

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

ANTHONY MASSIA, *Applicant*

vs.

**R. J. DONOVAN CORRECTIONAL FACILITY, legally uninsured,
adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

Adjudication Number: ADJ11354883

San Diego District Office

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration of the Findings and Award (F&A) issued on June 26, 2020, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant's permanent partial disability rated to 75% after apportionment per Labor Code¹, section 4664, but used a "range of evidence" analysis and reduced by the value of the permanent disability award by the monetary value of a prior award of permanent disability and did not subtract the percentage.

Defendant contends that the WCJ erred because the opinion does not follow the California Supreme Court's holding in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1100 (*Brodie*).

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the June 26, 2020 F&A and return this matter to the trial level for further proceedings consistent with this opinion.

¹ All future references are to the Labor Code unless noted.

FACTS

Per the WCJ's Report:

ANTHONY MASSIA sustained an admitted cumulative trauma during the period of March 6, 2006 to June 15, 2018. He sustained injury to his heart, hypertension, back, neck and bilateral knees while working as a correctional officer. (MOH/SOE page 2:3-8). He also sustained a prior award for 18% for heart/hypertension in ADJ9126146 for a cumulative trauma period of March 6, 2006 to November 12, 2012. The parties utilized Dr. Stuart Kramer as the PQME for the heart in ADJ9126146; and utilized Dr. Jerrold Glassman for the heart in ADJ11354883 (the current case). (See Jt. Exhibits 3 and 4). In ADJ9126146 Dr. Kramer found impairment to the heart as “a conduction abnormality known as a bundle branch block” and “left ventricular (LV) relaxation abnormality which he opined was one of the hallmarks of hypertensive end-organ damage also known as hypertensive heart disease (ADJ9126146 Dr. Kramer Report). In ADJ11354883 (present case) Dr. Glassman found that the applicant had supraventricular tachycardia that required ablation, left ventricular hypertrophy on echocardiogram, hypertension and chronic pain. Dr. Glassman assigned a 35% WPI for the hypertensive heart disease and 20% WPI for the supraventricular tachycardia (Jt. Ex. 2). The parties had the report of Dr. Glassman rated by the Disability evaluation Unit which bound a combined disability of 75% before apportionment (60% for left ventricular hypertrophy on echocardiogram and 38% for the arrhythmia).

The case came up for trial on April 28, 2020 before the undersigned. Defendants asserted that there should be Labor Code §4664 apportionment for the prior award of 18% for hypertensive heart disease (ADJ9126146) and thus, the combined rating should be 64% (60-18= 42% combined with 38 for arrhythmia). The applicant asserted that the award should be the full 75% with a deduction for the money paid out under the prior award and not the percentage.

After analyzing the apportionment under the concepts of whether there was “overlap” between the prior and current disability, “Kite” (whether the impairments should be added or combined and the effect on the rating and finally, deducting the dollar amount of the prior award rather than the percentage, the court found that the range of disability was between 98% using an additive methodology and as low as 64% by simply deducting the prior award.

There was also difficulty in considering whether the “left ventricular hypertrophy on echocardiogram” found by Dr. Glassman was overlapped by the “conduction abnormality known as left bundle branch block” and left ventricular diastolic dysfunction found by Dr. Kramer. While both can be described as hypertensive heart disease, they involve different functions and parts of the heart.

Taking all these things into consideration, and utilizing Labor Code §3202 (liberal construction) it was found that awarding 75% and deducting the money paid pursuant to the Award in ADJ9126146 was within the range of the evidence and provided the most equitable result under the law and the California State Constitution Article XIV §4.

(WCJ's Report, pp. 2-3.)

DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

The burden is on the employer to present specific evidence of a prior permanent disability award for which apportionment may be warranted under section 4664(b). (See *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 (Appeals Board en banc) [evidence of a compromise and release agreement without more is not evidence of a prior permanent disability award under section 4664, although medical records or other evidence from the prior claim may constitute "other factors" for apportionment under section 4663]; *United States Fire Ins. Co. v. Workers' Comp. Appeals Bd. (Urzua)* (2007) 72 Cal.Comp.Cases 869 (writ den.) [Defendant failed to meet burden of proof on apportionment in the absence of evidence of a prior award of permanent disability by not subpoenaing records from applicant's prior claim].) This burden of proof was thoroughly described by the court in *Kopping* as follows:

First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of

the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.

(Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App.4th 1099, 1115.)

When apportionment is proven pursuant to section 4664, the correct method for applying apportionment was decided by the Supreme Court in *Brodie, supra*. You calculate “the percentage of disability attributable to the new injury by subtracting the old rating from the new rating, then consulted the table for the award due this difference.” (*Brodie, supra* at 1322.)

A ‘range of evidence’ approach is more frequently associated with older cases, when parties obtained competing QMEs and each QME’s report constituted substantial evidence, which then formed a range from which the WCJ could decide. (*Blackledge v. Bank of America* (2010), 75 Cal.Comp.Cases 613, 625 (Appeals Board en banc) (rating must be based on substantial medical evidence).) Today, range of evidence is not often used, but remains permissible when deciding between competing reports, both of which constitute substantial medical evidence. ‘Range of evidence’ cannot be used merely to achieve equity, no matter how noble a goal that may be.

The WCJ’s use of ‘range of evidence’ was not proper in this case. The WCJ was not presented with competing opinions on disability, both of which constituted substantial medical evidence. In her Report, the WCJ simply questions whether defendant met its burden of proving overlap. In such cases, a WCJ may exercise their discretion and order development of the record or find that defendant failed to meet their burden. If defendant ultimately failed their burden of apportionment, applicant is entitled to an unportioned award of disability.

Accordingly, as our Decision After Reconsideration we will rescind the June 26, 2020 F&A and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on June 26, 2020, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

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

April 25, 2024

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

**ANTHONY MASSIA
ADAMS, FERRONE & FERRONE
STATE COMPENSATION INSURANCE FUND, LEGAL**

EDL/mc

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