

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

ROBERT CARTER, *Applicant*

vs.

**CITY OF LOS ANGELES, *Permissibly Self-Insured, Adjusted By TRISTAR RISK
MANAGEMENT, Defendant***

**Adjudication Numbers: ADJ10625599, ADJ11025566
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Joint Findings and Award of November 24, 2020, wherein it was found that while employed on September 30, 2016 in case ADJ10625599 as a police officer, applicant sustained industrial injury to his neck and heart. It was also found that while employed as a police officer during a cumulative period ending on July 3, 2017 in case ADJ11025566, applicant sustained industrial injury to his hands/wrists and heart. In finding injury to the heart in both cases, the WCJ applied the "heart trouble" presumption of Labor Code section 3212.5.¹ The WCJ then applied Labor Code section 4663(e) which states that section 4663 apportionment does not apply to "injuries or illnesses covered under Section[] ... 3212.5," and issued a joint award of 79% permanent disability covering both injuries.

Defendant contends that the WCJ erred in issuing a joint award of permanent disability covering both cases. While defendant concedes that the heart disability caused by both injuries should have been rated jointly, defendant argues that the neck disability caused by the injury in case ADJ10625599 and the hands/wrists disability caused by the injury in case ADJ11025566 should have been rated separately from one another, since they were caused by separate injuries.

¹ The WCJ mistakenly cited to Labor Code section 3212, which creates a presumption of hernia injury for police officers. Section 3212 creates a heart trouble presumption for other classes of safety workers, but not for police officers. However, other than the classes of safety workers covered, the heart trouble presumption codified in sections 3212 and 3212.5 are identical.

We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we hereby adopt and incorporate, we will deny the defendant's Petition. As an Appeals Board panel stated in *Delia v. County of Los Angeles* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 282, *18 (Appeals Bd. panel), "While there may be parts of body that may not be subject to [section 4663(e)], when those parts of body straddle and overlap various dates of injury to such a degree that they are inextricably linked with presumptive parts of body, thereby preventing a WCJ from parsing and apportioning the non-presumptive parts of body from the presumptive parts of body and issuing awards that adequately and proportionally compensate an applicant, a joint award must be issued to avoid violating Labor Code section 4663(e)." Similarly in *Zuniga v. County of Los Angeles* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 549 (Appeals Bd. panel), we found that *Benson* apportionment was not appropriate between a specific injury and a cumulative injury, when both injuries contributed to presumptive "heart trouble" condition, but only the cumulative injury included the knees, a body part not covered by any statutory presumption. In *Zuniga*, a single award of permanent disability was issued, which included the knee disability. Accordingly, the WCJ here correctly issued a joint award including all body parts.²

² While it is true that Appeals Board panel decisions are not binding precedent and have no stare decisis effect (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal. Comp. Cases 236]), we consider them to the extent we find their reasoning persuasive. Unlike unpublished appellate court opinions, which, pursuant to California Rules of Court, rule 8.1115(a), may not be cited or relied on, except as specified by rule 8.1115(b), Appeals Board panel decisions are citable, even though they have no precedential value. (See *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal. Comp. Cases 145].)

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Joint Findings and Award of November 24, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 19, 2021

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

**ROBERT CARTER
STRAUSSNER SHERMAN
LOS ANGELES CITY ATTORNEY'S OFFICE**

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*

**REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

The Workers' Compensation Administrative Law Judge ("WCJ") issued a Joint Findings and Award, and Opinion on Decision, on November 24, 2020. Defendant, hereinafter, "Petitioner," has filed a timely and verified Petition for Reconsideration on the following grounds pursuant to Labor Code § 5903 / Rules 10940; 10955:

1. That by the order, decision, or award, the Board acted without or in excess of its powers;
2. The evidence does not justify the Findings of Fact;
3. That the findings of fact do not support the order, decision, or award.

I. CONTENTIONS

That this judge erred in issuing a single Joint Award for a police officer applicant, and instead should have issued two separate Awards for each date of injury. Specifically, that there are two distinct and separate injuries, and that while the heart was pled on both, and is presumptively compensable pursuant to L.C. § 3212, "it would be most reasonable to apply Applicant's hypertensive heart disease impairment to the cumulative trauma versus the specific" injury. Petition for Reconsideration, page 5, lines 22-23.

II. FACTS

The case herein involves an applicant, who sustained two admitted dates of injury, while working for defendant in the course of his duties as a police officer. Both injuries include the heart as a body part.

Specifically, the first injury occurred on September 30, 2016, ADJ10625599-MF, which was described by the applicant at trial as "an on-duty motor vehicle accident." Minutes of Hearing and Summary of Evidence, page 5, lines 20-21. Petitioner admitted the injury to the applicant's cervical spine only, and denied the heart.

The second injury is a cumulative trauma injury, ADJ11025566, pled from September 26, 1999 through July 3, 2017, involving the applicant's bilateral hands and wrists, which petitioner admitted, and denied the heart.

The cases were set for trial on September 15, 2020, at which time the parties submitted for determination the following eight issues on both cases:

1. Permanent Disability
2. Apportionment
3. Need for further medical treatment
4. Attorney fees
5. L.C. 3212 heart presumption
6. L.C. 4663 (e) nonattribution clause
7. Applicant asserts joint award for both case numbers is appropriate as supported by medical evidence and the labor code
8. Defendant argues that there is apportionment pursuant to Benson.

Minutes of Hearing and Summary of Evidence, September 15, 2020, pages 2-3, 3- 4.

The parties submitted as Joint Exhibits 1- 11, reports issued by the AMEs Dr. Meth and Dr. Heskiaoff, who addressed the applicant's hypertension/heart and orthopedic body parts respectively. The applicant provided credible testimony under direct examination only.

The undersigned issued a Joint Findings and Award, and Opinion on Decision, on November 24, 2020, finding, in relevant part, that the applicant had injured his heart ("hypertensive heart disease") pursuant to the findings of the AME Dr. Meth, and that it is presumed compensable pursuant to L.C. § 3212. Further, that apportionment did not apply to the applicant's injuries, because L.C. § 4663 (e) states that said requirements "do not apply to injuries or illnesses covered under Sections 3212."

Accordingly, the applicant was awarded a single Joint Award of 79% PD for both injuries.

Defendant's Petition for Reconsideration was timely filed thereafter. Applicant's attorney has filed a response.

III. DISCUSSION

THE APPLICANT IS ENTITLED TO A SINGLE JOINT AWARD

In the “Petition for Reconsideration,” petitioner seeks to have Reconsideration granted, and the Joint Award vacated, on a twofold argument. First, petitioner argues that because the applicant has different orthopedic body parts on each date of injury, he should be awarded two separate awards, pursuant to Benson. Secondly, while petitioner acknowledges that the applicant is entitled to the L.C. § 3212 heart presumption, they propose that the PD related to the applicant’s heart be awarded on only one date of injury.

Petitioner quotes from the case of Benson v. Workers’ Comp. Appeals Bd. (2009) 170 Cal. App. 4th 1535 [74 Cal.Comp. Cases 113 (Benson)], noting that the Court of Appeal in that case found that there had been no “dispute that the applicant had suffered a specific injury and a cumulative trauma injury that resulted in two distinct industrial injuries, and warranted two separate awards.” Petition for Reconsideration, page 3, lines 20-22. Petitioner compares the cases herein to those in Benson. Specifically, that the cervical spine is solely due to the specific injury, and that the bilateral hands/wrists are solely due to the CT. Therefore, petitioner argues that “it is invalid for the cervical and bilateral carpal tunnel injuries to be joined into a joint award when they are clearly caused by two distinct and separate dates of injuries.” Id. at page 4, lines 10-12.

However, the claims herein are not comparable to the claims in Benson.

The claims herein involve a police officer, who in addition to sustaining injuries to orthopedic body parts, has sustained injury to his heart on both injuries. Accordingly, unlike Benson, L.C. § 3212 and L.C. § 4663(e) apply.

L.C. § 3212 provides as follows:

“The hernia, heart trouble, or pneumonia so developing or manifesting itself in those cases shall be presumed to arise out of an 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. (emphasis added).

The parties herein proceeded to the AME Dr. Meth, who found that the applicant's heart/hypertension developed due to work related stress. Joint Exhibit 1, page 21. Specifically, Dr. Meth found that the applicant has "hypertensive heart disease" and qualifies for the presumption pursuant to L.C. § 3212. Joint Exhibit 2, page 2. Petitioner did not submit any evidence that controverted the presumption, or the AME's findings. Accordingly, the applicant's heart condition was found to have arisen out of his employment.

Dr. Meth also found apportionment between both injuries, finding 85% related to the CT claim, and 15% related to the specific. Id. at page 2. However, despite said findings, L.C. § 4663(e) precludes their application, because apportionment requirements "do not apply to injuries or illnesses covered under Sections 3212" amongst others. L.C. § 4663 (e).

Accordingly, because L.C. § 4663 (e) applies to the cases herein, unlike Benson, there are no longer two distinct and separate injuries, but rather one. The result is that the applicant is entitled to a single Joint Award.

The WCAB upheld a single joint award for an applicant police officer in the Panel Decision of Joe Delia v. County of Los Angeles/Sheriff's Department, PSI, Administered by Tri-Star Risk Management, (Delia) 2010 Cal. Wrk. Comp. P.D. Lexis 282. In Delia, the applicant police officer had three dates of injury; one involving the cervical and lumbar spine, the second the lumbar spine and both hands, and the third, the cardiovascular system, hernia, bilateral hands and auditory. Delia, 2010 Cal. Wrk. Comp. P.D. Lexis 282, 4-5. The WCJ issued a single joint Award for 99%, for which defendant filed a Petition for Reconsideration. Like petitioner herein, defendant in Delia, argued that the applicant should have been awarded separate awards pursuant to Benson. Id. at page 3.

The WCAB denied petitioner's "Petition for Reconsideration," and noted that the court in Benson "agreed with the Appeals Board that there may be circumstances where the percentages that causally contribute to the employee's overall permanent disability cannot be parceled out. Such a circumstance occurs in this case, because the anti-attribution provisions of sections 3212 and 3212.3 preclude apportionment pursuant to section 4663...as discussed by the WCJ in his Report, the antiattribution provisions...preclude apportionment of the causation of permanent disability pursuant to section 4663...For that same reason, the permanent disability caused by each of

applicant's three injuries cannot be separately apportioned to separate awards pursuant to section 4663 as described in Benson." Delia, 2010 Cal. Wrk. Comp. P.D. Lexis 282, 8.

Accordingly, as in Delia, the applicant is entitled to a single joint award, because L.C. § 4663 is precluded by the "anti-attribution" provisions of L.C. § 3212.

Petitioner's second argument is that "it would be more accurate and in accordance with the Labor Code to find two dates of injury but only apply the hypertension to one of the dates of injury because there are clearly two distinct dates of injury." Petition for Reconsideration, at page 5, lines 10-12.

Specifically, petitioner proposes that the PD for the heart be placed on the cumulative trauma injury, based on Dr. Meth's apportionment findings. Petitioner argues that because Dr. Meth apportioned "an overwhelming 85% of the Applicant's hypertensive heart disease to the cumulative trauma injury and a mere 15% to the motor vehicle accident...it would be most reasonable to apply Applicant's hypertensive heart disease impairment to the cumulative trauma versus the specific motor vehicle accident." Id. at page 5, lines 16-23 (emphasis added).

Petitioner is essentially arguing for both the application and non-application of Benson; that it should apply to find that the orthopedic body parts be kept separate and an award issued for each date of injury, and at the same time, that Dr. Meth's apportionment findings be ignored for the heart, and the heart be apportioned 100% to one injury. The argument is contradictory and has no legal basis.

Accordingly, the applicant is entitled to a single joint award.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety.

Sandra Rosenfeld

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE

DATE: January 14, 2021