WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KIRBY ALSTROM, *Applicant*

vs.

COUNTY OF FRESNO, permissibly self-insured, administered by AIMS, *Defendants*

Adjudication Numbers: ADJ10759829; ADJ10759863; ADJ12769656
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues. This is our Opinion and Decision after Reconsideration.[1]

Applicant and defendant have each filed a Petition seeking reconsideration of the June 4, 2021 Joint Findings of Fact, Award, and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a deputy sheriff by defendant, sustained injury arising out of and in the course of employment (AOE/COE) to the low back on January 1, 1997 (Case Number ADJ12769656), sustained injury AOE/COE to the right foot and gastroesophageal reflux disease (GERD) on January 18, 2017 (Case Number ADJ10759829), and sustained injury AOE/COE to skin and in the form of hypertension, supraventricular tachycardia, hiatal hernia and GERD, but not to the low back, mid back, or neck, during the period of January 31, 1993, to March 3, 2017 (Case Number ADJ10759863).

Applicant makes the following contentions in his Petition: (1) the duty belt presumption under Labor Code[2] section 3213.2[3] can only be rebutted with evidence that a contemporaneous, non-industrial event is the sole cause of low back impairment, which was not done in this case; (2)

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

[3] Labor Code section 3213.2 is miscited as 3212.3 in the petition, but the intended reference is clear from context.

there is a rebuttable presumption under section 3213.2 that low back injury is apportionable only to the cumulative trauma of wearing a duty belt; (3) the progression of applicant's low back symptoms provides an additional basis for the presumption under section 3213.2; (4) Dr. Previte's opinions are not substantial medical evidence due to an inadequate investigation into the cause of the applicant's neck and mid-back pain, an inaccurate history, and an inadequate review of records; (5) the findings should follow Dr. Hyman's finding of injury in the form of hypertension, and permanent disability related thereto; (6) Dr. Hyman's apportionment of GERD to the specific injury of January 18, 2017 should also be followed, consistent with the stipulation of the parties; and (7) skin impairment should be apportioned to cumulative trauma.

Defendant contends in its Petition that (1) the January 1, 1997 injury to the low back is barred by the statute of limitations because it was not timely reported, and the employer had no knowledge of the injury until after 2005; and (2) actinic skin damage is not cancer, and as such is not subject to a presumption of industrial causation, nor is non-industrial apportionment disallowed under section 4663(e).

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant the Petition for Reconsideration. We received Answers from applicant and defendant to the respective Petitions.

Reconsideration was granted to allow sufficient time to further study the factual and legal issues in this case. After further consideration of the Petitions, Answers, and contents of the WCJ's Report, and after a complete review of the record in this matter, for the reasons discussed below, we will rescind the Findings of Fact, Award, and Order and return the matter to the trial level for further development of the record.

FACTS

On March 23, 2021, the parties proceeded to trial. Case Numbers ADJ10759829, ADJ10759863, and ADJ12769656 were consolidated. (Minutes of Hearing (MOH/SOE), March 23, 2021, p. 2, lines 3-8.)

The parties stipulated that on January 18, 2017, applicant sustained an injury AOE/COE to the right foot and GERD while employed by defendant. (*Id*. p. 2, lines 34-40.) The parties further stipulated that at the time of injury the employee's earnings were $1,463.50 per week, warranting indemnity at the weekly rate of $290 for permanent disability. Parties agreed that the employer has

furnished some medical treatment, no attorney fees have been paid, and William Previte, D.O., is the agreed medical evaluator (AME) in orthopedic surgery. (*Id*. p. 2, line 43 to p. 3, line 6.)

In Case NumberADJ12769656, the parties stipulated that applicant while employed on January 1, 1997 by defendant claims to have sustained an injury AOE/COE to the lower back. (*Id*. p. 3, lines 40-45.) As in Case Number ADJ10755829, the parties stipulated that no attorney fees have been paid, and that Dr. Previte is the orthopedic surgery AME. (*Id*. p. 3, lines 40-45.)

In Case Number ADJ10759863, the parties stipulated that during the cumulative period of January 31, 1993 to March 3, 2017, applicant sustained an injury AOE/COE to hypertension, supraventricular tachycardia, skin, hiatal hernia and GERD, and claims to have sustained an injury AOE/COE to the cervical spine, thoracic spine and lumbar spine. (*Id*. p. 3, lines 11-20.) Stipulations regarding earnings, treatment, and the orthopedic AME were the same in this case as in Case Number ADJ10755829, with the additional stipulation that the primary treating physician is Kevin Calhoun, M.D. (*Id*. p. 3, lines 23-35.)

The issues submitted for decision at trial included the statute of limitations with respect to the claim of injury on January 1, 1997, injury AOE/COE with respect to the claimed cumulative injury, and permanent disability and apportionment in all three cases. (*Id.* pp. 5-6.)

At trial, the parties offered 14 medical reports as joint exhibits, identified as Joint Exhibits AAA through NNN.

Panel Qualified Medical Evaluator (PQME) William Johncox, D.C., served as the PQME on a claim for a prior injury of July 22, 2005, when applicant quickly jumped out of his patrol car and felt a pop and some discomfort in his low back. (Joint Exhibits AAA, BBB.) About 45 minutes later, applicant noticed that the back pain was intensifying while he was directing traffic. About a week later, the pain kept worsening and he felt a sensation of instability in his low back. (Joint Exhibit AAA, PQME report of William Johncox, D.C., 12/4/2005, p. 1, para. 2.) Applicant was referred by his employer to chiropractor John Emerzian, D.C., who found that applicant "had a lower disc problem." (*Id*. p. 1, para. 3.) Dr. Emerzian did not take applicant off work but applicant did receive treatment from August 15, 2005 to November 8, 2005, and a lumbar MRI showed "that three discs were degenerating." (*Id*. p. 2, para. 1.) Dr. Johncox's first report mentioned applicant stating that "in 1997 he had a work injury involving his lower back." (*Id*. p. 2, para. 3.) At his second evaluation of April 3, 2006, applicant told prior PQME Dr. Johncox that he "feels that he has returned to a pre-injury level with respect to the 7/22/05 industrial injury." (Joint

Exhibit BBB, PQME report of William Johncox, D.C., 4/3/2006, p. 1, para. 2.) As before the 2005 injury, applicant had occasional minimal low back pain. (*Id*. p. 1, para. 2, and p. 2, para. 1.) Dr. Johncox noted that applicant had full lumbar spine range of motion at that time. (*Id*. p. 2, para. 2.) Accordingly, Dr. Johncox agreed with applicant that there were no ratable residual subjective complaints, objective finding, disability, or impairment" attributable to the 2005 injury, and current complaints were apportionable entirely to the 1997 industrial injury." (*Id*. p. 2, para. 4.)

Joint Exhibits CCC through GGG are four reports and a deposition transcript of the present orthopedic AME, Dr. Previte. In his first report of July 8, 2017, Dr. Previte described applicant's 1997 specific injury as follows:

> On an industrial injury basis, he recalls a 1990s back injury for which he received treatment of conservative nature. He is unaware of whether permanent partial disability had been assigned, though he notes that there was ongoing continued conservative care for low back residuals subsequent [to] that event. There was also a hand injury that occurred at some unknown date, associated with work functions as a sheriff, and this was treated by bracing. Again, he is uncertain whether permanent partial disability had been assigned for that matter.

(Joint Exhibit CCC, AME report of William Previte, D.O., 7/8/17, p. 3, para. 2.)

Dr. Previte later adds: "an index low back injury occurred at work in the 1997, 1998, or 1999 timeframe when Mr. Alstrom was utilizing a ram to break through a door while serving a warrant. According to his statements and deposition testimony, he reported the injury and was provided some chiropractic care briefly. I cannot state with certainty whether any time was missed from work but I can state with certainty that he resumed perform[ing] his usual and customary job duties." (*Id*. p. 13, under "Discussion.")

Dr. Previte describes the 2017 specific injury as follows:

> In describing the injuries that I am to currently address, he confirms that on 1/19/17, he kicked a concrete divide ln the locker room injuring his right foot. At the time of this event, he was wearing work boots. He reported the injury promptly. He describes missing three days from work as a result of this specific accepted Injury event and thereafter performing light duty for about one week. Subsequent[ly], he returned to full duty. Treatment is described to have included anti-inflammatory medications and ice. He indicates that there has been some current care for the right foot that is [sic] included primarily modalities.

(*Id*. p. 3, para. 3.)

Regarding cumulative trauma, Dr. Previte found none. He explained:

> In doing so [performing his usual and customary job duties], as is evidenced by his discussions with me today as well as his deposition testimony, episodically thereafter, mechanical low back pain flare ups occurred which resulted in very brief periods of chiropractic management. Has had no demonstrated inability to perform his usual and customary job duties as a deputy sheriff through the 25 year period of his career leading to his retirement in March 2017. I do not appreciate anything that would represent neck or mid back Injury. He denies any type of specific event involving his neck or mid back. When flare ups of his back occurred, pain would sometimes migrate into the mid back or upper back region. In my opinion, this does not constitute an injury of his neck or mid back. He does discuss in his deposition that at times when sitting in a car and performing typing on a computer, muscle like tenderness or pain in his upper back or mid back would develop. I do not believe this constitutes an industrial related injury of either specific or cumulative trauma nature.

(*Ibid*.)

Also, more explicitly, Dr. Previte wrote: "I do not find evidence for cumulative trauma on an orthopedic basis for his neck, mid back or low back nor do I find injury of specific or cumulative trauma nature for the cervical spine or thoracic spine." (*Id*. p. 15, para. 1.) Dr. Previte indicated that he did not have enough information to provide WPI and apportionment but could provide an impairment rating of the lumbar spine, "most likely wholly apportionable to the late 1990 [*sic*] date of injury," if a treating doctor obtained an MRI for his review. (*Id*.)

Joint Exhibit DDD is a transcript of a deposition of Dr. Previte that was taken on November 10, 2017. At deposition, Dr. Previte did not change any of his opinions. Most notably, Dr. Previte expressed his opinion that wearing a duty belt is not a viable mechanism of injury to the low back:

> Q. Your answer is wearing a duty belt is not a viable mechanism of injury?
>
> A. Medically to me, no.

(Joint Exhibit DDD, AME Deposition transcript of Dr. Previte, 11/10/2017, p. 25, lines 10-12.)

Dr. Previte testified that he does not believe any studies—not even an x-ray—are warranted with respect to applicant's neck and mid-back complaints because applicant indicated that his neck and mid back symptoms were radiating from the low back, and that he "does not let anything about his neck, mid back or low back alter his behaviors or activities in any way, shape or form and enjoys whatever he likes." (*Id*. p. 22, line 23 to p. 24, line 2.)

Dr. Previte evaluated applicant again on April 13, 2019. In his re-evaluation report, Dr. Previte did not change his opinion, but did add a finding of one percent Whole Person Impairment (WPI) for foot pain, presumably using Chapter 18 of the *AMA Guides to the Evaluation of*

Permanent Impairment, Fifth Edition (AMA Guides), and five percent WPI for the low back using Table 15-3 of the AMA Guides. (Joint Exhibit EEE.) He attributed applicant's foot condition to the specific injury of January 18, 2017, and indicated that applicant's lumbar spine problems were "industrially related to an event occurring in the mid 1990s," with "temporary aggravations of a chronic low back condition that has occurred over time." (Joint Exhibit EEE, AME Report of William Previte, D.O., 4/13/2019, p. 9, last paragraph.) With respect to apportionment, Dr. Previte indicated that "impairment involving the right foot determined by the Trier of Fact would be 100% apportionable to the 1/18/17 event" and "[w]ith regard to the low back, based on reasonable medical probability, I would apportion his impairment entirely to the mid 1990s injury which represented the culprit responsible for his mechanical low back pain that has been chronic." (*Id*., p. 10, para. 1.)

In his supplemental report dated September 10, 2020, Dr. Previte reviewed additional records, including the reports of Dr. Emerzian from 2005, a lumbar MRI report from Woodward Park Radiology, and the reports of prior PQME Dr. Johncox. (Joint Exhibit FFF.) There was no change in Dr. Previte's opinions. With respect to the lumbar spine, Dr. Previte commented: "Use of the duty belt may have resulted in periods of temporary aggravation of the low back condition however I do not possess information that would support that the duty belt wear 'accelerated' a chronic ongoing low back condition which was well established and existed prior to his employment with the County of Fresno." (Joint Exhibit FFF, AME Report of William Previte, D.O., 9/10/20, p. 6, para. 2.) No records reviewed by Dr. Previte predated applicant's employment with the County of Fresno, nor did he offer any explanation how he had extrapolated what was "well established" prior to that 25-year employment based on later records. With respect to the cervical and thoracic spine, Dr. Previte opined that "the symptoms which he experiences In the mid back and cervical regions occurs [*sic*] on a radiation basis episodically and would not suggest independent or isolated issues that would be relevant to his work with the County of Fresno as there is no information to support that his cervical spine or thoracic spine were ever injured while working [for] the County of Fresno." (*Id*.)

In his report of October 16, 2020, Dr. Previte reviewed his own deposition testimony, per the request of defense counsel, and, like the other reports reviewing records, there was no change in Dr. Previte's opinions. (Joint Exhibit GGG.)

Six reports of internal medicine AME Mark Hyman, M.D., were admitted into evidence as Joint Exhibit HHH through MMM. The initial AME report of July 10, 2017 noted that applicant had worked for the County of Fresno as a deputy sheriff for 25 years, from March of 1992 to March 7, 2017. He had no work restrictions when he was hired, based on a pre-employment physical examination. (Joint Exhibit HHH, AME Report of Mark Hyman, M.D., 7/10/17, p. 2, para. 2.) Dr. Hyman assessed five percent WPI as the result of industrial cumulative trauma resulting in actinic skin damage using Table 8-2 of the AMA Guides, four percent WPI for gastroesophageal reflux disease using Table 6-3, 15 percent WPI for hypertensive heart disease with diastolic dysfunction and intraventricular conduction delay using Table 4-2, and two percent WPI for carotid arterial disease using Table 4-3. (*Id*. p. 12, para. 4.) Apportionment of these percentages of WPI was deferred pending review of more records.

In a supplemental report, Dr. Hyman reviewed the reports of orthopedic AME Dr. Previte and concluded that all causation of internal medical conditions should be attributed to cumulative trauma. "I note that the specific foot injury appears to be a more minor mechanism of difficulty. Therefore, I would identify any of his industrially related internal medicine conditions to be applied only to the cumulative trauma injury." (Joint Exhibit III, AME Report of Mark Hyman, M.D., 8/31/2017, p. 1, para. 2; p. 2, para. 1.) Dr. Hyman also assigned percentages of apportionment to applicant's skin and GERD disability by combining multiple causes without a separate explanation of how each cause contributed to permanent disability, and without justification of how or why he selected approximate percentages of causation:

> I would further identify that his hypertensive heart disease is heart trouble as seen in safety personnel and there would be no basis for apportionment. I would identify his actinic skin damage to be apportioned 50% to personal sun exposure and 50% to the sun exposure from his work duties. I would identify his gastroesophageal reflux disease as being apportioned 75% to personal contributions to his weight, personal dietary habits including alcohol and caffeine consumption, and 25% to the pain of his orthopedic injuries, the stress of these injuries and the medications used to treat these injuries. Finally, I would identify his carotid arterial disease to be apportioned 75% to personal dietary habits, personal contributions to his weight, the impacts of his lipids and the personal contributions to the blood pressure condition and 25% to that portion of his blood pressure which is industrially related.

(*Id*. p. 2, para. 2.)

On October 9, 2017, Dr. Hyman issued another supplemental report in response to an interrogatory of September 27, 2017, and addressed apportionment of disability from applicant's

hernia as follows: "The finding of a hiatal hernia represents an anatomic change to the connection between the esophagus and stomach. This is part of the personal contribution to his reflux disease and is therefore encompassed within the 75% apportionment of personal contributions to his reflux disease condition." (Joint Exhibit JJJ, AME Report of Mark Hyman, M.D., 10/09/17, p. 1, para. 2; p. 2, para. 1.) Dr. Hyman does not discuss whether his inclusion of a hernia in non-industrial apportionment is offered in rebuttal of the hernia presumption created by section 3212 and does not offer any analysis of either causation of injury or disability in support of a rebuttal if one was intended.

On October 31, 2018, Dr. Hyman re-evaluated applicant and noted that applicant is retired and "recently had a right foot fracture when he was hit on his motorcycle." (Joint Exhibit KKK, AME Report of Mark Hyman, M.D., 10/31/2018, p. 2, para. 2.) Dr. Hyman indicated that applicant's premature supraventricular tachycardia constitutes "heart trouble" that is presumed industrial under section 3212, with six percent WPI under Table 3-11 of the AMA Guides, unapportioned due to the presumption. Dr. Hyman also noted that applicant's carotid arterial disease had resolved, but he advised applicant to go on a diet, exercise, and lose weight.

On June 17, 2019, Dr. Hyman issued a supplemental report in response to a letter of June 14, 2019, questioning whether his assessment of applicant's apportionment for GERD could include apportionment between injuries. Dr. Hyman noted that while applicant's hernia condition appears to be a presumptive condition and not subject to apportionment, GERD was apportioned 25 percent to "orthopedic issues," of which 50 percent is due to cumulative trauma and the other 50 percent is due to the specific foot injury of January 18, 2017. There is no explanation offered for the 75 percent non-industrial apportionment. The only explanation provided in support of Dr. Hyman's percentages of GERD apportionment is the observation that "the onset of the majority of [applicant's] reflux disease symptoms is after his more recent specific injury." (Joint Exhibit LLL, AME Report of Mark Hyman, M.D., 6/17/2019, p. 2, para. 1.)

In his next report, Dr. Hyman reviewed orthopedic AME Dr. Previte's report of April 13, 2019. Dr. Hyman indicated that if the hiatal hernia and GERD were rated separately, he would assign each 2 percent WPI under the AMA Guides. Dr. Hyman indicated once again that the hernia would not be apportionable under a statutory presumption, but GERD would be apportioned 75 percent to "personal factors" and 25 percent to "industrial factors," of which 50 percent is

cumulative trauma and 50 percent is the specific injury of January 18, 2017. (Joint Exhibit MMM, AME Report of Mark Hyman, M.D., 7/10/2019, p. 2, para. 2.)

The parties also submitted as a joint exhibit a PR-2 report from Van Polglase, M.D., which appears to relate to the right foot injury of January 18, 2017, when applicant kicked his right foot against a "little ridge" at work. Dr. Polglase indicated in this report that as of January 30, 2017, just 12 days after the injury, applicant was "doing well" with "minimal symptoms" and was released back to normal work activities. (Joint Exhibit NNN, Report of PTP Van Polglase, M.D., 1/30/2017, p. 2, para. 1-3.)

Applicant's exhibits, which were lettered instead of numbered, consisted of one medical report and eight non-medical records. (Applicant's Exhibits A-I.)

The medical report is a PR-2 report from Dr. Emerzian dated December 18, 2017. The report indicated that x-rays of applicant's spine were taken in-house, showing degenerative disc disease at all levels of the lumbar and thoracic spine. (Applicant's Exhibit B, Report of John Emerzian, D.C., 12/18/2017, p. 1, under "Objective findings.") There is no discussion of causation in the report. The report includes a paragraph marked "Amendment 01/09/18," requesting an MRI of the thoracic and lumbar spine. (*Id.* p. 2, para. 3.)

A letter dated July 4, 2020 from applicant's attorney to Dr. Previte, admitted as Applicant's Exhibit A, questions (1) Dr. Previte's conclusion that applicant's back injury was solely attributable to a specific incident in the 1990s based on the reports of prior PQME Dr. Johncox; (2) whether there is any evidence that applicant's duty belt did not accelerate his low back complaints; (3) whether cervical spine imaging would be reasonably necessary to confirm whether applicant's neck complaints are really radiating from the low back; (4) whether Dr. Emerzian's comments about the thoracic spine in his PR-2 report of December 18, 2017 tend to show cumulative injury to the thoracic spine; and (5) whether an MRI of the thoracic or lumbar spine is necessary. (Applicant's Exhibit A, Applicant's Attorney's Letter to Dr. Previte, 7/4/2020, p. 1, items 1-5.)

Defendant's exhibits, which were numbered instead of lettered, consisted of one medical report and seven non-medical records. (Defendant's Exhibits 1-8.) All of the exhibits identified at trial were admitted into evidence except Defendant's Exhibit 8, which was marked for identification only.

Four witnesses testified at trial. First, Dr. Emerzian testified, not as an expert but as a percipient witness. Dr. Emerzian testified that Sergeant David Huerta, applicant's supervisor, brought applicant to him for an industrial injury. Dr. Emerzian could not recall when applicant's initial treatment began; however, he recalled it was a back injury associated with applicant swinging a battering ram. Sgt. Huerta was present during applicant's initial evaluation. (MOH/SOE, March 23, 2021, p. 7, lines 22-28.)

Dr. Emerzian could not recall exactly when this occurred, but it was years ago. He testified that Sgt. Huerta died about two and a half to three years ago. Besides the battering ram injury, Dr. Emerzian has treated applicant for his neck, mid back and trapezius muscle problems. Dr. Emerzian billed the claims examiner, Fimbres, for applicant's treatment. He recalls billing Fimbres because Mr. Fimbres, the owner, lived across the street from him. Mr. Fimbres passed away over five years before he had moved from there, which was at least five years before, so he had not been in contact with Mr. Fimbres for at least 10 to 15 years. Dr. Emerzian treated County employees and billed Fimbres. He's probably treated hundreds of County employees. (*Id*. p. 7, lines 32-46, and p. 8, lines 27-32.)

Dr. Emerzian confirmed that applicant also injured his low back when exiting a vehicle in 2005. He was referred to Defendant's Exhibit 3, a five-page document of his chart notes from around that time, but the witness, appearing telephonically, could not see the exhibit. Dr. Emerzian testified that if the exhibit indicated a copay at the bottom, it could have been a clerical error. An employee did his billing. If a patient treated on an industrial basis and was discharged from treatment, it was not uncommon for him to continue to treat the patient on a non-industrial basis. If a patient had a prior injury, it would be common to refer to the prior injury in the chart notes, but it's not a procedure always followed because his main intent is to treat the patient. He would typically refer to a prior injury if the condition seemed to be worse after a patient returned for treatment. (*Id*. p. 8, lines 1-26.)

Applicant was next called as a witness on his own behalf and testified that he recalls an injury in the 1990s when he rammed a door and hurt his back. David Huerta was his supervisor at that time. He told his sergeant about how he got hurt doing the search warrant. Sgt. Huerta completed his on-the-job injury packet and took him to see Dr. Emerzian. He recalled completing his work injury packet and he also recalled receiving paperwork in the mail for the injury. (*Id*. p. 8, lines 43-47, and p. 9, lines 1-2.)

Applicant was directed to Defendant's Exhibit 1, with documents regarding a date of injury of July 12, 1996. He was referred to page 7, a law enforcement report. Applicant confirmed that he was the reporting party for the law enforcement report that begins at page seven of Defendant's Exhibit 1, describing left hand pain after handcuffing an individual who was resisting arrest. (*Id*. p. 8, lines 11-14; Defendant's Exhibit 1, Claims Document Regarding Date of Injury 7/12/1996, p. 8, under "Investigation.")

Applicant also recalled injuring his low back in 2005 exiting his patrol vehicle rapidly. He was referred to a supervisor investigation report describing that injury in Defendant's Exhibit 2. Applicant was then specifically referred to page 3 of the report, which provides a history of applicant's back condition, under the heading "What happened and where did it happen?" This brief history, included in the supervisor's report, indicates that in 1997 to 1998, applicant was assisting with search warrants, which included operating a hand-held battering ram, and as a result of that incident, he injured his back and was given a work injury packet, after which he was treated and released back to work, but since then he has noticed his back would give him problems from time to time. The supervisor's report also notes that applicant was reassigned to patrol in 2004, which requires him to wear a duty belt, and that on July 22, 2005, applicant noticed a sharp pulling type of pain in his lower back when exiting a patrol vehicle.[4] (MOH/SOE , March 23, 2021, p. 9, lines 21-34; Defendant's Exhibit 2, Supervisor's Report of Injury, 8/15/2005, p. 3.)

Applicant testified about his first and second evaluation with Dr. Previte. He told Dr. Previte about his job duties, but it didn't seem as though Dr. Previte was listening. He found Dr.

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[4] The entire history in the Supervisor's Investigation Report is as follows:

> In 1997 to 1998 Deputy Alstrom was assigned to the Operation Safe Street team and later promoted to Property Crimes Detectives. Part of his responsibilities included assisting on search warrants. One of his duties included him operating the handheld battering ram. As a result of an incident, he injured his back while serving a search warrant. He was given an OJI package. He was treated and released back to work. Since that incident he has noticed his back would give him problems from time to time.
>
> In 2004 Deputy Alstrom was reassigned back to Patrol, which requires him to wear bis department issued gun belt Since being in patrol, he has noticed some back pain. Recently he has noticed his back pain has gotten progressively worse.
>
> On 7-22-2005 at approximately 1715 hours he assisted units on a possible homicide in progress call at 5667 E. Ashlan Avenue in Fresno. As he pulled up to the call, he exited out of the patrol vehicle and noticed a sharp pulling type of pain in his lower back. He continued to work, but mentioned the incident to me. He stated if the pain in his lower back continued, he would seek an on package. On 8-12-2005 Deputy Alstrom requested an OJI package.

(Defendant's Exhibit 2, Supervisor's Report of Injury, 8/15/2005, p. 3.)

Previte to be dismissive. He disagreed with Dr. Previte's history of injury shown in the report dated September 10, 2020, admitted into evidence as Joint Exhibit FFF. Applicant believes that the history of his injury as reported in Sergeant Haze's supervisor investigatory report (in Defendants' Exhibit 2, at page 3) is an accurate representation of his injury. (MOH/SOE, March 23, 2021, p. 9, lines 36-47.)

Applicant admitted that he also had a work injury in 1996. He gave information about it to Sgt. Huerta. He did not recall where he treated for his 1996 injury. He did recall receiving a notice from Fimbres Fresno in the mail regarding his 1997 low back injury. He also received notices for his 1996 left hand injury. Applicant testified that he was confident that he received notices for both injuries, and he recalled that he even drove by the Fimbres office again to familiarize himself with the office. He could not recall when he last received a notice from Fimbres regarding the 1997 low back claim. (*Id*. p. 10, lines 9-19.)

Applicant testified that he first met Dr. Emerzian when he injured his low back with the battering ram in 1997. His first meeting with Dr. Emerzian was not in 2005. He recalled that in 2005 he had an injury, for which he was evaluated by PQME Dr. Johncox. He could not recall who administered the claim for the 2005 injury. He recalled receiving notices for that claim as well. (*Id*. p. 10, lines 21-25.)

Applicant's attention was called to Defendant's Exhibit 8, a cover letter dated November 8, 2005 from insurance carrier Pegasus to PQME Johncox. Applicant recalled receiving the letter, but he did not recall telling anyone at Pegasus about his low-back injury from 1997 in response to the statement from Pegasus that they do not have any medical records from his 1997 injury, and that it was not reported as being industrially related. He didn't worry about that statement regarding the 1997 injury because he had already received treatment for it in 1997, and he didn't have to pay for that. (*Id*. p. 10, lines 27-38.)

Defendant called Lieutenant Joe Smith as a witness for the defense. Lt. Smith testified that he is employed by the County of Fresno as a lieutenant and assigned as a Commander of Human Resources. He has access to the archives of workers' compensation claims for the County of Fresno employees. He researched the archives for applicant for the period of 1997 along with analyst Christine Borba. His search included a digital copy of paper records on laserfiche. He met with IT to conduct a search. He could not find a claim for applicant for 1997. He found a claim for 1996 for applicant when he injured his left thumb as a deputy sheriff. He also found a claim for 2005 to

the low back when applicant was exiting his vehicle. He would have expected to find a 1997 claim if it had been reported. (*Id*. p. 11, lines 12-29.)

Lt. Smith was referred to Applicant's Exhibit F, which is applicant's August 14, 2019 subpoena and notice to the Fresno County Sheriff's Department to produce records. Lt. Smith testified that he has no knowledge of whether the department complied with that subpoena. (*Id*. p. 11, lines 21-25.)

According to Lt. Smith, Fresno County keeps payroll reports of current employees. He does not know whether they maintain payroll records for former employees. He did not check to see on which dates applicant received section 4850 pay in the 1990s.[5] (*Id*. p. 11, lines 28-31.)

Lt. Smith testified that he is personally familiar with applicant. They worked together for four years. They worked together on a search and rescue team for a few years. He finds applicant to be truthful. He has a positive opinion of applicant. He's heard rumors that could have caused him to change his opinion of applicant, but he still maintains a positive opinion of applicant's truthfulness. (*Id*. p. 11, lines 33-39.)

Lt. Smith admitted that he did not personally conduct the laserfiche search himself, although he has conducted laserfiche searches before. Lt. Smith thinks that whoever did the laserfiche search started with the identified time frame then navigated through tens, if not thousands of documents. However, he admitted that it is possible that they could have missed something in the search. (*Id*. p. 12, lines 41-46.)

After Lt. Smith's testimony, defendant called claims supervisor Patrick Augustin as a witness. Mr. Augustin is employed by AIMS, a Third-Party Administrator (TPA) for County of Fresno employees who have been hurt on the job. Mr. Duncan testified that he has access to claims going back to 1996 and before for the County. (*Id*. p. 13, lines 7-11.)

Mr. Augustin indicated that he is familiar with applicant's claim and is aware that applicant has alleged an injury to his low back in 1997. All information prior to 2018 is archived. He searched available archives for a 1997 low-back injury but could not find anything. He found claims by applicant, but not for a 1997 low back injury. He found a prior 1996 injury to an extremity, but no claims were found for the period from 1996 through 2004. He found a 2005

[5] Section 4850 gives up to one year of salary continuation benefits in lieu of temporary disability indemnity payable to certain kinds of employees, including law enforcement officers of any sheriff's office. (Lab. Code, § 4850.)

injury for the low back, for which applicant received treatment. Additional claims were also filed after that. (*Id*. p. 13, lines 13-24.)

Mr. Augustin was hired in July 2018. Sometime after that, AIMS became the TPA for the County of Fresno. The County's claims were transferred from Risico to AIMS. Mr. Augustin is aware of the old claims data system, and where the paper files are housed. In his experience, if medical treatment had been provided, there would be documentation of the payment. (*Id*. p. 13, lines 26-33.)

Mr. Augustin checked records for the period from 1996 through 1999, looking for applicant's injury to the low back. He does not have direct access to the County of Fresno payroll, but he has access to a contact who can access it. He did not check to see if applicant received Labor Code section 4850 benefits in the 1990s, but he did check for the years 1997 and 1998. He only checked those years because those were the dates referenced in the medical reports. (*Id*. p. 13, lines 37-43.)

Mr. Augustin indicated that he has access to applicant's application for the 1997 date of injury. He knows who the prior TPAs were for this date of injury but does not know their contract dates. (*Id*. page 13, lines 45-47.) He thinks Fimbres was the TPA in 1997. After Fimbres, he believes it went to York, and possibly Pegasus to York, but he's not sure of the order between York and Pegasus. The administrative transfer from Risico to AIMS was approximately January of 2018. (*Id*. p. 14, lines 1-6.)

Mr. Augustin testified that he has had no prior employment with Fimbres, Pegasus, York, or Risico. He has no personal knowledge of how the files were transferred from and between these four prior TPAs. He has no personal knowledge of whether Fimbres maintained electronic files. All documents transferred from Risico to AIMS have been digitized and scanned. Mr. Augustin has no personal knowledge of where either Applicant or Sgt. Huerta would have taken applicant's claim form. But, as a claims supervisor, Mr. Augustin has dealt with hundreds, if not thousands of cases, and has never before had the experience of being unable to access a referenced claim. (*Id*. p. 14, lines 8-22.)

On June 4, 2021, the trial judge issued a Findings of Fact, Award, Order, and Opinion on Decision in case numbers ADJ10759863, ADJ12769656, and ADJ10859829.

In case number ADJ12769656, regarding the claimed injury of January 1, 1997, the WCJ found that applicant's claim is not barred by the statute of limitations pursuant to sections 5400

and 5402. The WCJ also found that the medical opinions of Dr. Previte constitute substantial medical evidence, and based on those opinions, applicant sustained injury arising out of and occurring in the course of employment to the low back, causing permanent disability of eight percent, with no legal basis for apportionment to non-industrial factors. For this injury, applicant was awarded "Workers' Compensation benefits pursuant to the Labor Code for Applicant's industrial injuries to the low back, to be adjusted by the parties with jurisdiction reserved to resolve any disputes," with permanent partial disability indemnity of eight percent payable to applicant, less credit for sums previously paid, and less reasonable attorney fees in the amount of 15 percent of applicant's permanent partial disability award.

In case number ADJ10759863, the WCJ found based on Dr. Previte that applicant did not sustain industrial cumulative injury to the low back, mid back or neck during the period of January 31, 1993 to March 3, 2017. On the other hand, the WCJ found that applicant did sustain cumulative injury to his internal systems, specifically supraventricular tachycardia, skin, hiatal hernia and GERD, which caused permanent disability and the need for future medical treatment. The WCJ deferred findings on the exact level of permanent disability, apportionment, and attorney fees. The WCJ also found that QME Panel Number 7099256 does not apply to this case.

In case number ADJ10759829, the WCJ found that applicant sustained injury on January 18, 2017 to his right foot and GERD, and that Dr. Previte's reliance on *Almaraz/Guzman* to assess applicant's right foot impairment condition effectively rebuts strict application of the AMA Guides, with the orthopedic injury causing permanent disability of three percent, and ratable permanent disability for applicant's internal GERD injury, with a determination as to the exact level of permanent disability, apportionment, and attorney fees deferred.

DISCUSSION

Defendant contends in its Petition that the claimed injury of January 1, 1997 should be barred by the statute of limitations because it was not timely reported, and the employer had no knowledge of the injury until after 2005. We disagree.

Section 5400 requires that a workers' compensation claim be filed within 30 days of the date of injury:

> Except as provided by sections 5402 and 5403, no claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served

> upon the employer notice in writing, signed by the person injured or someone in his behalf, or in case of the death of the person injured, by a dependent or someone in the dependent's behalf.

(Lab. Code, § 5400.)

Section 5402, subdivision (a) provides that employer knowledge from any source is tantamount to the filing of a written claim under section 5400:

> Knowledge of an injury, obtained from any source, on the part of an employer, the employer's managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400.

(Lab. Code, § 5402(a).)

The statute of limitations is an affirmative defense and defendant, as the party asserting the defense, has the burden of proof. (Lab. Code, § 5705.) As a general rule, limitations provisions in workers' compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a loss of compensation. (Lab. Code, § 3202; *Bland v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 330-331 [35 Cal.Comp.Cases 513], *Lundberg* v. *Workmen's Comp. App. Bd*. (1968) 69 Cal.2d 436, 439 [33 Cal.Comp.Cases 656]; *Granado* v. *Workmen's Comp. App. Bd*. (1968) 69 Cal.2d 399, 404 [33 Cal.Comp.Cases 647].)

In this case, applicant testified that he recalls ramming a door and hurting his back in the 1990s. He testified that he told Sgt. Huerta, who was his supervisor at that time, about the injury. Sgt. Huerta took applicant to see Dr. Emerzian. (MOH/SOE, 3/23/2021, p. 8, lines 43-47.) Applicant's testimony was corroborated by the testimony of Dr. Emerzian, who testified that Sgt. Huerta was present with applicant during an initial evaluation for a back injury from using a battering ram. Dr. Emerzian cannot recall exactly when this occurred. According to Dr. Emerzian, Sgt. Huerta died about two and a half to three years ago, so applicant's supervisor at the time of injury is no longer available to rebut or call into question whether or when applicant's back injury was first reported to him.

Because the statute of limitations is defendant's burden of proof under section 5705, it is defendant's burden to prove that applicant did not report his injury to Sgt. Huerta within 30 days, and that it did not otherwise have knowledge of the assertion of a claim of injury sufficient to

afford it an opportunity to make an investigation into the facts. (Lab. Code, §§ 5705, 5400, 5402.) The evidence adduced at trial does not meet that burden. The testimony of Sgt. Huerta was not available to disprove a verbal report of injury, and defendant did not offer the testimony of any other witness to communications between applicant and his supervisor in 1997. In support of its statute of limitations argument, defendant offered only the testimony of employee Lt. Smith and claims examiner Patrick Augstin that they could not find any records. Lt. Smith had someone else conduct a laserfiche search and did not check to see on which dates applicant received section 4850 pay in the 1990s. He was unaware of applicant's records subpoena, which calls into question whether he was in fact the person most knowledgeable about such records. The testimony of Mr. Augustin established that no fewer than five different TPA companies have handled Fresno County workers' compensation claims since 1997. According to Dr. Emerzian's testimony, one of those, Fimbres, was managed by his former neighbor, Mr. Fimbres, who died some years ago. Mr. Augustin admitted that he does not know whether Fimbres kept any electronic records. Given this history of claims management, it seems more probable that the claim file was lost than that it never existed. Defendant's Exhibit 2 shows a supervisor's acknowledgment in 2005 that a 1997 claim did in fact exist. Applicant credibly testified that he reported his 1997 low back injury to Sgt. Huerta and received claims notices from Fimbres for both the 1997 injury and a previous 1996 hand injury. Applicant's testimony clearly distinguishes the 1996 and 1997 injuries, which involved different body parts and mechanisms of injury. Lt. Smith testified that he knew applicant and believed him to be credible, as did the WCJ. We give the WCJ's credibility determination great weight because she had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) In this case, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

Next, we turn to the substantive issues raised by the two Petitions for Reconsideration, which are mostly centered around injury AOE/COE, apportionment, and the applicability of statutory presumptions. Applicant contends in the Petition that there is a rebuttable presumption under section 3213.2 that low back injury is apportionable only to the cumulative trauma of wearing a duty belt. We agree, and accordingly, applicant has sustained a statutorily presumed cumulative industrial injury to the lumbar spine under section 3213.2, which is also presumed to be the sole cause of any permanent disability under section 4663(e).

Section 3213.2 reads as follows:

> (a) In the case of a member of a police department of a city, county, or city and county, or a member of the sheriff's office of a county, or a peace officer employed by the Department of the California Highway Patrol, or a peace officer employed by the University of California, who has been employed for at least five years as a peace officer on a regular, full-time salary and has been required to wear a duty belt as a condition of employment, the term "injury," as used in this division, includes lower back impairments. The compensation that is awarded for lower back impairments shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.
>
> (b) The lower back impairment so developing or manifesting itself in the peace officer 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 person 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.
>
> (c) For purposes of this section, "duty belt" means a belt used for the purpose of holding a gun, handcuffs, baton, and other items related to law enforcement.

(Lab. Code, § 3213.2.)

In this case, applicant was an employee of the Fresno County Sheriff's Department, so he was "a member of the sheriff's office of a county" under section 3213.2(a). He was employed for 25 years, which is more than five years, and all of the evidence in the record supports the conclusion that applicant was required to wear a duty belt as a condition of his employment. Orthopedic AME, Dr. Previte, found that applicant has a low back impairment. Accordingly, the presumption of low back injury applies to applicant unless "controverted by other evidence" as indicated in subsection (b).

Applicant further contends that the duty belt presumption created by section 3213.2 can only be rebutted with evidence that a contemporaneous, non-industrial event is the sole cause of low back impairment, which was not done in this case. While we do not interpret section 3213.2 as limiting rebuttal to a specific event, or that such an event be contemporaneous, we note that in order to rebut the presumption created under section 3213.2, defendant must prove by substantial

medical evidence that injury was exclusively caused by something other than the cumulative trauma of wearing a duty belt.[6]

In this case, although the reports and deposition testimony of Dr. Previte attribute applicant's low back injury to a specific industrial injury that occurred in 1997, these opinions are unsupported by any detailed or cogent explanation of how or why the presumptive cumulative effect of wearing a duty belt for more than five years did not contribute in any way whatsoever to applicant's low back condition. Furthermore, Dr. Previte seems to hold the opinion that wearing a duty belt cannot constitute a medically probable cause of cumulative lumbar injury. This position is both unsubstantiated by explanation and based on a legally incorrect theory. As a matter of law, injury to the lumbar spine is presumed under prescribed circumstances. Any medical-legal evaluator who presumes the opposite to be true, without a detailed and cogent rebuttal, fails to meet the standards of substantial medical evidence set forth in *Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604 (Appeals Board en banc).

Applicant asserts that the progression of applicant's low back symptoms provides an additional basis for the presumption under section 3213.2. While the existence of symptoms does support the finding that the duty belt presumption applies, we note that it is not sufficient without medical expert opinion finding the existence of a "lower back impairment" that gives rise to a presumption of industrial causation under section 3213.2. In this case, there is evidence of both low back symptoms as reported by applicant, and impairment of the lumbar spine as noted by Dr. Previte.

Applicant contends in his Petition that Dr. Previte's opinions are not substantial medical evidence due to an inadequate investigation into the cause of applicant's neck and mid-back pain, an inaccurate history, and an inadequate review of records. It is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Escobedo*, *supra*, 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc), citing *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*.

[6] We note that *San Francisco v. Workers' Comp. Appeals Bd.* (*Wiebe*) (1978) 22 Cal.3d 103 [43 Cal.Comp.Cases 984] and *Turner v. Workers' Comp. Appeals Bd.* (1968) 258 Cal.App.2d 442 [33 Cal.Comp.Cases 61], cited in applicant's Petition, dealt with the specific provisions of section 3212.5, including that heart trouble "shall in no case be attributed to any disease existing prior" and not the duty belt presumption contained in section 3213.2. (*Wiebe*, *supra*, 22 Cal.3d 103, 121; *Turner*, *supra*, 258 Cal.App.2d 442, 445.) However, neither of these cases contradicts our holding that to rebut the presumption created under section 3213.2, defendant must prove by substantial medical evidence that injury was exclusively caused by something other than the cumulative trauma of wearing a duty belt.

(1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Furthermore, "a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions." (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621, citing *Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 [33 Cal.Comp.Cases 647] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d at 794, 799, 800-801 [33 Cal.Comp.Cases 358] (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

We ordinarily follow the opinions of an AME, because we presume that the parties have agreed that the mutually selected physician is a sufficiently qualified and neutral expert. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Nevertheless, even the opinions of an AME must constitute substantial medical evidence.

Further, we note that even though it is incumbent upon the parties to take reasonable measures to ensure that evaluating physicians have an adequate history and records, and that they have adequately addressed all disputed issues, even an inexcusable lack of diligence on the part of counsel or physicians does not permit the Appeals Board to base its decision on medical evidence that lacks substantiality.

In this case, orthopedic AME Dr. Previte does not persuasively explain and support his conclusion that applicant's duty belt did not cause cumulative injury or aggravation of injury to the lumbar spine in rebuttal of the presumption imposed by section 3213.2. As explained above, this mechanism of injury is presumed to be industrial, because applicant was a sheriff's deputy who wore a duty belt for more than five years. (Lab. Code, § 3213.2.) As explained above, Dr. Previte's rebuttal does not constitute substantial medical evidence because it "fails to set forth the reasoning behind the physician's opinion, not merely his or her conclusions." (*Escobedo*, *supra*, 70 Cal.Comp.Cases 604, 621.) Accordingly, the presumption created by section 3213.2 stands unrebutted, and the lumbar disability is caused by cumulative trauma as a matter of law.

As for Dr. Previte's conclusion that applicant's symptoms in the mid back and neck were merely radiating from the lumbar spine, we note that there is no medical expert opinion to the contrary, assuming that the AME's conclusion that there is no separate injury to the mid back or neck remains undisputed, we note that an award of future medical care should include treatment of any such symptoms as related to the low back, which is presumed to be injured on an industrial basis.

With respect to the internal AME, Dr. Hyman, applicant's Petition asserts that the Appeals Board should follow his finding of injury in the form of hypertension, and permanent disability related thereto. We agree that Dr. Hyman's opinion regarding industrial causation of injury in the form of hypertension should be followed, but note that the June 4, 2021 Findings, Award, and Order did this by finding such injury, based on the parties' stipulation thereto. With respect to permanent disability, the WCJ's decision deferred that issue, based on a lack of substantial medical evidence from Dr. Hyman regarding apportionment. We agree with the decision in this respect, and similarly defer the issue of internal apportionment, but we will rescind the decision in all three cases because permanent disability of the low back is necessarily apportioned to cumulative trauma by operation of section 3213.2 and 4663(e) as explained above. (Lab. Code, §§ 3213.2, 4663(e).)

Applicant asserts that Dr. Hyman's apportionment of GERD to the specific injury of January 18, 2017 should also be followed, consistent with the stipulation of the parties. Applicant also asserts that skin impairment should be apportioned to cumulative trauma.

In developing the record on the issue of internal medicine apportionment, Dr. Hyman correctly recognized that hypertension can be sufficiently related to "heart trouble" to invoke a presumption of industrial causation of injury under section 3212, without nonindustrial apportionment under section 4663(e). (See Lab. Code, §§ 3212, 4663(e); *Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622, 636 [40 Cal.Comp.Cases 578].) Further, Dr. Hyman recognized that applicant's hernia is also a presumptive condition under section 3212, precluding nonindustrial apportionment of hernia disability.

With respect to skin disability, however, Dr. Hyman does not fully address why applicant's actinic skin damage does or does not constitute cancer under section 3212.1, which is an issue raised by defendant's Petition. That section applies to county sheriff's deputies as peace officers under Penal Code section 830.1. (Lab. Code, § 3212.1(a)(4); Pen. Code, § 830.1.) Section 3212.1 describes the presumption, in relevant part, as follows:

> (b) The term "injury," as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.
>
> (c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.
>
> (d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. 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 120 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(Lab. Code, § 3212.1(b)-(d).)

Defendant contends that actinic skin damage is not cancer, and as such is not subject to a presumption of industrial causation, nor is non-industrial apportionment disallowed under section 4663(e). While we agree that actinic skin damage is not necessarily skin cancer, the distinction between the two is a matter to be addressed by expert medical opinion. Dr. Hyman should address the question of whether or not applicant's particular condition is "pre-cancer" or an early stage of cancer as a result of exposure to a known carcinogen during employment as a matter of reasonable medical probability. If so, the cancer presumption set forth in section 3212.1 may apply, precluding nonindustrial apportionment under section 4663(e). If not, then the presumption does not apply. (Lab. Code, §§ 3212.1, 4663(e).)

If the presumption does not apply, then a substantial medical opinion explaining and justifying percentages of causation of permanent disability is required. Although internal medicine AME Dr. Hyman indicates apportionment of 50 percent of applicant's skin disability to activities outside of work, he does not explain with any specificity what these activities were, or how and why they caused approximately 50 percent of applicant's permanent disability. This does not meet the requirements for substantial medical evidence as explained in *Escobedo*, *supra*.

Similarly, with respect to GERD, Dr. Hyman's apportionment opinion fails to constitute substantial medical evidence under the standards set forth in *Escobedo*, *supra*, because he combines multiple causes of disability without a separate explanation of the mechanism by which each cause contributed to permanent disability, and without justification of how or why he selected approximate percentages of causation.

In summary, a substantial medical opinion on the applicability of the skin cancer presumption, and if inapplicable, apportionment, should be sought from the existing AME in internal medicine, Dr. Hyman, as required by the directions for development of the record set forth in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc). Dr. Hyman may also supplement his opinion on apportionment of GERD, which presently lacks sufficient substantiality to justify any apportionment. Further development of Dr. Previte's opinions is likely not necessary, as he has already identified a specific low back injury of January 1, 1997, which is not barred by the statute of limitations, with low back impairment that as a matter of law must be apportioned to cumulative trauma by operation of sections 3213.2 and 4663(e), absent any substantial evidence to rebut the presumption. Similarly, development of the record with respect to Dr. Previte's other findings, including his finding of a specific injury of January 18, 2017 to the right foot, and his conclusion that there is no independent mechanism of injury to the neck or mid back may not be necessary.

Accordingly, the June 4, 2021 Findings and Award and Order are rescinded in all three cases, and the matter is returned to the trial WCJ for development of the record. Under the Appeals Board's en banc decision in *McDuffie, supra*, development of the record should include at a minimum a supplemental opinion from the current internal medicine AME, Dr. Hyman, on the disputed issue of the applicability of the skin cancer presumption of section 3213.2, and if the presumption is inapplicable, an apportionment analysis that describes the mechanism of causation for each specifically identified cause of permanent disability, as well as a non-speculative justification of each approximate percentage of causation that is selected by Dr. Hyman.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the June 4, 2021 Joint Findings and Orders are **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 17, 2025

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

KIRBY ALSTROM
THE LAW OFFICES OF DAN EPPERLY & ASSOCIATES, P.C.
LAW OFFICES OF DUNCAN, CASSIO, LUCCHESI, BINKLEY & VAN DOREN, P.C.

CWF/*cs*

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