

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

**JOHN DAVIES, *Applicant***

**vs.**

**COUNTY OF SAN DIEGO PROBATION DEPT.; COUNTY OF SAN DIEGO, *Defendants***

**Adjudication Number: ADJ6996303  
San Diego District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendant County of San Diego. This is our Opinion and Decision After Reconsideration.<sup>1</sup>

Defendant seeks reconsideration of the December 16, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant sustained new and further disability in his hips and heart/hypertension resulting in 84% permanent disability.

Defendant contends that the WCJ's award of 84% permanent disability undoes the prior stipulation and award to applicant's heart/hypertension, where defendant claims apportionment was taken despite the Labor Code<sup>2</sup>, section 3212.10 heart presumption and the non-attribution clause of section 4663(e).

We received and reviewed applicant John Davies's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons

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<sup>1</sup> Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

<sup>2</sup> All statutory references are to the Labor Code unless otherwise indicated.

discussed below, we affirm the December 16, 2020 Findings and Award.

Defendant contends that the WCJ had three options for a permanent disability award: (1) apply a 40% apportionment to non-industrial causes to the entire 40% whole body impairment (WPI) based on applicant's heart/hypertension, (2) apply a 40% apportionment to non-industrial causes to the underlying 35% WPI based on applicant's heart/hypertension with no apportionment to applicant's 5% WPI for his "new and further disability" in the form of heart/hypertension, or (3) apply no apportionment to the entire 40% WPI based on applicant's heart/hypertension because of the heart presumption under section 3212.10 and the non-attribution clause under section 4663(e).

Defendant contends that the former option should be applied because the parties entered into a stipulations and award of 34% permanent disability in the underlying case, which defendant claims took into account apportionment, despite the existence of the heart presumption and the non-attribution clause. Defendant does not dispute that the heart presumption applies. Defendant contends that apportionment should not apply because doing so is in effect reconsidering the previous stipulation and award in light of the new and further disability.

Although we appreciate defendant's contention, the fact remains that applicant is entitled to the heart presumption and section 4663(e) prohibits apportionment of an injury or illness covered by such presumption. (§§ 3212.10, 4663(e).) The court in *Miller v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 350 [55 Cal.Comp.Cases 68], held that the heart presumption should be taken into account in a petition for new and further disability even when the underlying stipulations and award did not consider it. Furthermore, in *Bates v. County of San Mateo* (March 14, 2019, ADJ7497019) 2019 Cal. Wrk. Comp. P.D. LEXIS 72, a different Appeals Board panel held that a presumed injury not subject to apportionment should not be parceled out into separate awards. As a result, defendant's first two options for calculating permanent disability are not viable. Accordingly, we agree with the WCJ that applicant is entitled to the full permanent disability derived from applicant's heart condition without apportionment. We, thus, affirm the December 16, 2020 Findings and Award. Although defendant is liable for the full permanent disability derived from applicant's heart condition without apportionment, it is entitled to credit from the previous award of permanent disability for the heart stemming from the underlying stipulations.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that defendant County of San Diego's Petition for Reconsideration of the December 16, 2020 Findings and Award is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 23, 2023**

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

**JOHN DAVIES  
LAW OFFICES OF O'MARA & HAMPTON  
COUNTY COUNSEL-SAN DIEGO**

**LSM/pc**

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

**STATE OF CALIFORNIA  
Division of Workers' Compensation  
Workers' Compensation Appeals Board**

**CASE NUMBER: ADJ6996303**

**JOHN DAVIES**

vs.

**COUNTY OF SAN DIEGO PROBATION DEPT; COUNTY OF SAN  
DIEGO;**

**Workers' Compensation Administrative Law Judge: Alicia D. Hawthorne**

**DATE: January 5, 2021**

**REPORT AND RECOMMENDATION ON PETITION FOR  
RECONSIDERATION**

Workers' Compensation Administrative Law Judge: Alicia D. Hawthorne

*Counsel:*

Petition for Reconsideration Filed By: Defendant, County Counsel, County of San Diego

Attorney for Petitioner: County Counsel, by David E. Shamsky, Sr. Deputy

Attorney for Applicant: Law Offices of O'Mara and Hampton, Beth Williams, Esq.

**INTRODUCTION**

Defendant, County of San Diego, has filed a timely, verified, petition for reconsideration, on the standard statutory grounds, from the trial court's December 16, 2020 Findings and Award, pleading that:

1. The evidence does not justify the Findings of Fact;
2. The Findings of Fact do not support the Order, Decision or Award;
3. By the Decision and Award, the Board acted without or in excess of its powers.

Specifically, defendant contends that this WCJ's Findings and Award was in error when this WCJ found an unapportioned award for applicant's *new and*

*further* disability despite the fact that the parties had stipulated to apportionment for applicant's original disability.

### FACTUAL BACKGROUND

Applicant, John Davies, while employed during the period January 5, 1995 to April 1, 2009, as a Probation Officer, Occupational Group Number 390, at San Diego, CA, by the County of San Diego, sustained injury arising out of and in the course of employment to his back, right foot, right knee, hernia, bilateral hips, and heart/hypertension.

Parties previously entered into stipulations in this above matter on August 5, 2010, which resulted in an Award issuing on August 5, 2010 for a total of a 34% PD.

Applicant filed a timely petition to reopen for a new and further disability. The parties proceeded to trial on 09/24/2020, in which the parties stipulated to a new and further disability to the heart/hypertension and added body part of the hips. (MOH/SOE, page 3, lines 3-4).

The parties were given an opportunity to file post-trial briefs and a Findings and Award issued on December 16, 2020.

### DISCUSSION

Defendant contends that the WJC erred in not allowing any apportionment to applicant's new and further disability to his heart/hypertension when the prior stipulation of the parties allowed such apportionment to be applied. This WCJ disagrees. Prior case law has addressed this issue. As previously explained in the Opinion on Decision, when addressing applicant's new and further disabilities, apportionment under Labor Code § 4663/4664 still applies. In addition, the facts of this case lend an additional analysis under Labor Code § 3212.10 as applicant is a probation officer subject to the non-attribution clause. Prior cases have determined that apportionment on the new and further disability is appropriate when adequately addressed by the medical evidence presented. (See *Myrtle Vargas vs. Atascadero State Hospital and State Compensation Insurance Fund*, 71 Cal. Comp. Cases 500, 502; *Wilson-Marshall v. Workers' Compensation Appeals Bd.*, 72 Cal. Comp. Cases 1431, 2007 Cal. Wrk. Comp. LEXIS 304 (Cal. App. 4th Dist. September 07, 2007) (writ denied)) Taking this analysis, applicant's new and further disability to his heart/hypertension is not subject to apportionment.

Defendant argues that finding an 84% permanent disability is the worst case scenario and results in undoing the original stipulations of the parties which allowed for apportionment. They conclude that this would effectively undo the original stipulation that allowed for apportionment. This WCJ appreciates this

argument and notes that the current finding increases applicant's percent of permanent disability significantly. In addition, as previously noted in the Opinion on Decision, the WCJ will not disturb the original Award which includes the parties' stipulated apportionment. However, this WCJ finds that in determining applicant's final disability, the doctor shall state what the current disability level is for the applicant. In the matter at hand, Dr. Bressler indicates, "based on the recent echocardiogram, " ... there has been some element of additional end-organ damage in the form of increased creatinine. This increased creatinine, reflecting decreased renal function, leads me to revise my opinion regarding whole person impairment upward; I thus assign a 40 percent whole person impairment, taking into account the end-organ effects of his hypertension on both his heart and his kidneys." (Joint Exhibit 7, page 13) Having determined that the reporting of Dr. Bressler is substantial medical evidence, this WCJ confirmed Dr. Bressler's report with the 40 percent WPI was correct with the parties' stipulations and determined that the final permanent disability of the applicant is now an 84%.

There appears to be a disconnect with defendant's interpretation of a new and further disability. Defendant would like this WCJ to determine a percent only of the additional permanent disability since applicant's original Award. However, that is not in accordance with the actual understanding of a *new and further* disability. The basic concept of permanent disability is to adequately compensate an injured worker for the loss of their ability to compete in the open labor market<sup>1</sup> Here, if this WCJ followed defendant's argument and only awarded the applicant the proposed 69% permanent disability, the findings would not adequately compensate the applicant for his actual level of disability. Applicant's overall permanent level of disability resulting from this industrial injury is properly reflected in a final level of disability of 84%.

Defendant contends that there has been a miscalculation as to the permanent disability in this matter. Defendant contends that this WCJ "arguably ordered 84% 'new and further' disability, over and above a prior 34% stipulation in this matter." (Petition for Reconsideration, page 5, lines 12-13) A reading of the Opinion on Decision states that the applicant's new level of permanent disability is 84%. Any other interpretation would give the applicant a higher than 100% PD which would not be allowed in this situation. However, if clarification is needed, then the petition for reconsideration should be granted to allow this WCJ to clearly indicate that the Applicant's overall disability is 84% or in the

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<sup>1</sup> (See *City of Martinez v. Workers' Comp. Appeals Bd.*, (2000) 85 Cal. App. 4th 601, 608-609, 102 Cal. Rptr. 2d 588, 593, 2000 Cal. App. LEXIS 950, 65 Cal. Comp. Cases 1368, which state "Permanent disability, like temporary disability, may compensate for an employee's actual incapacity to work; it also compensates for residual physical and mental impairments, with "consideration being given to the diminished ability of such injured employee to compete in an open labor market" (§ 4660, subd. (a)). (See generally 1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation, *supra*, Permanent Disability Benefits, § 8.01, pp. 8-5 to 8-6.)

alternative, the Board should issue a new Findings and Award to be substituted for the Findings and Award issued on December 16, 2020.

RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied or in the alternative, amended for clarification only.

DATE: January 5, 2021

Alicia D. Hawthorne

WORKERS' COMPENSATION JUDGE