

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

MICHAEL TISCARENO, *Applicant*

vs.

CITY OF RICHMOND, permissibly self-insured, adjusted by AIMS, *Defendant*

**Adjudication Numbers: ADJ10607060; ADJ10607085
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 23, 2021

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

**MICHAEL TISCARENO
ARJUNA FARNSWORTH
LAUGHLIN FALBO LEVY & MORESI**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant, City of Richmond, permissibly self-insured and adjusted by AIMS, (hereinafter referred to as “defendant”) petitions for reconsideration of the Findings and Award that issued in these cases on 12/02/2020 wherein I found with respect to ADJ 10607060 applicant Michael Tiscareno’s (hereinafter referred to as “applicant”) while employed on 09/26/2016 as a firefighter by defendant sustained injury arising out of and in the course of his employment to his shoulders and knees and with respect to ADJ10607085 applicant while employed during the CT period through 09/26/2016 as a firefighter by defendant sustained injury arising out of and in the course of his employment to his neck, back, shoulders, knees, and elbows. In the Findings and Award that issued in these cases on 12/02/2020 I further found the opinions of Dr. Lavorgna as set forth in his reports and deposition testimony constitute substantial medical evidence, that with respect to ADJ10607085 applicant’s injury to his neck, back, shoulders, knees, and elbows caused permanent total disability of 100 percent, that with respect to ADJ10607060 applicant’s injury to his shoulders and knees caused a need for further medical treatment to cure or relieve from the effects of the injury and that with respect to ADJ10607085 applicant’s injury to his neck, back, shoulders, knees, and elbows caused a need for further medical treatment to cure or relieve from the effects of the injury. I also awarded an attorney’s fee.

Defendant has filed a timely Petition for Reconsideration contending that the evidence does not justify the findings of fact and that the findings of fact do not support the order, decision or award.

Defendant takes issue with my finding the opinions of Dr. Lavorgna constitute substantial medical evidence and that with respect to ADJ10607085 applicant’s injury to his neck, back, shoulders, knees, and elbows caused permanent total disability of 100 percent in that I added the permanent disability ratings instead of combining the ratings using the CVC. (Defendant’s Petition for Reconsideration,

dated 12/28/2020, at pages 1 – 2)

Defendant's Petition for Reconsideration was timely filed and is accompanied by the verification required under Labor Code section 5902. Applicant timely filed an Answer on 01/05/2021.

DISCUSSION

In my Opinion on Decision, I explained the rationale for my decision as follows:

"OPINION ON DECISION"

PARTS OF BODY INJURED, RIGHT SHOULDER AND LEFT ELBOW PERMANENT DISABILITY, APPORTIONMENT

At the 09/25/2020 trial, the parties stipulated that applicant Michael Tiscareno (hereinafter referred to as "applicant") sustained industrial injury to his neck, back, left shoulder, and left knee and alleged he sustained industrial injury to his right shoulder and left elbow. (Minutes of Hearing, hereinafter referred to as M.O.H., dated 09/25/2020, page 2)

John Lavorgna, M.D. is the parties' agreed medical evaluator (hereinafter referred to as "AME"). He evaluated applicant on 03/28/2017, 11/29/2018, and 05/14/2019, reviewed various medical reports and records, and authored reports dated 03/29/2017, 11/29/2018, 05/14/2019, 06/18/2019, and 07/10/2019. (Joint Exhibits 105,104, 103, 102, and 101). In his report of 03/29/2017, Dr. Lavorgna noted applicant had been a firefighter for thirty years and recalls having pain about the left shoulder and leftknee off and on through the years. His report further reflects that on 09/26/2016 applicant was pulling up onto a fire truck when he had left shoulder and left knee pain and that the left knee twisted. Dr. Lavorgna diagnosed left shoulder impingement and torn meniscus left knee, opined applicant was totally temporarily disabled as a result of the 09/26/2016 injury and provided for further medical treatment. (Joint Exhibit 105, pages 1, 9) After reexamining applicant on 11/29/2018, Dr. Lavorgna noted in his 11/29/2018 report that applicant had undergone left knee arthroscopic surgery in February 2018 and had headaches with neck pain, sleep disturbance, and limited motion with numbness and tingling about the left hand and wrist; Dr. Lavorgna added cervical radiculopathy to his diagnosis and recommended applicant be evaluated for hisneck complaints. He also noted applicant played golf once a week or once every two weeks, uses a cart all the time, and that after discussing his off work activities as well as other job activities, opined that when he reaches maximum medical improvement, apportionment as to cause for the left knee will most likely

be 15 percent due to other causes and 85% to the 09/26/2016 injury. (Joint Exhibit 104, pages 1, 9)

After evaluating applicant again on 05/14/2019, Dr. Lavorgna noted in his report of that date that applicant had neck pain radiating to the left arm, bilateral shoulder pain, worse on the left, bilateral elbow pain, and bilateral knee pain, worse on the left. In that same report, Dr. Lavorgna adds a diagnosis of bilateral shoulder impingement, worse on the left, bilateral elbow tendinitis, lumbar radiculopathy, and bilateral knee arthritis, worse on the left, finds applicant permanent and stationary for both the 09/26/2016 and a cumulative trauma injury through 09/26/2016, and opines as follows:

“There is evidence for both an acute injury as well as cumulative trauma through 09/26/2016. It is medically reasonable to assign 25% of his impairment to the acute injury and 75% to the cumulative trauma. The patient’s off-work activities do not involve any aggregating activities for the body parts involved in his work injury. Body parts involved in the acute injury as well as the cumulative trauma period are the cervical spine with radiation, both shoulders with the right shoulder in compensation for a left shoulder injury, bilateral elbows, lumbar spine and bilateral knee pain with the right knee in compensation for the left knee which has had arthroscopic surgery.

There is evidence for impairment about the cervical spine. There is an asymmetric range of motion with upper extremity radiation. The patient fits into AMA DRE Cervical Category II. Due to the extent of his limited motion and complaints, an 8% impairment of the whole person is medically reasonable. In addition, the patient has sleep disturbance and disturbance in normal daily activities on the basis of pain, and a further 3% whole person impairment on this basis is medically reasonable.

Concerning the patient’s lumbar spine, once again, he fits into AMA DRE Lumbar Category II with an 8% impairment of the whole person for the same reasons.

Regarding the patient’s bilateral shoulder condition, for the left shoulder there is 4% upper extremity impairment based on flexion and 3% based on abduction, with a further 5% due to internal rotation. A 23% upper extremity impairment indicates a 7% whole person impairment.

For the right shoulder, there is a 6% upper extremity impairment based on flexion and 4% based on abduction, with a further 5% based on internal rotation. A 15% upper extremity impairment indicates 9% whole person impairment.

The patient’s bilateral elbow symptoms do not fulfill criteria for AMA impairment.

Regarding the patient’s bilateral knee impairment, there is a varus

deformity of the left knee with limited motion and significant limping. The patient has total loss of joint space of the medial compartment of the left knee. Using Table 17-31 on page 544 of the AMA Guides, there is a 20% whole person impairment. The right knee has a full range of motion without deformity. This does not satisfy criteria for AMA Guide impairment. However, the right knee should be included in future medical care. (Joint Exhibit 103, pages 1, 8 - 9)

After reviewing additional medical records, Dr. Lavorgna did not revise any of his opinions in a supplemental report dated 06/18/2019. (Joint Exhibit 102, at paged 1 - 3) In his 07/10/2019 supplemental report, Dr. Lavorgna stated that after review of his reports through 05/14/2019, applicant's left knee, low back, neck and both shoulders have been declared at MMI with future medical care indicated and opined further:

“It is medically probable that these multiple body parts, which were injured, interact synergistically to create a higher level of disability than each injury would individually. Addition of the impairments rather than using the relative value scale in the AMA Guides is medically appropriate. (Joint Exhibit 101, pages 1)

The parties deposed Dr. Lavorgna on 02/05/2020. Dr. Lavorgna testified that he would keep the non-industrial apportionment at 15 percent and clarified that 85 percent of the overall level of disability is industrial and 15 percent of the overall disability is non industrial; the remaining 85 percent is divided 75 percent and 25 percent. Dr. Lavorgna further testified that his opinion about applicant's injuries interacting synergistically was in response to counsel for applicant's correspondence and is based on his medical knowledge and experience; his earlier opinion apportioning out the two dates of injuries is also based on his medical knowledge and experience. When asked whether his opinion in his May 2019 report allocating applicant's impairment between his two injuries is the more accurate assessment of his impairment, Dr. Lavorgna testified he was talking about causation and apportionment of causation in his May 2019 report and that as far as body parts acting synergistically, that's just in a different compartment in his mind. He further testified that:

“And these various injured body parts do act in synergy. For instance, he's limping on his left knee, so that would affect his low back and neck. Just on a purely medical basis without going through the legal history, et cetera, certainly body parts are acting in synergy”

When asked “But you are able then to, in spite of that, allocate how much, which you said 25 percent was due to his specific injury and 75 percent was due to his cumulative trauma with apportionment as well to non-industrial events”, Dr. Lavorgna responded:

“Yeah. But I was speaking purely about causation of impairment with that 75, 25, 15.”

Dr. Lavorgna further testified that the lumbar spine, bilateral elbow tendonitis, and cervical spine are solely part of the cumulative trauma injury while

the shoulders and knees are part of the specific and cumulative dates of injury and subject to the 75, 25 apportionment. He further testified that invoking *Almaraz/Guzman*, he found impairment to applicant's bilateral elbows of 6 percent resulting from the cumulative trauma injury. He further testified that golfing is an activity that causes issues with people's shoulders, knees and their backs and that is why he had indicated he would apportion 15 percent to his off duty activities. (Joint Exhibit 106, at pages 1, 3 – 4, 11 - 14, 34 – 36, 37 – 40)

Based on my review of the evidence and the relevant law, I find the opinions of Dr. Lavorgna as set forth in his reports and deposition testimony constitute substantial medical evidence. Based on my review of the parties' stipulations, the evidence at trial, and the relevant law, I find applicant sustained industrial injury to his shoulders and knees on 09/25/2016 and sustained industrial injury to his neck, back, shoulders, knees, and elbows during the cumulative trauma injury ending on 09/26/2016.

Based on my review of the evidence and the relevant law, I also find the opinions of Dr. Lavorgna as set forth in his reports and deposition testimony constitute substantial medical evidence as to *Almaraz/Guzman*, the fifteen percent non-industrial apportionment with respect to applicant's neck, back, shoulders, and knees, and as to the Benson apportionment of 25% to the specific date of injury of 09/26/2016 and 75% to the cumulative trauma injury with respect to applicant's injuries to his bilateral shoulders and knees. The parties agreed to Dr. Lavorgna as their AME. He evaluated applicant three times, with the latest evaluation on 05/14/2019, reviewed extensive medical reports and records, authored five reports, and sat for deposition.

Dr. Lavorgna's opinions rate as follows, factoring in the 15 percent non-industrial apportionment as to the shoulders, knee, neck and back and apportionment of 25 percent and 75 percent between the 09/26/2016 specific date of injury and the cumulative trauma date of injury through 09/26/2016 as to applicant's injuries to his bilateral shoulders and knees:

As to the 09/26/2016 specific date of injury;

(right shoulder) 85 (16.02.01.00 – 9 – [1.4]13 – 490I – 18 – 23) 20% and after apportioning 25% to specific injury, 5%

(left shoulder) 85 (16.02.01.00 – 7 – [1.4]10 – 490I – 15 – 19) 16% and after apportioning 25% to specific injury, 4%

(left knee) 85 (17 – 20 – [1.4] – 28 – 36 – 43) 37% and after apportioning 25% to specific injury, 9%

As to the cumulative trauma date of injury through 09/26/2016:

(neck) 85 (15.01.01.00 – 11 – [1.4]15 – 490I – 21 – 26) 22%

(back) 85 (15.03.01.00 – 8 – [1.4]11 – 490I – 16 – 20) 17 %

(bilateral elbows) 16.03.02.00 – 6 [1.4]9 – 490I 14 – 18%

(right shoulder) 85 (16.02.01.00 – 9 – [1.4]13 – 490I – 18 – 23) 20%, and after apportioning 75% to cumulative trauma injury, 15%

(left shoulder) 85 (16.02.01.00 – 7 – [1.4]10 – 490I – 15 – 19) 16%, and after apportioning 75% to cumulative trauma injury, 12%

(left knee) 85 (17 – 20 – [1.4] – 28 – 36 – 43) 37%, and after apportioning 75% to cumulative trauma injury, 28%

In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal. Comp. Cases 2013 (writ denied), the WCJ combined permanent disability stemming from injury to each of applicant's hips by using simple addition rather than by using the combined values chart or reduction method, based on the opinion of the panel qualified medical evaluator. The WCAB denied defendant's petition for reconsideration noting that although the 2005 Permanent Disability Rating Schedule provides that impairments are generally combined by using the reduction formula, the AMA Guides describe several methods of combining impairments, that rigid application of multiple disabilities table is not mandated, that scheduled impairment rating is rebuttable, and that the panel qualified medical evaluator appropriately determined that the impairment resulting from applicant's right and left hip injuries was most accurately combined by using simple addition rather than by using the combined values formula. The First District Court of Appeal denied defendant's petition for writ of review.

Based on my review of the evidence and the relevant law, I find the opinions of Dr. Lavorgna as set forth in his reports and deposition testimony as to whether to combine or add applicant's permanent disability impairments constitute substantial medical evidence. In his 07/10/2019 supplemental report, Dr. Lavorgna opined:

"It is medically probable that these multiple body parts, which were injured, interact synergistically to create a higher level of disability than each injury would individually. Addition of the impairments rather than using the relative value scale in the AMA Guides is medically appropriate. (Joint Exhibit 102)

Dr. Lavorgna further testified that his opinion about applicant's injuries interacting synergistically was in response to counsel for applicant's correspondence and is based on his medical knowledge and experience; his earlier opinion apportioning out the two dates of injuries is also based on his medical knowledge and experience. When asked whether his opinion in his May 2019 report allocating applicant's impairment between his two injuries is the more accurate assessment of his impairment, Dr. Lavorgna testified he was talking about causation and apportionment of causation in his May 2019 report and that as far as body parts acting synergistically, that's just in a different compartment in his mind. He further testified that:

"And these various injured body parts do act in synergy. For instance, he's limping on his left knee, so that would affect his low back and neck. Just on a purely medical basis without going through the legal history, et cetera, certainly body parts are acting in synergy" (Joint Exhibit 106, at pages 1, 3 - 4, 11 - 14, 34 - 36, 37 - 40)

Accordingly, based on my review of the evidence and the relevant law, I find Dr. Lavorgna opinion as to adding the impairments to be substantial medical evidence and that with respect to the cumulative trauma date of injury through 09/26/2016, I find applicant's industrial injury to his neck, back, bilateral elbows, right shoulder, left shoulder, and left knee caused permanent total disability of 100 percent."

DISCUSSION
DEFENDANT'S CONTENTIONS

I

The Findings that the Opinions of Dr. Lavorgna as set forth in his Reports and Deposition Testimony constitute Substantial Medical Evidence and that with respect to ADJ10607085 Applicant's Injury to his Neck, Back, Shoulders, Knees, and Elbows caused Permanent Total Disability of 100 percent is supported by the Evidence received at Trial, and the Relevant law

Insofar as defendant contends my finding that the opinions of Dr. Lavorgna in regards adding the permanent disability ratings constitute substantial medical evidence is incorrect and not supported by the record, that contention lacks merit.

In order to constitute substantial medical evidence, a medical opinion must be predicated on reasonable medical probability. Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten) (2006) 145 Cal. App. 4th 922, 928 [71 Cal Comp Cases 1687].) The substantiality of the opinion of a vocational rehabilitation expert should be judged by the same standards as the opinions of medical experts.

Defendant does not allege that Dr. Lavorgna's opinions are based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Defendant does contend that Dr. Lavorgna failed to meet the standard laid out in *Martinez v. State of California*, 2020 Cal. Wrk. Comp. P.D. LEXIS 51, *Taina v. County of Santa Clara/Valley Med. Ctr.*, 2018 Cal. Work. Comp P.D. LEXIS 344, *Melgoza v. Prkacin Co.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 104, and *Leo v. Greenspan Adjusters Int'l*, 2016 Cal. Wrk. Comp. P.D. LEXIS 431, that is, there must be a level of reasoning beyond mere assertion. Defendant's contention is without merit.

The parties agreed to Dr. Lavorgna as their AME. He evaluated applicant three times, with the latest evaluation on 05/14/2019, reviewed extensive medical reports and records, authored five reports, and sat for deposition. In his 07/10/2019 supplemental report, Dr. Lavorgna opined:

“It is medically probable that these multiple body parts, which were injured, interact synergistically to create a higher level of disability than each injury would individually. Addition of the impairments rather than using the relative value scale in the AMA Guides is medically appropriate. (Joint Exhibit 101, pages 1)

At his 02/05/2019 deposition, Dr. Lavorgna testified in part that his opinion about applicant’s injuries interacting synergistically was in response to counsel for applicant’s correspondence and is based on his medical knowledge and experience; his earlier opinion apportioning out the two dates of injuries is also based on his medical knowledge and experience. When asked whether his opinion in his May 2019 report allocating applicant’s impairment between his two injuries is the more accurate assessment of his impairment, Dr. Lavorgna testified he was talking about causation and apportionment of causation in his May 2019 report and that as far as body parts acting synergistically, that’s just in a different compartment in his mind. He further testified that:

“And these various injured body parts do act in synergy. For instance, he’s limping on his left knee, so that would affect his low back and neck. Just on a purely medical basis without going through the legal history, et cetera, certainly body parts are acting in synergy” (Joint Exhibit 106, at pages 1, 3 – 4, 11 - 14, 34 – 36, 37 – 40)

In *Taina v. County of Santa Clara/Valley Med. Ctr.*, 2018 Cal. Work. Comp P.D. LEXIS 344, the Appeals Board affirmed an award reached by adding the permanent disability disabilities. The psychiatric AME opined the applicant’s psychiatric and orthopedic disabilities did not overlap and their synergistic disabling effect on her earning capacity supported adding to reach an accurate overall rating and the orthopedic AME agreed the impairments did not overlap and appeared additive in their impact on her level of permanent disability. In *Melgoza v. Prkacin Co.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 104 the Appeals board affirming an award reached by adding the permanent disability impairment where the PQME opined the

separate impairments should be added because applicant was more functionally impaired due to the synergy between the shoulders. In *Leo v. Greenspan Adjusters Int'l*, 2016 Cal. Wrk. Comp. P.D. LEXIS 431, the Appeals Board rescinded an award reflecting the addition of permanent disability impairment where the PQME testified only that the applicant's impairments should be added because they represented two different parts of the spine. And in *Martinez v. State of California*, 2020 Cal. Wrk. Comp. P.D. LEXIS 51 the Appeals Board held there was no substantial medical evidence to support adding applicant's impairments where the PQME did not offer an adequate rationale for adding applicant's hypertension and orthopedic disabilities beyond the fact that the disabilities did not overlap.

Based on the foregoing, I remain persuaded that based on the relevant law and the evidence at trial, that the opinions of Dr. Lavorgna constitute substantial medical evidence and that with respect to ADJ10607085 applicant's injury to his neck, back, shoulders, knees, and elbows caused permanent total disability of 100 percent.

RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed 12/28/2020, be DENIED.

Terri Ellen Gordon
WORKERS' COMPENSATION
ADMINISTRATIVE LAW

Dated: January 8, 2021