

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

JEFFERY CLEGG, *Applicant*

vs.

**WACO STATE PRISON;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ12322184
Bakersfield 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 and the opinion on decision 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 and the opinion, both of which we adopt and incorporate, we will deny reconsideration.

For the reasons stated in the report and opinion, we agree with the WCJ that applicant met his burden to prove that the presumption pursuant to Labor Code sections 3212.2 and 3212.10 applies based on the preponderance of the evidence. (Lab. Code, §§ 3202.5, 5705.) Once the presumption is established, the burden shifts to defendant to rebut that presumption. The employer may only rebut the presumption by proving that some contemporaneous non-work related event was the sole cause of the heart trouble. (*Jackson v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 965 [70 Cal.Comp.Cases 1413].) Effectively this means that the employer can only rebut the presumption with proof of causation by a nonindustrial event occurring at the same time that the heart trouble developed or manifested itself. Defendant has presented no evidence of this. In fact, the only evidence in the record is the opinion of cardiology panel qualified medical examiner (PQME) Jeffrey F. Caren, M.D.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 19, 2021

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

**JEFFERY CLEGG
LAW OFFICES OF ADAMS, FERRONE AND FERRONE
STATE COMPENSATION INSURANCE FUND**

PAG/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

RECOMMENDATION: DENY

INTRODUCTION

Trial in the primary proceedings of the above-captioned case was held on October 30, 2020. The matter was submitted for decision to Workers' Compensation Judge Christopher M. Brown on November 17, 2020. Findings of Fact, Awards and Order; Opinion on Decision was issued on December 28, 2020. Defendant filed a timely, verified and properly served Petition for Reconsideration on January 21, 2020.

The Petition for Reconsideration does not state the statutory authority for its filing, but the arguments are consistent with Labor Code Sections 5903(a), (c) and (e). Specifically, Petitioner contends Applicant's Aortic Valve Disease and Ascending Aortic Aneurysm manifested or developed before his employment as a Correctional Officer so the presumptions created by Labor Code Sections 3212.2, 3212.10 and 4663(e) should not apply.

STATEMENT OF FACTS

1. Jeffery Clegg (Applicant) worked for the California Department of Corrections and Rehabilitation (Defendant) as a Correctional Officer, Occupational Group Number 490, from July 16, 1994 through June 20, 2019. (FOF 1)
2. Applicant did not have identified heart disease prior to his employment with California Department of Corrections and Rehabilitation. In 2005, Applicant began having shortness of breath and chest pains. He was diagnosed with a heart valve problem. On September 19, 2005 Applicant's aortic valve was replaced with a mechanical valve. In 2017 Applicant was diagnosed with an enlarged aorta after a CT scan showed the aorta diameter was 4.7 cm. (Joint Ex. 2 Page 2, Joint Ex. 1 Page 12)

DISCUSSION

**THE BOARD HAS AUTHORITY TO RESOLVE DISPUTES SUBMITTED FOR
DECISION BY THE PARTIES**

The parties submitted a Pre-Trial Conference Statement at the Settlement Conference held on September 22, 2020 which was processed and filed on September 28, 2020. A Trial was held on October 30, 2020 and the parties were given until November 16, 2020 to file Post-Trial Points and Authorities. The issues submitted by the parties included parts of body injured (heart), Labor Code Sections 3212.2, 3212.10 and 4663(e), and permanent disability and apportionment. Labor Code Section 4604 gives the Appeals Board Jurisdiction to resolve disputes.¹ Therefore Defendant's

¹ Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5. (Labor Code 4604)

argument made pursuant to Labor Code Section 5903(a) lacks merit and the Petition should not be granted reconsideration based on Labor Code Section 5903(a).

**APPLICANT INJURY IS COVERED BY THE PRESUMPTION OF INJURY
AOE/COEBECAUSE HE PROVED BY A PREPONDERANCE OF THE EVIDENCE
THAT HIS HEART TROUBLE DEVELOPED AND MANIFESTED IN THE COURSE
OF HIS EMPLOYMENT WITH DEFENDANT**

Applicant was evaluated by Dr. Jeffery Caren M.D. as the Panel Qualified Medical Examiner for his heart problems. Dr. Caren gave his expert opinion that Applicant was born with a bicuspid aortic valve that was malformed in utero. (Joint Ex. 3 Page 5 Line 21 – Page 6 Line 5) He also gave his expert opinion that:

Prior to his employment by CDCR, Mr. Clegg did not have identified heart disease. He was not informed of having childhood murmur. He passed a US Marine Corp induction exam in 1975. Mr. Clegg has received his medical care at Kaiser Bakersfield. He has had annual wellness examinations. ... In 2005, Mr. Clegg began having shortness of breath and chest pains. His primary doctor referred him to a cardiologist who diagnosed a heart valve problem. On September 19, 2015 [sic]², Mr. Clegg's aortic valve was replaced with a mechanical valve. He has taken warfarin since. He was restricted from duty for eight weeks after the surgery. (Joint Ex. 2 Page 2)

Dr. Caren also opined that some people can go through their whole lives and never require treatment for a bicuspid aortic valve. (Joint Ex. 3 Page 12 Lines 8 - 10) Applicant's first need for medical treatment and first disability resulting from bicuspid aortic valve occurred in 2005 when he was forty-nine (49) years old and had been employed by Defendant for just over eleven (11) years. Therefore, his heart problem in the form of need for medical treatment and being disabled after surgery developed and manifested while he was working as a correctional officer

² Dr. Caren corrected the year to 2005 in his supplemental report dated April 3, 2020. (Joint Ex.1 Page 12)

for Defendant and the presumption created by labor Code Sections 3212.2 and 3212.10 applies.³

Dr. Caren also diagnosed Applicant with an ascending aortic aneurysm. Dr. Caren gave his expert opinion that Applicant, “didn’t have an ascending aortic aneurysm when he was born. He was born with a proclivity for developing it later in life.” (Joint Ex. 3 Page 9 Lines 12 – 14) Applicant underwent a CT Angiogram of the chest on February 11, 2019. The angiogram identified a 4.7 cm ascending thoracic aortic aneurism with no dissection. He was prescribed Metoprolol 25mg to treat the ascending aortic aneurysm. (Joint Ex. 1 Page 11) The first diagnosis and medical treatment of Applicant’s ascending aortic aneurysm occurred when he was sixty-three (63) years old and had been employed as a Correctional Officer for almost 25 years. Therefore, the presumption his heart problem arose out of and in the course of his employment with Defendant created by Labor Code Sections 3212.2 and 3212.10 applies.

Once the presumption of injury AOE/COE is created Defendant holds the affirmative on the issue and must rebut it by a preponderance of the evidence. Defendant’s Petition refers to Dr. Caren’s expert opinion that:

I do not find substantial evidence that stress trauma AOE/COE was not a cause of the CAD. Therefore, the aortic valve disease represents a presumptive injury AOE/COE with the CDCR. (Joint Ex. 1 Page 13)

He clarified his statement during his deposition when he testified:

Q: Okay. Now, would I be correct in thinking, though, in typical flight-or-fight response or in a period of stress, that the pressure actually increases?

A: Yes.

Q: Okay, In those events, would I be correct in thinking that the turbulence is actually increasing in blood flowing through that bicuspid aortic valve and that could help precipitate the stenotic effect of the valve?

A: Yes. It would contribute to the stenosis, the damage to the valve. (Joint Ex. 1 Lines 14 – 25)

Dr. Caren also gave a history of the injury that stated, “Wasco is a reception center and Level I – III facility. There is stress interacting with the inmates.” (Joint Ex. 2 Page 2) The deposition testimony viewed together with the history of injury support application of the presumption and do not rebut it by a preponderance of the evidence. Therefore, the evidence does support the Findings of Fact, the Findings of Fact do support the Award and the Petition should not be granted pursuant to Labor Code Section 5903 (c) or (e).

LABOR CODE SECTION 4663(e) PROHIBITION OF APPORTIONMENT DOES APPLY

The conclusion of Defendant’s Petition asserts that Applicant’s permanent partial

³ “Such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.” L.C. Sec. 3212.2 “The heart trouble ...so developing or manifesting itself shall be presumed to arise out of and in the course of employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.” L.C. Sec. 3212.10

disability should be subject to apportionment. (Petition Page 6 Lines 19 – 25) Labor Code Section 4663(e) prohibits apportionment when the presumption created by Labor Code Sections 3212.2 and 3212.10 apply.⁴ Applicant proved by a preponderance of the evidence that his heart problems developed and manifested while he was employed by the CDCR as a Correctional Officer, and he is entitled to the presumptions created by Labor Code Sections 3212.2 and 3212.10. Defendant did not rebut the presumption by a preponderance of the evidence. Apportionment of Applicant's permanent partial disability is prohibited by 4663(e).

CONCLUSION

Defendant did not contest the rating of Applicant's permanent partial disability. Applicant proved by a preponderance of the evidence that he has 59% permanent partial disability, and that apportionment of this disability is prohibited by law. The Finding that Applicant has 59% permanent partial disability and the Award of \$99,542.50 in Permanent Partial Disability Indemnity should be Affirmed.

Date: February 2, 2021

CHRISTOPHER BROWN

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

⁴ "Subdivisions (a), (b) and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213 and 3213.2." Labor Code Section 4663(e)

OPINION ON DECISION

BURDEN OF PROOF

The party holding the affirmative of an issue bears the burden of proving it by a preponderance of the evidence. ¹Defendant denied liability for Applicant's injury asserting it did not arise out of or in the course of his employment as a Correctional Officer. ²Applicant asserted the presumption of causation created by Labor Code Sections 3212.2 and 3212.10. Applicant holds the affirmative on establishing the presumption and must prove by a preponderance of the evidence that the presumption is created. Then Defendant holds the affirmative on rebuttal of the presumption, and must prove by a preponderance of the evidence the presumption is rebutted.

Applicant holds the affirmative on the issues of permanent partial disability. Defendant holds the affirmative on the issue of apportionment of Applicant's permanent partial disability.

Applicant asserts Labor Code Section 4663(e) prohibits apportionment of his permanent partial disability.

Applicant also holds the affirmative on the issues of his permanent and stationary date and the need for further medical care to cure or relieve the effects of his industrial injury.

The parties stipulated Applicant was employed as a Correctional Officer, Occupational Group Number 490. (MOH Page 2 Lines 6 – 8)

The parties stipulated Applicant's Average Weekly Wage was \$1,215.17 as of June 20, 2019 and that he is entitled to Permanent Partial Disability Indemnity payments at the rate of \$290.00 per week. (MOH Page 2 Lines 12 – 15)

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE HIS INJURY IS ENTITLED TO THE PRESUMPTION CREATED BY LABOR CODE SECTIONS 3212.2 & 3212.10 AND DEFENDANT DID NOT REBUT THE PRESUMPTIONS BY A PREPONDERANCE OF THE EVIDENCE

The parties stipulated Applicant was 62 years old on June 20, 2019 and that he worked as a Correctional Officer, Occupational Group Number 490, at Wasco State Prison from July 16, 1994 through June 20, 2019. (MOH Page 2 Lines 6 – 8) Applicant alleged an injury to his heart and asserts that the issue of injury AOE/COE it is covered by the presumptions created by Labor

¹ Labor Code Sections 3202.5 and 5705

² Labor Code Section 3600

Code Sections 3212.2 and 3212.10.³ Applicant was evaluated by Dr. Jeffery F. Caren, M.D. on December 18, 2019 as a Qualified Medical Examiner for cardiology issues. Dr. Caren issued reports dated December 18, 2019 and April 3, 2020. (Joint Exs. 1 & 2) Dr. Caren was deposed on August 27, 2020. (Joint Ex. 3)

Dr. Caren provided a detailed history of Applicant's heart problems. He reported that Applicant did not have heart problems prior to his employment with Defendant. He reported that Applicant had frequent face-to-face inmate interaction and that Applicant experienced stress interacting with inmates. Applicant first developed shortness of breath and chest pain symptoms in 2005. Applicant's aortic valve was replaced with a mechanical valve on September 19, 2005. (Joint Ex. 1 Page 12) Applicant has been treated with warfarin since the surgery. Applicant had an echocardiogram in January of 2017 that revealed an enlarged aorta. He was prescribed metoprolol and aspirin. (Joint Ex. 2 Page 2) Dr. Caren also testified at his deposition that "The aortic valve did get worse in the course of his employment." (Joint Ex. 3 Page 10 Lines 23 – 24) The history taken by Dr. Caren which includes Applicant's first symptoms in 2005 and a surgery in 2005 combined with his deposition testimony prove by a preponderance of the evidence that Applicant's heart trouble developed during his employment as a correctional officer interacting with inmates with Defendant between 1994 and 2019. Therefore, Applicant met his burden of proof and established his injury is entitled to the presumptions created by Labor Code Section 3212.2 and 3212.10.

Once Applicant establishes by a preponderance of the evidence that his condition is entitled to the presumptions created by Labor Code Sections 3212.2 and/or 3212.10 the burden shifts to Defendant to rebut the presumptions by a preponderance of the evidence. Dr. Caren reviewed Applicant's medical records before he issued his expert opinion in the report dated April 3, 2020. (Joint Ex. 1 Pages 2 – 12) Dr. Caren expertly opined that Applicant has aortic valve disease and ascending aortic aneurysm. He opined,

The valve became stenotic in the course of employment, but that condition did not arise out of employment. Labor Code Section 3212.2 provides that "heart trouble" is a presumptive injury AOE/COE for correctional officers. That Labor Code section states the presumption "is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it." I do not find substantial evidence that stress trauma AOE/COE was not a cause of the CAD. Therefore, the aortic valve disease represents a presumptive injury AOE/COE within the CDCR. (Joint Ex. 1 Pages 12 - 13)

³ "Such heart trouble so developing or manifesting itself in such cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it." L.C. Sec. 3212.2
"The heart trouble ...so developing or manifesting itself shall be presumed to arise out of and in the course of employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it." L.C. Sec. 3212.10

Dr. Caren also addressed causation of Applicant's ascending aortic aneurysm. He gave his expert opinion that the,

Ascending aortic aneurysm is associated with the bicuspid aortic valve. That association has led to a consensus opinion that both conditions are congenital anomalies. There is no other identified cause of ascending aortic aneurysm; therefore, I find it reasonably medically probable the condition is not AOE/COE. The ascending aorta is an embryological heart structure. The ascending aortic aneurysm is also "heart trouble." The presumption of industrial causation pursuant to Labor Code Section 3212.5 [sic]⁴ also applies to this case. That Labor Code section states the presumption "is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.' I do not find substantial evidence that stress trauma AOE/COE was not a cause of the CAD. Therefore, the aortic valve disease represents a presumptive injury AOE/COE with the CDCR. (Joint Ex. 1 Page 13)

In regard to both the aortic valve disease and ascending aortic aneurysm Dr. Caren gave his expert opinion the he did "not find substantial evidence that stress trauma AOE/COE was not a cause of the CAD." (Joint Ex. 1 Page 13) Dr. Caren also testified in response to questioning as follows:

Q. Okay. Now would I be correct in thinking, though, in a typical flight-or-fight response or in a period of stress, that the blood pressure actually increases?

A. Yes.

Q. Okay. In those events, would I be correct in thinking that the turbulence is actually increasing in the blood flowing through the bicuspid aortic valve and that could help precipitate the stenotic effect of the valve?

A. Yes. It would contribute to the stenosis, the damage to the valve. (Joint Ex. 3 Page 13 Lines 14 – 25)

Dr. Caren's testimony clarifies the language in his reports to establish some industrial causation of the heart problem. Defendant did not prove by a preponderance of the evidence that routine stress trauma arising out of and in the course of Applicant's employment with CDCR wasn't a contributing factor to Applicant's CAD. Therefore, Defendant did not rebut by a preponderance of the evidence the presumption that Applicant's CAD arose out of and in the course of his employment.

⁴ Dr. Clegg corrected the Labor Code Section to 3212.2 during his deposition. (Joint Ex. 3 Page 20 Lines 1 -2)

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAS 59% PERMANENT PARTIAL DISABILITY AFTER APPROPRIATE ADJUSTMENT AS A RESULT OF HIS INDUSTRIAL INJURY

Applicant holds the affirmative on the issue of his level of permanent disability. Labor Code Section 4663(e) prohibits apportionment of permanent disability to injuries or illnesses covered by Labor Code Sections 3212.2 and 3212.10.⁵ There is no evidence of a prior award of disability that would provide a basis for apportionment pursuant to Labor Code Section 4664.⁶ Dr. Caren gave his expert opinion that application of the AMA Guides to the Evaluation of Permanent Impairment Table 3-5 to Applicant's aortic valve disease produces 23% Whole Person Impairment. He also gave his expert opinion that application of the AMA Guides to the Evaluation of Permanent Impairment Table 4-3 to Applicant's ascending aortic aneurysm produces 6% WPI. Dr. Caren how and why his examination of Applicant and his review of the relevant medical records lead him to his expert conclusions. Based on the parties stipulations Applicant was 62 years old on the last day of his cumulative trauma injury and his Occupational Group Number is 490. Therefore Applicant's WPI adjusts as follows:

03.01.00.00-23-[1.4] 32-490I-41-51

04.04.00.00-6-[1.4] 8-490I-12-16

$51 \text{ C } 16 = 59\% = 343.25 \text{ weeks @ } \$290.00/\text{week} = \$99,542.50$

Dr. Caren determined Applicant should be considered permanent and stationary as of the date of the QME examination of December 18, 2019. (Joint Ex. 1 Page 13) There is no evidence contradicting this permanent and stationary finding. Therefore, Permanent Partial Disability Indemnity payments at the rate of \$290.00 per week should commence as of December 18, 2019.

APPLICANT PROVED BY A PREPONDERANCE OF THE EVIDENCE HE REQUIRES FURTHER MEDICAL TREATMENT TO CURE OR RELIEVE THE EFFECTS OF HIS INDUSTRIAL INJURY

Dr. Caren addressed Applicant's need for further medical treatment. He stated applicant will need annual cardiology visits for his aortic valve disease and routine chest CTs or echocardiogram for his ascending aortic aneurysm. (Joint Ex. 1 Page 15) There is no evidence contradicting Dr. Caren's expert opinion. Therefore, Applicant proved by a preponderance of the evidence he requires further medical care to cure or relieve the effects of this industrial injury.

⁵ Labor Code Section 4663(e)

⁶ Labor Code Section 4664

APPLICANTS ATTORNEY PROVIDED VALUABLE SERVICES BEFORE
AND AT TRIAL OF APPLICANT'S CLAIM WITH A REASONABLE VALUE
OF \$11,945.10

Applicant's Attorney provided valuable services before and at trial of Applicant's claim. \$11,945.10, 12% of the Permanent Partial Disability Indemnity being awarded herein, is a reasonable fee giving consideration to the responsibility assumed, the care exercised, the time involved and the results obtained.

DATE: DECEMBER 28, 2020

CHRISTOPHER BROWN

Workers' Compensation Administrative Law Judge