

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

AARON HODGES, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS; legally uninsured,
adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ16641380
San Bernardino District Office**

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued on November 27, 2024 wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that there was "[n]o good cause shown to set aside the stipulation of the parties to injury arising out of and in the course of employment to hypertensive heart disease[.]" the "heart presumption under Labor Code¹ section 3212.2 applies" and the "reporting of Dr. Alpern is substantial medical evidence" (F&A, pp. 1-2.) The WCJ issued a finding of injury arising out of and in the course of employment (AOE/COE) to hypertensive heart disease while applicant was employed by defendant as a correctional officer during the period from November 8, 2004 to July 1, 2022, and issued an award of 51% permanent disability "entitling applicant to \$80,892.50 less any permanent disability advances" and "attorney's fees of \$12,133.88 representing 15% of the permanent disability benefits[.]" (*Id.* at pp. 1-3.)

Defendant contends that the WCJ erred in refusing to set aside the stipulation by defendant as to hypertensive heart disease, and that the case of *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) referred to

¹ All further references are to the Labor Code unless otherwise noted.

by the WCJ when declining to relieve defendant from their stipulation is distinguishable from the current case as there was no stipulation by defendant on the record as to injury AOE/COE for hypertensive heart disease. Defendant further contends that the reporting of panel Qualified Medical Evaluator (QME), Dr. Harvey Alpern, which was relied upon by the WCJ, is contradictory and in need of clarification. (Petition, p. 4.) Defendant therefore “requests that the Findings and Award be overturned and the matter be remanded for a cardiac MRI and review and comment of the cardiac MRI by the PQME.” (*Ibid.*)

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted solely to amend the Findings and Award to reflect the correct indemnity amount awarded but should otherwise be denied.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition and affirm the F&A except that we will amend it pursuant to *Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145] (the Appeals Board may correct a clerical error at any time without need for further hearings) to reflect that the proper value of a 51% permanent disability award is \$80,982.50 with a corresponding 15% attorney’s fee of \$12,147.38.

FACTS

Applicant, while employed by defendant as a correctional officer during the period from November 8, 2004 through July 1, 2022, filed an Application for Adjudication (Application) claiming he sustained cumulative trauma in the form of hypertension arising out of and in the course of employment (AOE/COE). (Application, September 2, 2022.)

The parties retained Dr. Harvey Alpern as the internal panel Qualified Medical Evaluator (QME). Dr. Alpern issued three reports dated February 15, 2023, September 14, 2023, and May 22, 2024.

In his February 15, 2023 report, Dr. Alpern found industrial causation for applicant’s hypertension. (Exhibit 4, p. 46.)

In his May 22, 2024 report, Dr. Alpern noted that applicant “would be afforded the presumption for heart trouble” due to a finding of “left ventricular hypertrophy[.]” (Exhibit 1, p.

3.) He also found that applicant sustained a 30% whole person impairment using “Table 4-2 on page 66 under Class III” for hypertensive cardiovascular disease, with a need for continuing future medical. (*Ibid.*)

On August 21, 2024, the parties proceeded to a mandatory settlement conference (MSC). The pretrial conference statement (PTCS) indicated, in relevant part, that parties were stipulating to applicant’s employment during the period from November 8, 2011 through July 1, 2022 as a correctional officer for the State of California Department of Corrections as well as injury AOE/COE to “hypertensive heart disease” and a permanent disability rate of \$290.00 weekly. At issue was permanent disability, apportionment, and the need for further medical treatment.

On September 30, 2024, the matter proceeded to trial wherein defendant indicated that authority to stipulate to injury AOE/COE for hypertensive heart disease had been withdrawn.

Following the trial, a Minutes of Hearing (MOH) along with the original pretrial conference statement issued.

On October 9, 2024, defendant issued an objection to the MOH, noting that the WCJ failed to include language indicting defendant’s “authority to stipulate to hypertensive heart disease had been withdrawn after the submission of the PTCS and prior to the MSC.” (Defendant’s Objection to MOH and SOF, October 9, 2024, p. 1.)

On October 24, 2024, an amended MOH was issued by the WCJ which noted that defendant “had no authority to stipulate to hypertensive heart disease based on the findings of Dr. Alpern” and that applicant was reserving “the issue of penalties related to defendant’s withdrawal of the stipulation.” (Amended Minutes of Hearing, October 24, 2024, p. 2.)

On October 30, 2024, Defendant issued an additional objection alleging that the amended MOH “notes the discussion but ignores the substance of the discussion.” (Defendant’s Objection to Amended MOH, October 30, 2024, p. 1.)

On November 27, 2024, the WCJ issued a Findings and Award finding, in relevant part, injury AOE/COE to hypertensive heart disease during the period from November 8, 2004 through July 1, 2022; no good cause to set aside the stipulation of the parties as to injury AOE/COE; application of the heart presumption under Labor Code section 3212.2; and substantial medical evidence as to reporting by Dr. Alpern. The WCJ awarded a 51% permanent disability which entitled “applicant to \$80,892.50 payable over 279.25 weeks less any permanent disability advances” as well as future medical treatment and “reasonable attorney’s fees of \$12,133.88

representing 15% of the permanent disability benefits” to be deducted and paid to applicant’s attorney from the permanent disability award. (F&A, pp. 2-3.)

DISCUSSION

I.

Preliminarily, former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on December 27, 2024, and 60 days from the date of transmission is February 25, 2025. This decision was issued by or on February 25, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on December 27, 2024, and the case was transmitted to the Appeals Board on December 27, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 27, 2024.

II.

Turning now to the merits of the Petition, defendant argues that the case of *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] is not applicable to the current matter as the stipulation as to injury AOE/COE for hypertensive heart disease was not made on the record. (Petition, p. 4.) Notwithstanding the fact that we do not believe *Weatherall* to be on point for our purposes here, it contains no requirement that stipulations be made only on the record. As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel...ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' and serves 'to obviate need for proof or to narrow range of litigable issues' in a legal proceeding." (*Id.* at p. 1119.)

Section 5702, which we find more relevant to the instant case, states that:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(Lab. Code, § 5702.)

Per section 5702, the WCJ may make findings and awards based upon the stipulation itself or proceed with a hearing and obtain further testimony and/or other evidence to make those determinations. Here, the WCJ proceeded to trial on September 30, 2024 and based upon his review of the record and the testimony obtained at trial, determined that the burden of proof for establishing injury AOE/COE for hypertensive heart disease had been met. Per the WCJ's November 22, 2024 F&A, the QME reports of Dr. Alpern were "substantial medical evidence." (F&A, pp. 1-2)

Defendant alleges that Dr. Alpern's findings are not substantial medical evidence as he failed to "explain why he rejected the findings of the transthoracic echocardiogram." (Petition, p.

2.) Defendant argues that further clarification is necessary including a cardiac MRI and review and comment of the cardiac MRI by Dr. Alpern. (*Id.* at p. 4.)

It is well established that any award, order, or decision of the Appeals Board, including decisions by WCJs, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, an expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) “[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)” (*Gatten, supra*, at p. 928.) “A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)” (*Kyle v. Workers' Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.)

Based upon our review of record, we find that Dr. Alpern took an accurate and adequate history, thoroughly examined the applicant, reviewed all medical records provided, and explained how and why the cumulative injury contributed to applicant's hypertensive heart disease. Accordingly, we agree with the WCJ that “Dr. Alpern's reporting is not contradictory but instead is well reasoned with adequate explanation relying on the objective evidence.” (Opinion on Decision (OOD), November 22, 2024, p. 5.)

Lastly, defendant has found a clerical error in the F&A regarding the value of applicant's 51% permanent disability award and corresponding attorney's fee. Pursuant to *Toccalino*, the Appeals Board may correct clerical errors at any time, and we agree with defendant and the WCJ that the values listed within the F&A are incorrect. Accordingly, we grant the Petition and affirm

the F&A except that we will amend it to reflect that the proper value of applicant's 51% permanent disability award is \$80,982.50 and the corresponding 15% attorney's fee is \$12,147.38.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued November 27, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued November 27, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

8. The applicant's injury caused permanent disability of 51% entitling the applicant to \$80,982.50 payable over 279.25 weeks less any permanent disability advances already paid for this injury.

11. Applicant's attorney is entitled to reasonable attorney's fees of \$12,147.38 representing 15% of the permanent disability benefits. This attorney's fee is to be deducted and paid to Whiting Cotter from the permanent disability awarded and currently payable to the applicant. If there are insufficient sums accrued to pay this fee, it shall be commuted from the far end of the award.

AWARD

- (a) Permanent disability of 51%, entitling the applicant to \$80,982.50 payable over 279.25 weeks less any permanent disability advances already paid for this injury.
- (c) Applicant's attorney is entitled to reasonable attorney's fees of \$12,147.38 representing 15% of the permanent disability benefits. This attorney's fee is to be deducted and paid to Whiting Cotter from the permanent disability awarded and currently payable to the applicant. If there are insufficient sums accrued to pay this fee, it shall be commuted from the far end of the award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 24, 2025

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

**AARON HODGES
WHITING, COTTER & HURLIMANN
STATE COMPENSATION INSURANCE FUND**

RL/cs

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