

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

ART GOMEZ, *Applicant*

vs.

**CITY OF LOS ANGELES POLICE DEPARTMENT; permissibly self-insured,
administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Numbers: ADJ8420296, ADJ10940866, ADJ10985261
Van Nuys 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.

Defendant seeks reconsideration of the Findings and Awards (F&A), issued by the workers' compensation administrative law judge (WCJ) on October 12, 2020, wherein the WCJ found in pertinent part that in case number ADJ8420296 the injury caused 55% permanent disability; that as a result of the injury in case number ADJ10940866 applicant was permanently totally disabled (100% permanent disability); and the WCJ stated that, "ADJ10985261 shall be dismissed as a duplicative filing." (See Joint Opinion on Decision p. 13.)

Defendant contends that medical opinions of internal medicine qualified medical examiner (QME) Mark H. Hyman, M.D., and neurology agreed medical examiner (AME) Lawrence M. Richman, M.D., are not substantial evidence; that in case number ADJ10940866 applicant's disability factors should be combined not added; and that in regard to benefits awarded in case number ADJ10940866, defendant is entitled to credit for Labor Code section 4850 benefits paid to applicant in case number ADJ10985261, so that case should not be dismissed.

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

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 rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his right shoulder, lumbar spine, bilateral knees, and to his internal systems in the form of varicose veins, GERD (gastroesophageal reflux disease), sleep disorder, hypertension and a stroke, while employed by defendant as a motorcycle sergeant police officer during the period from October 17, 1988, through July 3, 2012 (ADJ8420296). The claim was settled by Stipulations with Request for Award; the Award approving the Stipulations, including 48% permanent disability, was issued on October 21, 2015. A Petition to Reopen for New and Further Disability was filed on June 14, 2017.

Applicant claimed injury to his bilateral upper extremities, right shoulder, bilateral knees, bilateral lower extremities (gait derangement), and to his internal systems in the form of hypertension, hearing loss, sleep impairment, blood clots, and a stroke, while employed by defendant during the period from October 17, 1988, through June 6, 2017 (ADJ10940866).

Applicant also claimed injury to his right shoulder, right upper and lower extremities, lumbar spine, and bilateral hips, to his heart and bladder, and in the form of headaches, double vision, dysphasia/speech disorder, sleep disorder, vertigo, and a stroke, while employed by defendant on June 8, 2017 (ADJ10985261).

Applicant was evaluated by internal medicine AME Jeffrey F. Caren, M.D. (App Exhs. 7 – 10), and orthopedic QME Gary Brazina, M.D. (App. Exhs 11 – 13), regarding the cumulative injury claim for the period ending on July 3, 2012, in case number ADJ8420296. Dr. Brazina concluded that applicant had 2% whole person impairment (WPI) for his left lower extremity, 12% WPI for his right lower extremity, 6% WPI for his lumbar spine, and that there was no apportionment to non-industrial factors. (See App. Exh. 11, Dr. Brazina, July 30, 2013, p. 19; App. Exh. 12, Dr. Brazina, September 18, 2012, p. 15.)

Dr. Caren found that applicant had 10% WPI due to left lower extremity venous disease, and 5% WPI due to right lower extremity venous disease, with no apportionment to non-industrial causation. Dr. Caren also found that applicant had 14% WPI due to the gastroesophageal reflux disease (GERD). He apportioned 20% of that impairment to the use of nonsteroidal anti-inflammatory medication and 50% to the “industrial continuous stress trauma.” (App. Exh. 7, Dr. Caren, January 7, 2013, p. 3.)

Orthopedic QME Darren Bergey, M.D., evaluated applicant regarding the June 8, 2017

specific injury claim in case number ADJ10985261.¹ The doctor determined that applicant had 1% left upper extremity WPI, 2% right upper extremity WPI, 6% cervical spine WPI, 6% lumbar spine WPI, 5% right knee WPI, 2% left knee WPI, and 10% WPI caused by his gait impairment. (App. Exh. 1 Dr. Bergey, July 15, 2019, p. 3; App. Exh. 2, Dr. Bergey, October 10, 2018, pp. 51 – 52.) Dr. Bergey apportioned 20% of applicant’s cervical and lumbar spine disability to non-industrial factors and 80 percent to the “cumulative trauma injury.” (App. Exh. 1, pp. 3 – 4.)

Internal medicine QME Dr. Hyman, (App. Exhs. 3 and 4) and neurology AME Dr. Richman, (App. Exhs. 5, 6, and 15 deposition transcript), evaluated applicant in regard to each of the three injury claims. In his initial report, Dr. Hyman stated:

What is important to identify is that this gentleman has had a life-altering stroke complication. He is not reasonably able to compete in the open labor market. He is 100% disabled.
(App. Exh. 4, Dr. Hyman, November 1, 2018, p. 12)

In his supplemental report Dr. Hyman stated, “As previously indicated, this gentleman is 100% disabled.” (App. Exh. 3, Dr. Hyman, January 18, 2019, p. 4.)

In the December 5, 2017 report, Dr. Richman stated that applicant had 50% right upper extremity WPI, and 50% right lower extremity WPI. (App. Exh. 6, Dr. Richman, December 5, 2017, p. 75.) He also stated that applicant’s headaches caused 2%WPI, his double vision caused 30% WPI, and his dysphagia (difficulty swallowing) caused 14% WPI. (App. Exh. 6, p. 75.) Later in the report Dr. Richman stated, “Given the patient's deficits he is incapable of returning to work in any capacity. In my opinion he qualifies for Labor Code Section 4662, Subsection 4.” (App. Exh. 6, p. 76.)

Dr. Richman’s deposition was taken on April 20, 2020. His testimony included the following:

Q. So my question is: if, in fact, the [applicant’s] deposition transcript that I read out to you is correct, is it fair to say that the impairments that you previously assigned in that report are no longer valid or appropriate? ...

A. Yes. Are you asking me globally, are they still valid? Well, as I said, it sounds to me like his vision has improved based on his statements, so that is hard to neglect. So with respect to the patient's own statements that he is no longer using

¹ Although the reports indicate the Date of Injury is June 8, 2017 (See p. 1 of both reports) Dr. Bergey discusses the cumulative injury claims in addition to the specific injury claim.

a four-pod or a two-pod two-wheel walker, I believe that would lower him one class in table 13-15 to class 3 is my estimate, but, again, I don't have the guides in front of me. My guess is he would be somewhere in class 3. And I would get a better idea by observing him, but let's just say he -- his gait is improved based on his testimony. I can't dispute that it's probably not normal, but I believe it's improved. So basically I would amend some of my impairment ratings based on his deposition testimony.

Q. Okay. So at this time, would you -- is it your opinion that you would need a reevaluation and to review the deposition transcript?

A Yes. I believe that would be important.
(App. Exh. 15 Dr. Richman, April 21, 2020, deposition transcript. pp. 25 – 27.)

The parties proceeded to trial on July 21, 2020. The cases were consolidated for trial, the stipulations and issues for each injury claim were identified, exhibits were submitted, applicant testified, and the matter was submitted. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 21, 2020.) An Order vacating submission of all three cases, and Formal Rating Instructions for case number ADJ10940866 were issued on September 28, 2020.

DISCUSSION

Based on our review of the trial record and the Electronic Adjudication Management System (EAMS) ADJ file, upon return of this matter, we request that the WCJ address the following procedural and/or substantive issues:

Review of the EAMS ADJ files indicates that the three cases were submitted for decision on July 21, 2020, that the order of submission for each case was vacated on September 25, 2020, but case number ADJ10940866 was the only case subsequently submitted for decision before the F&A regarding all three cases was issued. (See the DEU Formal Rating.)

As noted above, applicant's injury claim in case number ADJ8420296 was settled by Stipulations with Request for Award and applicant filed a Petition to Reopen for New and Further Disability. There is no Finding in the F&A that there was good cause to grant applicant's petition to reopen, nor is there an explanation as to why the left elbow and right elbow WPI described by Dr. Bergey in the July 15, 2019 report, is an increase of the previously awarded 48% permanent disability, in that applicant did not claim injury to those body parts. (MOH/SOE, p. 2.)

Next, according to the Joint Opinion on Decision, case number ADJ10985261 was dismissed for being a "duplicate" filing. However, there was no Finding and/or Order dismissing

the case and statements in an Opinion on Decision are not findings of fact; their purpose is to explain the basis for the decision. (See Lab. Code § 5313; *Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd.*, (1983) 41 Cal.App.3d 778 [48 Cal.Comp.Cases 275].) Thus, the case was not actually dismissed. Also, it is not clear why the case was deemed “duplicative.” Defendant stipulated that applicant sustained injury AOE/COE in the form of headaches, double vision (diplopia), and dysphasia/speech disorder, and applicant also claimed injury to his bilateral hips, heart, bladder, and in the form of vertigo. None of these body parts or forms of injury were pled in case number ADJ10940866, nor in case number ADJ8420296. Additionally, the parties stipulated that defendant paid applicant Labor Code section 4850 benefits in case number ADJ10985261 and that no benefits were paid in case number ADJ10940866.

Further, the July 21, 2020 MOH/SOE identify “The Issues for Decision” for each injury claim. However, they also include “Other Issues” for each injury claim. (MOH/SOE, pp. 3, 4 – 5, and 6 – 7.) We do not understand the distinction between “The Issues for Decision” and “Other Issues” but it is clear that many of the issues identified were not addressed in the F&A. A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 (Appeals Board en banc).) A decision that does not address the issues identified by the parties does not comply with these requirements.

Finally, regarding the issue of apportionment, in the Opinion on Decision pertaining to case number ADJ10940866 the WCJ states, “Drs. Hyman and Richman concluded that applicant is 100% permanently and totally disabled due to the combined effects of his multiple disabilities as discussed above.” (Opinion on Decision, p. 11.) It appears the WCJ is referring to the disability caused by applicant’s hypertension and strokes. Dr. Richman noted that applicant had been diagnosed as having “cavernous malformation” [abnormally formed blood vessel] and “hemorrhagic stroke of brainstem” [when blood from an artery suddenly begins bleeding into the brain]. (App. Exh. 6, Dr. Richman, December 5, 2017, p. 66.) He later stated that applicant “...currently presents with significant neurological deficits due to a brainstem hemorrhagic stroke that occurred on 6/09/17...” (App. Exh. 6, p. 68.) Applicant claimed injury in the form of having

a stroke in each of the three cases at issue. The disability caused by the strokes may be subject to the injury presumptions in Labor Code sections 3212 et seq., and/or may be subject to apportionment. These issues need to be addressed by the WCJ.²

We recognize that this is a very complicated matter involving the three injury claims and that it may be necessary for the WCJ to have the parties further develop the record so that the issues discussed herein may be considered and resolved. It is left to the discretion of the WCJ to decide whether discovery should be re-opened so that the parties may develop the record as appropriate.

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

² We also note that in his Vocational Rehabilitation Evaluation Report Mr. Vega stated, “His disabilities related to his stroke, which is 100% industrial, are totally work disability on their own supporting a finding of 100% disability with no apportionment on a vocational basis.” (App. Exh. 20, Enrique N. Vega, August 6, 2019, p. 19.) Thus, Mr. Vega did not properly address apportionment and his report is not substantial evidence. (*Acme Steel v. Workers’ Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751].)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 12, 2020 Findings and Awards are **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 23, 2022

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

**ART GOMEZ
STRAUSSNER SHERMAN
CITY ATTORNEY OF LOS ANGELES**

TLH/pc

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