

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

MARK MASTRO, *Applicant*

vs.

STATE OF CALIFORNIA, *Legally Uninsured, Defendant*

**Adjudication Number: ADJ8081881
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of October 15, 2021 wherein it was found that, while employed as a correctional officer during a cumulative period from February 2, 2007 through September 24, 2011, applicant sustained industrial injury to his heart and psyche causing permanent disability of 94% and the need for further medical treatment. In finding permanent disability of 94%, it was found that applicant had 47% coronary heart disease disability which was not apportioned, 72% hypertensive cardiovascular disease, which was not apportioned, and 18% psychiatric disability after apportionment.

Defendant contends that the WCJ erred in finding permanent disability of 94%, arguing that 40 percent of the hypertensive cardiovascular disease disability should have been apportioned to preexisting hypertension per the opinion of agreed medical evaluator internist Ernest C. Levister, M.D. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

The WCJ correctly declined to apportion applicant's hypertensive cardiovascular disease, since the injury is a presumptive injury covered by Labor Code section 3212.2, and Labor Code section 4663(e) thus precludes apportionment. However, we will nevertheless defer the issue of permanent disability since it is unclear how the WCJ arrived at 94% permanent disability. Pursuant to the method outlined in the 2005 Schedule for Rating Permanent Disabilities for combining multiple disabilities (2005 Schedule at pp. 8-1 – 8-4), combining 72%, 47%, and 18% garners 88%

compensable permanent disability, rather than the 94% found by the WCJ. However, we defer the issue for determination at the trial level so that the parties may be heard on the issue. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Cal. Labor Code section 3212.2 states:

In the case of officers and employees in the Department of Corrections having custodial duties, each officer and employee in the Department of Youth Authority having group supervisory duties, and each security officer employed at the Atascadero State Hospital, the term "injury" includes heart trouble which develops or manifests itself during a period while such officer or employee is in the service of such department or hospital.

The compensation which is awarded for such heart trouble shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by the workmen's compensation laws of this state.

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. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

Applicant reported that he had hypertension preceding his employment as a correctional officer, although it was controlled by medication when he was hired. During his employment as a correctional officer, he was seen multiple times for hypertension, and was briefly hospitalized twice for chest pain. (August 31, 2012 report of Dr. Levister at pp. 3-5.) Applicant was initially evaluated by Dr. Levister on August 31, 2012. Dr. Levister had an echocardiogram administered to the applicant which revealed left ventricular hypertrophy. (August 31, 2012 report at pp. 17-18.)

"In order for [an injured worker] to be entitled to the presumption embodied in section 3212, he must first show that his disability can be characterized as 'heart trouble.' As stated in *Baker v. Workmen's Comp. Appeals Bd.* [(1971)] 18 Cal.App.3d 852, 859: 'The presumption is one of occupational causation; it is not a presumption that a disability is attributable to heart

trouble.” (*Muznik v. Workers’ Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 632 [40 Cal.Comp.Cases 578].)

The *Muznik* court reviewed the appellate cases that had found the existence of “heart trouble,” and concluded as follows:

[T]he phrase “heart trouble” assumes a rather expansive meaning. This result is further evidenced by the Legislature’s decision not to utilize a medical term or to list or require any specific malady for the presumption of section 3212 to become operative, but rather, to employ a lay term which is not necessarily related to physical deterioration or “disease” at all. As defined in Webster’s Dictionary, the term “trouble” when used as a noun covers a wide range of meanings, including distress, affliction, anxiety, annoyance, pain, labor, or exertion. The intent of the authors of the amendment adding the phrase “heart trouble” to section 3212 was no doubt to have the meaning of that phrase encompass any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it through interaction with other afflicted areas of the body, which, though not envisioned in 1939, might be produced by the stress and strain of the particular jobs covered by the section. [Citation].

(*Muznik*, 51 Cal.App.3d at p. 635.)

In *Muznik*, the court cautioned that it was not holding that “hypertension, in every instance, constitutes ‘heart trouble;’ nor do we conclude that disorders in other areas of the body that do not place the heart in a ‘troubled’ condition, qualify as ‘heart trouble.’” (*Muznik*, 51 Cal.App.3d at p. 635, fn. 5.) Nevertheless, the court reversed the WCAB’s reliance on a medical opinion stating that the applicant’s so-called “essential hypertension” did not constitute “heart trouble.” As the *Muznik* court explained, “in applying the term ‘heart trouble,’ it is permissible to determine whether the interaction of [hypertension] with the heart has proven ‘troublesome’ to that organ or has required the heart to engage in disabling exertion or labor.” (*Muznik*, 51 Cal.App.3d at p. 636.) Thus, in *Muznik*, the court found that the heart trouble presumption arose in a case that hypertension contributed to, among other things, ventricular irritability that caused the heart to skip beats. (*Muznik*, 51 Cal.App.3d at p. 637.)

In this case, the medical evidence clearly shows that applicant’s hypertension caused heart trouble. Dr. Levister found that the hypertension had caused left ventricular hypertrophy. In fact, Dr. Levister explains that he rates applicant’s hypertension at 45%, which is class 3 hypertensive cardiovascular disease under table 4-2 of the AMA Guides precisely because wall thickening (i.e.

ventricular hypertrophy) qualifies the impairment for class 3 and suggests “end-organ damage.” (December 22, 2012 report at p. 4; AMA Guides, Table 4-2, p. 66.)

Indeed, consistent with the Court of Appeal’s decision in *Muznik*, in *State of California v. Workers’ Comp. Appeals Bd. (Knox)* (2005) 70 Cal.Comp.Cases 909, 910-912 (writ den.), it was found that high blood pressure which caused left ventricular hypertrophy which resulted in the need for medical treatment, but did not cause ratable disability, constituted “heart trouble” sufficient to raise the presumption of industrial causation. Similarly, in *Orange County Fire Authority v. Workers’ Comp. Appeals Bd. (Sleep)* (2005) 70 Cal.Comp.Cases 1499 (writ den.), hypertension was found to constitute “heart trouble” giving rise to the presumption when “an echocardiogram revealed concentric left ventricular hypertrophy that was characteristic of hypertensive cardiomyopathy.” (*Sleep*, 70 Cal.Comp.Cases at p. 1500.)

Since the August 31, 2012 echocardiogram showed left ventricular hypertrophy, applicant’s hypertension evidenced heart trouble which manifested or developed during the statutory period.¹ Thus, even generously indulging the defendant’s argument that the section 3212.2 presumption only applies when heart trouble first manifests itself, or first develops, the first evidence of left ventricular hypertrophy was the echocardiogram ordered by Dr. Levister. We note that the medical records summarized by Dr. Levister did not document prior left ventricular hypertrophy despite prior echocardiograms. (See April 28, 2015 report at pp. A-6, A-8, A-9.)

Defendant correctly notes that Labor Code section 3212.2 does not contain an anti-attribution clause. Thus, defendant was free to introduce evidence that applicant’s heart trouble was not caused by his employment as a correctional officer. Defendant produced no such evidence, and, in fact, stipulated to industrial injury to the heart without reservation.² Despite the fact that Labor Code section 3212.2 does not contain an anti-attribution clause, section 3212.2 is

¹ There is some confusion regarding the applicant’s dates of service. At the September 20, 2018 trial hearing, applicant testified that he worked into October or December of 2012. (Minutes of Hearing and Summary of Evidence of September 20, 2018 trial at p. 7) However, at the September 22, 2021 trial hearing, applicant testified that his last day of work was September 24, 2011. (Minutes of Hearing and Summary of Evidence of September 22, 2021 trial at p. 4.) The parties stipulated to employment from February 2, 2007 to September 24, 2011. The section 3212.2 presumption is “extended to a member following termination of service for a period of three calendar months for each full year of the requisite service.” Since applicant worked four full years, the presumption was extended for one year after his last date of service. The August 31, 2012 echocardiogram which showed left ventricular hypertrophy was within one year of applicant’s last date of service.

² In order to rebut the Labor Code section 3212.2 presumption, a defendant must show that nonindustrial factors were the sole cause of the condition. (*Jackson v. Workers’ Comp. Appeals Bd.* (2005) 133 Cal.App.4th 965, 972 [70 Cal.Comp.Cases 1413].) Here, Dr. Levister repeatedly stated that industrial factors contributed to the deterioration of applicant’s condition.

expressly listed in Labor Code section 4663(e) as an injury or illness exempt from Labor Code section 4663 apportionment. Thus, to the extent that a condition gives rise to a Labor Code section 3212.2 presumption and that presumption is un rebutted, the condition is not subject to Labor Code section 4663 apportionment.

In any case, contrary to the defendant's arguments, Labor Code section 3212.2 does not state that it applies only when heart trouble first develops or first manifests itself. Dr. Levister opined that applicant's condition deteriorated (and thus "developed") during his employment as a correctional officer. "The medications have escalated, implicating the job stressors as impacting on his blood pressure as a result of the repetitive emotional trauma that he was subjected to as a correctional officer." (December 22, 2012 report at p. 4.) Indeed, by attributing 60 percent of applicant's hypertensive heart disease disability to his work as a correctional officer, Dr. Levister necessarily found that applicant's job as a correctional officer was contributory to his hypertensive heart disease.

Accordingly, since applicant had an injury coming within the ambit of Labor Code section 3212.2, the disability caused by the injury was not subject to apportionment pursuant to the clear statutory language of Labor Code section 4663(e). Despite the clear language of section 4663(e), defendant relies upon a digest summary of a case denied writ review in *Yubeta v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 1119 (writ den.). A California Compensation Cases digest of a "writ denied" case is not binding precedent on the Appeals Board, especially one, like *Yubeta*, where a WCJ's Report was adopted without further comment. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].)

The WCJ therefore correctly declined to apportion the hypertensive heart disability. However, as noted above, the WCJ did not fully explain the 94% permanent disability rating, given that the component ratings listed in the Opinion on Decision and the Formal Rating appear to come out to 88% permanent disability. We therefore grant reconsideration and defer the issue of permanent disability so that the parties may be heard on this issue.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of October 15, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of October 15, 2021 is **AMENDED** as follows:

FINDINGS OF FACT

1. Mark Mastro, while employed during the period 2/2/2007 through 9/24/2011, as Correctional Officer by the California Department of Corrections and Rehabilitation, sustained injury arising out of and in the course of employment to his heart and psyche.
2. The issue of permanent disability, including any Labor Code 4658(d) adjustment is deferred, with jurisdiction reserved.
3. Apportionment of applicant's heart disability is not applicable due to the dictates of Labor Code section 4663(e).
4. Applicant may be in need of further medical treatment to cure or relieve from the effects of the injury.
5. The Permanent Disability Rating Schedule is not rebutted by a vocational expert report.

AWARD

AWARD IS MADE in favor of Mark Mastro against the State of California as follows:

- a. Further medical treatment to cure or relieve from the effects of the injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2022

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

**MARK MASTRO
MASTAGNI & HOLDSTEDT
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. o.o