

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

MARK EDGREN, *Applicant*

vs.

**THE CITY OF OCEANSIDE, permissibly self-insured,
administered by ADMINASURE, INC., *Defendants***

**Adjudication Number: ADJ11922456
San Diego District Office**

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

Applicant seeks reconsideration of the Findings and Award, issued by the workers' compensation administrative law judge (WCJ) on December 4, 2020, wherein the WCJ found in pertinent part that defendant met its burden of proof on the issue of apportionment and that applicant's injury caused 13% permanent disability.

Applicant contends that defendant did not meet its burden of proof regarding the issue of apportionment because the April 23, 2019 report from internal medicine agreed medical examiner (AME) Daniel J. Bressler, M.D., does not constitute substantial evidence as to that issue.

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

We have considered the allegations in the Petition for Reconsideration (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 grant reconsideration, and affirm the F&A except that we will amend the F&A to find that the report of Dr. Bressler is not substantial evidence as to apportionment and defendant did not meet its burden of proof regarding apportionment (Finding of Fact 5), and that the injury caused 20% permanent partial disability (Finding of Fact 6); and we will amend the Award based thereon.

BACKGROUND

Applicant claimed injury in the form of gastroesophageal reflux disease (GERD) while employed by defendant as a police officer during the period from July 12, 2005, through December 7, 2018.

AME Dr. Bressler evaluated applicant on April 10, 2019. Dr. Bressler examined applicant, took a history, and reviewed the medical record. (Joint Exh. 1, Dr. Bressler, April 23, 2019.) He diagnosed applicant as having GERD and stated that applicant's condition was permanent and stationary. (Joint Exh. 1, p. 8.) Regarding the cause of applicant's whole person impairment and apportionment of his disability, Dr. Bressler stated:

CAUSATION/DISCUSSION: His impairment likely results from three factors: (1) a hiatal hernia, which is industrial per statutory presumption; (2) external compression caused by use of a duty belt and protective vest; and (3) a genetic predisposition based on the history of his mother and father. I find his condition to be **industrial with basis for apportionment of impairment**.

APPORTIONMENT: Based on three basic causative factors resulting in his 15 percent whole person impairment, and based on the relative equivalency of their contributions to that impairment, I will use a simple, but rational tally method for apportionment and thus apportion **two-thirds** of his impairment to **industrial** factors, and **one-third to nonindustrial** factors. (Joint Exh. 1, p. 8, emphasis in original.)

The parties proceeded to trial on November 2, 2020. The report from Dr. Bressler was the only exhibit offered and accepted into evidence; the issue submitted for decision was permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence, November 2, 2020, pp. 2 – 3.)

DISCUSSION

It has long been established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those

attributable to other industrial injuries or to nonindustrial factors, in order to fairly allocate legal responsibility. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565].) The employer has the burden of proof to establish apportionment of permanent disability to non-industrial factors or previous industrial injuries with substantial evidence. (Lab. Code § 3202.5; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114-1115 [71 Cal.Comp.Cases 1229].) Substantial medical evidence supporting apportionment of permanent disability must be based on the correct history and legal theory, it must include the reasoning for the physician's opinion and, and it cannot be based on speculation or an unsupported conclusion. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928-929 [71 Cal.Comp.Cases 1687].) In order to constitute substantial evidence as to the issue of apportionment, the medical opinion must disclose the reporting physician's familiarity with the concepts of apportionment and must delineate the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).)

As noted by the WCJ, apportionment may be based on other factors that caused the disability, including the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event, pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. (*City of Petaluma v. Workers' Comp. Appeals Bd., (Lindh)* (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869]; *City of Jackson v. Workers' Comp. Appeals Bd., (Rice)* (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437]; *Escobedo v. Marshalls* (2005) 80 Cal. Comp. Cases 604 (Appeals Board *en banc* opinion).) However, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo, supra.*)

Here, Dr. Bressler stated that applicant's "impairment likely results from three factors" and he then stated:

Based on three basic causative factors resulting in his 15 percent whole person impairment, and based on the relative equivalency of their contributions to that impairment, I will use a simple, but rational tally method for apportionment and thus apportion **two-**

thirds of his impairment to **industrial** factors, and **one-third** to **nonindustrial** factors.

(Joint Exh. 1, p. 8, emphasis in original.)

Dr. Bressler clearly stated his conclusions and identified the three factors, but he provided no analysis or reason explaining the “relative equivalency of their contributions” nor his use of a “rational tally method” in determining proper apportionment. Also, Dr. Bressler did not explain how and why those factors are responsible for the percentage of disability he assigned. (*Escobedo, supra.*) Thus, his opinion regarding apportionment is not substantial evidence.

Further, pursuant to the provisions of Labor Code section 3212, as to an injury claim made by a city or county police officer, a hernia injury is presumed to “arise out of and in the course of the employment” and the hernia “...shall in no case be attributed to any disease existing prior to that development or manifestation.” (Lab. Code, § 3212.) Applicant was employed as a police officer for the City of Oceanside and there was no evidence submitted at trial that rebutted the presumption. Based thereon, applicant’s disability, for which the hernia was a causative factor identified by Dr. Bressler, cannot be apportioned to any other factors.

Accordingly, we grant reconsideration, and affirm the F&A except that we amend the F&A to find that the report of Dr. Bressler is not substantial evidence as to apportionment and that defendant did not meet its burden of proof regarding apportionment (Finding of Fact 5), and that the injury caused 20% permanent partial disability (Finding of Fact 6); and we amend the Award based thereon.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on December 4, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 4, 2020 Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. The report of Dr. Bressler is not substantial evidence as to apportionment and defendant did not meet its burden of proof on that issue.

6. The injury caused permanent partial disability after adjustment for age, occupation, and FEC, of 20%.

AWARD

AWARD IS MADE in favor of MARK EDGREN against THE CITY OF OCEANSIDE permissibly self-insured, administered by ADMINSURE, INC. as follows:

- (a) Permanent disability indemnity in the total amount of \$21,895.00 payable forthwith.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2021

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

**MARK EDGREN
HOPKINS LAW
PARKER & IRWIN**

TLH/pc

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