WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE VALENCIA, *Applicant*

vs.

CITY OF DALY CITY;
INNOVATIVE CLAIM SOLUTIONS SAN RAMON, *Defendants*

Adjudication Numbers: ADJ14902030, ADJ19260558
San Francisco District Office

OPINION AND ORDER
DENYING RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings of Fact, Award, and Order (F&A) issued by a workers' compensation administrative law judge (WCJ) on October 16, 2024. In that decision, the WCJ found in pertinent part in Case No ADJ14902030 that applicant, while employed during the period of November 15, 2004 through January 23, 2021 as a firefighter by defendant the City of Daly City, sustained injury arising out of and in the course of employment to the respiratory system and circulatory system/heart and that applicant's injury caused permanent disability of 79% in Case No ADJ14902030, and she awarded permanent disability, attorney's fees, and a life pension; and in Case No. ADJ19260558 that applicant, while employed during the period of January 1, 2005 through January 23, 2021 as a firefighter, by the City of Daly City, did not sustain injury arising out of and in the course of employment to the circulatory system/heart and ordered that applicant take nothing in Case No. ADJ19260558.

Defendant contends that there should be two separate periods of cumulative trauma as there is a different date of injury under Labor Code section 5412 in Case No. ADJ19260558; and that defendant met its burden on apportionment.

We received an Answer from applicant. We received a Report and Recommendation (Report) from the WCJ, which recommends that we deny the Petition for Reconsideration.

We have reviewed the record, and we have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review, and as discussed below, we will deny the Petition.

FACTS

As set forth in the WCJ's Opinion on Decision:

> [Applicant]. . ., while employed during the period of November 15, 2004 through January 23, 2021 as a firefighter, Occupational Group Number 490, at Daly City, California, by the City of Daly City, sustained injury arising out of and in the course of employment to the respiratory system and claims to have sustained injury arising out of and in the course of employment to the circulatory system/heart.
>
> There is also a claim that [applicant] while employed during the period of January 1, 2005 through January 23, 2021 as a firefighter, Occupational Group Number 490, at Daly City, California, by the City of Daly City, claims to have sustained injury arising out of and in the course of employment to the circulatory system/heart.
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> At all times relevant herein, the employer was permissibly self-insured for workers' compensation purposes.
>
> At all times relevant herein, the employee's earnings were $2,380.00 per week, warranting indemnity at the rate of $290.00 per week for permanent disability.
>
> The employee has been adequately compensated for all periods of temporary disability claimed through June 1, 2022 in the claim of a cumulative trauma for the period of November 15, 2004 through January 23, 2021. There is no claim for temporary total disability for the claimed injury of January 1, 2005 through January 23, 2021.
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> The employer has furnished all medical treatment. The primary treating physician for the pulmonary is Dr. David Goodman, while the primary treating physician for the heart is Dr. Anand Soni.
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> The parties stipulated to a need for further medical care in the claimed cumulative trauma of November 15, 2004 through January 23, 2021. Permanent disability in that case also commenced on June 2, 2022.
>
> **Documentary evidence**
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> Roger Nacouzi[, M.D.] evaluated the applicant as a panel selected QME on May 26, 2021. He noted the applicant worked as a fire engineer and paramedic

for North County Fire Authority (Daly City) between November 15, 2004 and January 23, 2021. He had a history of intermittent seasonal allergies symptomatic for sneezing and watering eyes every 2 to 3 years but has not had seasonal allergies since 2017. He also had a history of work related pneumonia in 2015. On September 20, 2020 while fighting a fire in Fresno County he developed a cough. Later in September 2020 he fought a fire in Sonoma County and the cough persisted. In October 2020 he fought a fire in Los Angeles involving dirty smoke and the cough worsened and became associated with shortness of breath. He stopped working due to persistent cough and shortness of breath on January 23, 2021. Dr. Nacouzi noted the applicant had frequent bouts with dry, irritative cough while he was taking the applicant's history. His current complaints included a dry, irritative cough and shortness of breath walking up one flight of stairs or on the treadmill for less than five minutes. His ability to walk and climb was limited and he walked at a slower pace. Dr. Nacouzi diagnosed him with occupational asthma, a history of occupational pneumonia and seasonal environmental allergic rhinitis. No records were submitted for his review. (Applicant's Exhibit 1, Report of Panel QME Roger Nacouzi, M.D., dated May 26, 2021, pages 1, 2 and 4.)

Dr. Nacouzi prepared a supplemental report following the review of 47 pages of medical records including a March 9, 2021 pulmonary function test and a February 16, 2021 CT scan of the chest. He the review the records confirmed the diagnosis of asthma. He opined that as a result of an injury of September 20, 2020, the applicant developed occupational asthma which was related to a direct irritative effect onto the mucosal lining of the respiratory tract leading to chronic inflammation and fibrosis in the tissues underlying the respiratory mucosa. The condition reached maximum medical improvement on May 26, 2021. He assigned 25% Whole Person Impairment (WPI). He noted there was a history of environmental seasonal allergies occurring every 2 to 3 years which represented a minor nonindustrial factor predisposing him to the occupational asthma and apportioned 95% to the industrial injury of September 20, 2021 and 5% the nonindustrial environmental seasonal allergies. Future medical care was needed. (Applicant's Exhibit 2, Report of Panel QME Roger Nacouzi dated June 16, 2021, pages 2, and 3.)

Dr. Nacouzi reevaluated the applicant on January 4, 2023. Since his prior evaluation, he saw a pulmonary specialist who referred him to a cardiologist and in 2022 had a stress test and echocardiogram which showed thickening of the left ventricular wall. He was started on blood pressure medication. He continued to have complaints of shortness of breath and chest burning upon walking up the hill and needs to stop and rest upon walking one flight of stairs. He continued to have frequent bouts with dry, irritative cough during the history taking. Dr. Nacouzi reviewed 254 pages of medical records including the June 3, 2022 stress echocardiogram and September 22, 2021 pulmonary function test. Diagnoses included hypertensive cardiac degree disease and occupational asthma. The June 3, 2022 echocardiogram showed hypertensive cardiac disease with target organ

cardiac damage in the form of left ventricular hypertrophy associated with the hypertension, which is a form of heart trouble that developed and manifested during his employment with the North County Fire Authority and should be considered industrial. Based on the hypertensive cardiac disease he had 30% WPI. 10% of impairment was due to excess weight absent the anti-attribution clause. Future medical care was needed in the form of follow up with the treating internal and cardiopulmonary physician. There was no discussion about the rating for the asthma. (Applicant's Exhibit 5, Report of Panel QME Roger Nacouzi dated January 4, 2023, pages 2, 8 and 9.)

Dr. Nacouzi opined that if the anti-attribution clause applied, there is no apportionment. He also opined that the hypertensive cardiac disease was not caused by the occupational asthma. Both the occupational asthma and hypertensive cardiac disease contributed to the respiratory symptoms of cough and shortness of breath that first manifested on September 20, 2020. (Applicant's Exhibit 6, Report of Panel QME Roger Nacouzi dated June 23, 2023)

Dr. Nacouzi prepared a supplemental report following review of additional records. He noted the applicant had asthma symptoms in 1999 in a pre-existing history of allergic rhinitis along with a history of pre-existing excess weight. The excess weight did not contribute to the asthma condition but would contribute to the physical deconditioning that was not taken in consideration in addressing the asthma permanent impairment, but he did not provide apportionment to the obesity. However, given the records of mild occasional bronchospasm dating back to 1999 which predated his employment with Daly City there would be a basis to allocate the occupational asthma permanent impairment between the employment with Daly City and his employment as a firefighter prior to November 15, 2014. He apportioned 5% to nonindustrial environmental seasonal allergies, 20% the employment firefighting prior to November 15, 2004 and 75% to the employment with Daly City. In terms of the hypertensive cardiac disease, although it was not diagnosed until June 3, 2022 echocardiogram, it first manifested on September 20, 2020. Both the occupational asthma and hypertensive cardiac disease contributed the complaints of cough and shortness of breath. (Applicant's Exhibit 7, Report of Panel QME Roger Nacouzi dated July 31, 2023, pages 8 and 9.)

Dr. Nacouzi prepared another supplemental report after the review of additional medical records including a June 2015 pulmonary function test. He opined that it showed that the mild occasional bronchospasm dating back to 1999 was transient and did not result in functional impairment. The mild transient occupational bronchospasm represents a pre-existing pathology that predisposed him to the occupational asthma. He apportioned 5% to nonindustrial environmental seasonal allergies, 5% to the employment firefighting prior to November 15, 2004 and 90% to the employment firefighting through

September 20, 2020 with Daly City. (Applicant's Exhibits 8, Report of Panel QME Roger Nacouzi dated September 8, 2023, pages 2 and 3.)

Dr. Nacouzi was deposed on March 7, 2024. He testified that the onset of disability and symptoms for the occupational asthma was September, 2020. (8:4-7.) In terms of the hypertensive cardiac disease, all cumulative exposures through the last day of employment contributed to the hypertensive cardiac disease. (8:15-20.) The manifestation of shortness of breath back in September 2020 could be an expression of both the occupational asthma and the hypertensive cardiac disease. He would have no problem if the parties "split the baby" and said the occupational asthma is related to the September 2020 injury and the hypertensive cardiac diseases related to the cumulative trauma through the last day of employment. (7:15 – 10:5.) Under questioning by applicant's counsel, Dr. Nacouzi testified that the asthma was caused by a cumulative trauma and all smoke exposure through the last date of employment contributed to the occupational asthma. (35:16-25.) The end date of injurious exposure for both the asthma and the left ventricular hypertrophy would be the last day of work on January 23, 2021. (36:8-12.)

Dr. Nacouzi also was questioned at his deposition about his apportionment determinations. When asked if the applicant's obesity was exacerbating his asthma symptoms, he testified that it can cause an inflammatory state which restricts the lungs, losing some ability to expand, the airways are jammed and it is difficult to expel mucus within the airways and they have more propensity to get inflamed and worsen the bronchial spasms in airways disease. (30:21-23.) The applicant had pre-existing obesity that became morbidly so and apportionment was justified for the obesity. (32:12-33) In terms of apportionment, he testified that 15% of the impairment is attributed to the decades long history of obesity, 5% to the history of recurrent respiratory infections and allergic issues and 5% before he worked for the City of Daly City. (33:6-15.) He confirmed that he was apportioning to prior firefighting employment with exposure to smoke. (36:1 –6.) He conceded that although the pulmonary function did not show restrictive lung disease, obesity interfered with the healing of the airways and interfered with the treatment of the airways and therefore a certain level of apportionment had to be given. (41:11 – 19.) (Applicant's Exhibit 9, Transcript of the deposition of the Panel QME Roger Nacouzi, M.D. dated March 7, 2024.)

Applicant was seen by David Goodman on January 23, 2021 for a chronic cough and transfer of care. The applicant developed a chronic cough for fighting multiple fires in Fresno including grass, trees, electrical wires and a gas station. A couple days after working the Fresno fires he developed a dry cough which continued and worsened as he worked though the fire and there was dispatch the glass fires in Sonoma. He was coughing daily and noticed exercise- induced bouts of coughing and began to struggle to speak more than one sentence without coughing and developed chest pain. He progressively developed the now nearly

constant cough with paroxysms so severe they induced gagging and vomiting which were caused by and/or triggered by assignments to wildfires during the fall fire season. He was taken off duty (Defendant's Exhibit B, Report of David Goodman M.D., dated January 23, 2021.)

Anand Soni, M.D. saw the applicant on May 6, 2022. The applicant was a retired firefighter with progressive shortness of breath and cough who had been diagnosed with a smoke related lung injury. He was evaluated by a pulmonologist. Dr. Soni ordered a treadmill stress, echo and recommended the applicant keep a home blood pressure diary. (Defendant's Exhibit C, Report of Anand Soni, M.D., dated May 6, 2022.)

Anand Soni saw the applicant again on June 24, 2022 at which time he reviewed the results of the June 3, 2022 stress echo. He was diagnosed the applicant with dyspnea on exertion, cough and essential hypertension. (Defendant's Exhibit D, Report of Anand Soni MD dated June 24, 2022.)

Defense attorney emailed Dr. Soni on November 30, 2023 regarding a deposition. Dr. Soni emailed the parties back on January 3, 2024 and stated he reviewed all the records for José Valencia. The applicant first saw him on May 6, 2022 to assess if the symptoms of shortness of breath and cough were from a cardiac ideology. He had been previously diagnosed with situational hypertension but was not on blood pressure medication. The applicant underwent a stress echocardiogram on June 3, 2022 which determined there was no cardiac cause for the shortness of breath and cough but had incidental findings of mild left ventricular hypertrophy likely the result of his hypertension. In response to a January 3, 2024 email from Mark Peterson with additional questions, Dr. Soni responded that only after the stress echocardiogram on June 2, 2022 that the LVH (presumably left ventricular hypertrophy) was recognized. He could not recall a specific discussion with the applicant linking the LVH the effort to hypertension but if it occurred it would have been after June 2, 2022. His clinic started treating the hypertension in October 2022. He cannot attribute any symptoms that are disabling to the heart and he believes his pulmonary symptoms are noncardiac. None of the emails from the doctor were signed under penalty of perjury. (Defendant's Exhibit E, email string between Anand Soni, M.D. and Mark Peterson between November 30, 2023 through January 3, 2024.)
. . . .

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In this case, the applicant's asthma was related to his exposure to smoke as a result of his job as a firefighter. (Applicant's Exhibit 9, 35:1:35.) He continued to work and be exposed to fire up until the time he was placed on disability by Dr. Goodman. . . . During that time[,] he was solely employed by the city of Daly City. In terms of the heart, that is presumptively due to his work as a firefighter for the Daly City which again ended on January 23, 2021. Dr. Nacouzi testified that all exposure through his last day of work contributed to the

hypertensive cardiac disease. (*Id.* at 8:15-20) Based on the unrebutted opinions of Dr. Nacouzi, both the occupational asthma and the heart condition arose out of the same period of injurious exposure. (*Id.* at 36:1-7.)

The defendant has the burden of establishing the percentage of permanent disability caused by nonindustrial factors. (*Escobedo vs. Marshalls* (2005) 70 Cal.Comp.Cases 604, 614 (en banc).) In order to be considered substantial medical evidence on apportionment, the medical opinion "must set forth reasoning in support of its conclusions." (*Id.* at 621.)

In terms of the applicant's heart condition, as a firefighter he is entitled to the presumption under Labor Code section 3212 that the heart trouble is industrial. For heart presumption cases, apportionment does not apply. (Labor Code section 4663(e).)

Dr. Nacouzi apportioned parts of the applicant's pulmonary impairment to obesity, preexisting seasonal allergies and employment as a firefighter that predated the applicant's employment with defendant.

Most of Dr. Nacouzi's analysis of apportionment is cursory, at best. At his deposition, Dr. Nacouzi did provide a detailed discussion regarding how applicant's obesity had a restrictive effect on his lungs, leading to the airways having less ability to expel mucus or other products of inflammation, which in turn worsened the asthma condition. (Applicant's Exhibit 9, pages 29- 33.) However, Dr. Nacouzi provided no analysis in his reports or deposition as to how preexisting seasonal allergies contributed to the applicant's current level of impairment. In the June 16, 2021 report he opined that the seasonal allergies predisposed the applicant to occupational asthma, which appears to conflate causation of injury with causation of disability. (Applicant's Exhibit 3, page 3.) No further analysis was made for the apportionment to the seasonal allergies in any supplemental reports, or in his deposition. There is simply no explanation for how and why the preexisting seasonal allergies contributed to the applicant's current level of impairment.

Dr. Nacouzi also apportioned 5% of the impairment to the applicant's employment as a firefighter prior to his employment with the City of Daly City. At his deposition, Dr. Nacouzi confirmed that he was apportioning to prior firefighting employment with exposure to smoke. (36:1–6.) This is the same injurious exposure that led to the occupational asthma. There is nothing in evidence of a prior pulmonary injury which would allow apportionment under Labor Code section 4664. . . .

> Although I do find that Dr. Nacouzi provided sufficient analysis of how applicant's obesity contributed to his impairment, the remainder of the apportionment analysis is not substantial evidence, and therefore his apportionment determination is not substantial evidence. I therefore find that [defendant] has not met its burden on this issue.

(Opinion on Decision, January 23, 2025, pp. 1-8, 9, 10-11.)

DISCUSSION

I.

Former Labor Code section[1] 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 in Events 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."

[1] All statutory references are to the Labor Code unless otherwise stated.

Here, according to Events, the case was transmitted to the Appeals Board on November 25, 2024, and 60 days from the date of transmission is Friday, January 24, 2025. This decision is issued by or on Friday, January 24, 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 be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on November 25, 2024, and the case was transmitted to the Appeals Board on November 25, 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 November 25, 2024.

II.

We begin by observing that the parties stipulated that applicant's last day of work was January 23, 2021, and stipulated that applicant never returned to work. Thus, as explained below, as a matter of law, if applicant was no longer engaging in injurious activities caused by employment by defendant, defendant could not have caused injury to him after January 23, 2021. Defendant's error is in "merging" the concept of two injuries with the concept of one injury to separate body parts. Defendant's argument is premised on the assumption that applicant sustained two separate cumulative injuries merely because disability for the injuries to the body parts resulting from one period of employment arose at different times. This is legally incorrect. The determination of whether there are one or two injuries is based on an analysis of causation. That is, did the events of an injured worker's employment cause injury? Nonetheless, because of defendant's evident confusion, we will explain the applicable statutes and the principal cases addressing them.

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297 298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a) & 3202.5.) An injury must be proximately caused by the employment in order to be compensable. (Lab. Code, § 3600(a)(3); see also *Clark, supra,* 61 Cal.4th at pp. 297-298.) Proximate cause in workers' compensation requires the employment be a contributing cause of the injury. (*Clark*, *supra*, 61 Cal.4th at pp. 297-298 [outlining this standard and analyzing the difference between causation in tort law and causation in workers' compensation].) Here, the WCJ correctly found that the events of applicant's employment during the period of exposure caused a single injury to applicant.

It has long been the law that separate disabilities arising out of a single injury are rated together, even if those disabilities do not become permanent and stationary at the same time. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] [chef suffered specific back injury but, as a result of blood transfusions given during later back surgery, contracted hepatitis; employee's spinal disability and liver disability were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [43 Cal.Comp.Cases 1116] [police officer suffered a cumulative injury causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 1 Cal.App.3d 720 [41 Cal.Comp.Cases 81] [employee's chest and left knee injuries rated together].)

The general rule is that when an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury. For example, in *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618 [45 Carl.Comp.Cases 1098], a deputy sherif£ suffered trauma to his back from July 22, 1968 through November 9, 1977 and trauma to his esophagus and stomach from 1974 to November 1977. The Court of Appeal found a single cumulative injury, stating among other things: "we conclude that the cumulative back injury and cumulative esophagus and stomach injury cannot be said to be truly successive injuries, they must be treated as contemporaneous and therefore rated as multiple factors of disability from one injury." (*Norton*, *supra*, 111 Cal.App.3d at p. 629.)

Similarly, in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Hurley*) (1977) 70 Cal.App.3d 599 [42 Cal.Comp.Cases 481], a welder employed from April 30, 1959 to January 5, 1973 suffered trauma to his eyes due to the heat and flashes of the welding torches, to his ears due to the noises of the shop, and to his lungs due to exposure to dust and fumes he inhaled. The Court of Appeal found a single cumulative injury, stating among other things: "From all of the foregoing we conclude that Hurley suffered repetitive physically traumatic experiences extending throughout his employment, ... , the combined effect of which resulted in bodily injury, and permanent disability. (See Lab. Code, § 3208.1.)." (*Hurley, supra*, 70 Cal.App.3d at pp. 606.) The Court further held that the disabilities had to be rated together because the various traumas the employee had suffered were not "separate and independent," but "instead suffered contemporaneously." (*Hurley, supra*, 70 Cal.App.3d at pp. 605; cf. *Morgan, supra*, 85 Cal.App.3d 710 [police officer employed from November 1, 1946 through April 30, 1974 suffered trauma causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award].)

Section 3208.1 defines a "cumulative" injury as one "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412."

In turn, section 5412 states: "The date of injury in cases of ... cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." Therefore, in cumulative injury cases, there is no "date of injury" until there is a concurrence of both disability and knowledge. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1110 [53 Cal.Comp.Cases 502].) As used in section 5412, "disability" means either compensable temporary disability or permanent disability. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (Rodarte) (2004) 119 Cal.App.4th 998, 1002-1004, 1005-1006 [69 Cal.Comp.Cases 579]; *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473-474 [56 Cal.Comp.Cases 631].)

Section 3208.2 provides:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

Section 5303 provides, in pertinent part:

> There is but one cause of action for each injury coming within the provisions of this division.... [N]o injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

The issue of how many cumulative injuries an employee sustained is a question of fact for the WCAB. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]; *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd.* (*Coltharp*) (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720].) In *Coltharp*, the applicant's initial work duties, which he described as "heavy labor," caused cumulative trauma resulting in disability and a need for medical treatment, including back surgery. After the applicant returned to work, he was assigned "lighter work," but he still had to do some lifting as well as crawling through pipe. He said of his post-return work duties, "regardless of everything I did, it was aggravating on my back." A physician stated that applicant's post-return cumulative work activities were "the immediate precipitating factor that necessitated" another back surgery. Based on these facts, the *Coltharp* court found that the applicant had sustained two separate cumulative injuries, i.e., one before and one after the initial period of disability and need for treatment, and that to conclude, otherwise would violate the anti-merger provisions of sections 3208.2 and 5303.

In *Austin*, the applicant's increasing work responsibilities precipitated a major depression, resulting in temporary disability and a need for treatment, including psychiatric hospitalization. After receiving psychiatric treatment and being off work for a period of time, the applicant returned to work. However, when the applicant returned to work, he had not fully recovered from his depressive episode, he remained under a doctor's care and on medication, and he became progressively worse. It was the same stress that resulted in the initial hospitalization that further

exacerbated applicant's problem after he returned to work. Based on these facts, the *Austin* court concluded the applicant had only one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not "distinct."

When the holdings of *Austin* and *Coltharp* are harmonized and read in conjunction with the section 3208.1 definition of "cumulative injury" and the anti-merger provisions of sections 3208.2 and 5303, the following principles are revealed:

(1) if, after returning to work from a period of industrially-caused disability and a need for medical treatment, the employee's repetitive work activities again result in injurious trauma - i.e., if the employee's occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment - then there are two separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code, §§ 3208.1, 3208.2, 5303; *Coltharp, supra*, 35 Cal.App.3d at p. 342); and

(2) if, however, the employee's occupational activities after returning to work from a period of industrially-caused disability are not injurious - i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an exacerbation of the original injury - then there is only a single cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Austin*, *supra*, 16 Cal.App.4th at p. 235.)

Here, applicant already had compensable disability when he stopped working on January 23, 2021, and he already had knowledge that this disability was work-related. There is no basis in the statutory or decisional law to conclude that an injured worker can have a subsequent second section 5412 date of injury for a different body part in a single injury. Defendant's attempt to craft a second period of injurious exposure by changing the beginning date of the period of injurious exposure is simply meritless, and borders on frivolous. (See Cal.Code.Regs., tit. 8, § 10517 [pleadings may be amended to conform to proof].) The legal impact of the first date of injurious exposure is not legally significant here, and could have been amended at trial, especially where the parties have stipulated to the legally operative date of the last date of injury-causing exposure. The WCJ could have dismissed the second Application as duplicative and if she chose, could have imposed sanctions for filing without reasonable justification, bringing a claim without merit,

presenting a defense without merit, and asserting a position that misstates the law. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

Turning to the issue of whether the WCJ should have found apportionment, defendant's argument appears to be based on the same confusion about the difference between causation of injury and causation of disability.

Section 4663 provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) A doctor who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) Section 4663 requires that the doctor "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612-613 (Appeals Board en banc) (*Escobedo*).)

The report by the physician addressing the issue of apportionment must be supported by substantial evidence. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 620, citing Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) 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. (*Hegglin, supra,* 4 Cal.3d at p. 169; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525].)

As stated in the WCJ's Report:

> Dr. Nacouzi apportioned parts of the applicant's pulmonary disability to obesity, preexisting seasonal allergies and employment as a firefighter that predated the applicant's employment with defendant. Dr. Nacouzi did provide a detailed discussion regarding how applicant's obesity had a restrictive effect on his

> lungs, leading to the airways having less ability to expel mucus or other products of inflammation, which in turn worsened the asthma condition. (Applicant's Exhibit 9, pages 29-33.) However, Dr. Nacouzi provided no analysis in his reports or deposition as to how preexisting seasonal allergies contributed to the applicant's current level of impairment. In the June 16, 2021 report, he opined that the seasonal allergies predisposed the applicant to occupational asthma, which appears to conflate causation of injury with causation of disability. (Applicant's Exhibit 3, page 3.) No further analysis was made for the apportionment to the seasonal allergies in any supplemental reports, or in his deposition. There is simply no explanation for how and why the preexisting seasonal allergies contributed to the applicant's current level of impairment.
>
> Dr. Nacouzi also apportioned 5% of the impairment to the applicant's employment as a firefighter prior to his employment with the City of Daly City. At his deposition, Dr. Nacouzi confirmed that he was apportioning to prior firefighting employment with exposure to smoke. (36:1 –6.) This is the same injurious exposure that led to the occupational asthma. . . .As it is based on an incorrect legal theory, his opinion on apportionment to the applicant's prior employment is not substantial evidence.

As set forth in the WCJ's discussion in the Opinion on Decision and the Report, which we have excerpted herein, we see no reason to disturb the WCJ's conclusion that defendant did not meet its burden to show that any of applicant's disability was caused by this injury.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings of Fact, Award, and Order issued by a workers' compensation administrative law judge on October 16, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 24, 2025

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

JOSE VALENCIA
BROWN & DELZELL, LLP
D'ANDRE LAW LLP

AS/mc

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