problems. (Joint Exhibit AA)

In *Kite*, the QME found a synergistic effect of the injury to the same body parts bilaterally compared to body parts of different regions. The QME further found that adding the impairments for both hips produced the most accurate reflection of the actual disability. *Athens Administrators v. WCAB (Kite)* (2013) 78 Cal. Comp. Cases 213 (writ denied).

With the Petition for Reconsideration, Applicant filed an additional report by Dr. Renbaum dated March 28, 2021 with proof of service dated April 14, 2021. That report predated the Mandatory Settlement Conference but was not listed on the Pre-Trial Conference Statement, was not offered as evidence at trial, and was not admitted into the record. Regardless, in that report, Dr. Renbaum defers the *Kite* issue to the Trier of Fact. Dr. Renbaum does not find a synergistic effect causing increases problems between the dermatology, ENT, and orthopedic issues. Dr. Renbaum found no overlap.

Based on Dr. Renbaum's opinions, the record supports adding the right knee with the left knee and adding the right wrist with the left wrist when combining disabilities for the purposes of determining permanent disability. This is consistent with the agreement by the parties. Dr. Renbaum is the AME, and his findings are better reasoned and more persuasive than the QME report[] by Dr. Shear.... The opinions of Dr. Renbaum do not support the application of *Kite* to the other impairments. The remaining impairments should be combined using the Combined Values Chart.

The findings of Dr. Renbaum [and] Dr. Shear ... rate as follows:

Cervical Spine	15.01.01.00 - 5 [1.4] 7 - 490! - 11 - 15
Lumbar Spine	15.03 .01.00 - 7 [1.4] 10 - 4901 - 15 - 20
Left Knee	17.05.10.08 - 15 [1.4] 21 - 4901 - 28 - 36
Right Knee	17.05.10.08 - 15 [1.4] 21 - 4901- 28 – 36
	36 + 36 = 72 ( <i>knees added</i> )
Left Wrist	16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11
Right Wrist	16.04.01.00 - 4 [1.4] 6 - 490H - 8 - 11
	11 + 11 = 22 ( <i>wrists added</i> )
...	
Hearing Loss	.58 (11.01.01.00 - 12 [1.4] 17 - 4901 - 23 - 30) 17

72 C 22 C 20 C 17 C 15 ... = [87]%

***Dr. Kearns (Hearing QME)***

The otolaryngologist PQME, Dr. Michael Kearns produced a supplemental report dated November 6, 2020 wherein he found no overlap between the hearing and orthopedic impairment. He indicated that combining rather than adding would greatly decrease the significance of Applicant’s hearing impairment. Dr. Kearns opined that the hearing loss was significant and would impact Applicant’s ability to functional on a professional and personal level. Dr. Kearns opined some environments would be difficult for Applicant to work in due to noise but that Applicant was not totally disabled. (Joint Exhibit HH)

Dr. Kearns produced a supplemental report dated February 18, 2021 wherein he opined there was no synergy between the orthopedic, skin, and hearing impairments. After considering the AMA Guides he amended his opinion and found it would be appropriate to use the Combined Values Chart considering Applicant’s impairment. (Joint Exhibit II)

Dr. Kearns produced a supplemental report dated March 3, 2021 wherein he addressed *Kite* again. He found the body parts do not affect the function of the other which is why he favors the Combined Values Chart. He opined that the orthopedic, dermatologic, and hearing issues have no synergistic affect. He explained that one impaired body part does not make the impairment of another body part more significant. He indicated it made little sense to add impairments from non-overlapping body parts when there is no overlapping disability. He found adding was not a more accurate assessment of impairment. Based on Applicant’s hearing level as well as the improvement with amplification, he found the Combined Value Chart to be the most accurate reflection of the disability and its impact on activities of daily living. (Joint Exhibit LL)

Later, Dr. Kearns provided deposition testimony on June 4, 2021 wherein he testified in pertinent part as follows: He opined adding in the *Kite* case made sense because the total disability was greater than the sum of the two hip



impairments but in this case the overlap impairment for the orthopedic and hearing problems is not greater than the calculated one. He understood that *Kite* allows for an exception but he opined the exception should be exceptional. Dr. Kearns opined 12% WPI for hearing loss is correct and the most accurate assessment of his hearing loss. Dr. Kearns indicated that hearing loss does not make orthopedic or dermatologic issues worse. Dr. Kearns found reducing the hearing loss would not accurately reflect his overall level of disability. Dr. Kearns found no synergistic effect between hearing loss and orthopedic issues and skin issues. Dr. Kearns indicated the Combined Values Chart may not accurately reflect the level of impairment for hearing loss due to the compression of numbers. Dr. Kearns found the addition method most accurately reflects the hearing impairment. Dr. Kearns said he would follow the Combined Values Chart for overall permanent impairment because he believes he is mandated to do so. He clarified that he agrees that the Combined Values Chart reducing the impact of the hearing impairment to a level that perhaps does not accurately reflect the actual hearing impairment. (Joint Exhibit MM)

Like Dr. Renbaum, Dr. Kearns found no synergistic effect between hearing loss, orthopedic injuries, and skin cancer that would increase the disability. Dr. Kearns opined that Applicant was not totally disabled and that *Kite* should be used in exceptional circumstances. Furthermore, Dr. Kearns' opinions during his deposition that propose *Kite* were wavering. The findings of Dr. Kearns do not support a finding that the disabilities should be combined by simple addition.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings and Award of Findings and Award of November 22, 2021 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of November 22, 2021 is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. The following stipulations of the parties are herein adopted as findings of fact:

a. Gary Bradley, while employed during the period of April 19, 1982, through October 28, 2016, as a correctional officer, Occupational Group No. 490, at Sacramento, California, by the State of California, sustained injury arising out of and in the course of employment to bilateral knees, lumbar spine, cervical spine, bilateral wrists, and ears, and claims to have sustained injury arising out of and in the course of employment to the heart, shoulders, elbows and hips.

b. At the time of the injury, the employer was legally uninsured and adjusted by State Compensation Insurance Fund.

c. At the time of the injury, the employee's earnings were \$1,972.16 per week.

d. The employer has paid compensation as follows: Temporary disability indemnity at the weekly rate of \$1,128.43 for the period of December 19, 2016, through September 27, 2019 and permanent disability indemnity at the weekly rate of \$290 for the period of July 7, 2017 through June 17, 2021.

e. The employer has furnished some medical treatment.

f. No attorney fees have been paid and no attorney fee arrangements have been made.

g. Applicant is in need of future medical care.

h. The parties agree to add the right knee with the left knee and to add the right wrist with the left wrist when combining disabilities for the purposes of determining permanent disability.

1. The parties agree that Dr. Renbaum and Dr. Bellinger are AMEs.

j. The parties agree that Dr. Kearns and Dr. Shear are QMEs.

2. Applicant did not sustain an industrial injury to the shoulders, hips, or elbows.

3. Applicant did not sustain an industrial injury to the heart.

4. Applicant sustained a separate industrial injury in the form of skin cancer. Any issues regarding this separate injury are deferred, with jurisdiction reserved.

5. The injury caused permanent disability of 87%.

6. A reasonable attorney fee is 15% of the present value of the permanent disability and life pension awarded herein.

7. The impairment of right knee should be added with the impairment of the left knee, and the impairment of the right wrist should be added with the impairment of the left wrist when combining disabilities for the purposes of determining permanent disability per *Kite*, the impairments should otherwise be combined using the Combined Values Chart.

**AWARD**

**AWARD IS MADE** in favor of GARY BRADLEY against STATE OF CALIFORNIA of:

1. Permanent disability of 87% payable at the rate of \$290 per week for 705.25 weeks commencing on a date to be adjusted by the parties, with WCAB jurisdiction reserved, followed by a life pension at the rate of \$208.73 per week, less credit for permanent disability advances paid, and less attorney's fees payable to Eason Tambornini. The parties are to obtain a commutation from the DEU to determine the exact amount of attorney fees based on 15% of the present value of permanent disability indemnity and life pension awarded herein, subject to an assumption of a 3% yearly increase in the State Average Weekly Wage.

2. Future medical treatment to cure or relieve from the effects of the industrial injury to bilateral knees, lumbar spine, cervical spine, bilateral wrists, and ears.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**DEIDRA E. LOWE, COMMISSIONER**  
**PARTICIPATING NOT SIGNING**



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

**FEBRUARY 7, 2022**

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

**GARY BRADLEY  
EASON & TAMBORNINI  
STATE COMPENSATION INSURANCE FUND**

**DW/oo**

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