WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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| **RICHARD KITE,**<br>*Applicant,*<br>**vs.**<br>**EAST BAY MUNICIPALITY UTILITY DISTRICT; ATHENS ADMINISTRATORS,**<br>***Defendants.*** | **Case No. ADJ6719136**<br>**(Oakland District Office)**<br><br>**ORDER DENYING RECONSIDERATION** |

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

We have exercised our discretion to accept defendant's supplemental petition because it was filed within the time to file a petition for reconsideration. (Cal. Code Regs., tit. 8. § 10848, WCAB Rules of Practice and Procedure.) However, it does not change our decision herein.

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For the foregoing reasons,

**IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED.**

**WORKERS' COMPENSATION APPEALS BOARD**

FRANK M. BRASS

**I CONCUR,**

RONNIE G. CAPLANE

ALFONSO J. MORESI

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**
DEC 05 2012

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

**BOXER & GERSON**
**FINNEGAN MARKS**
**RICHARD KITE**

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STATE OF CALIFORNIA
**Division of Workers' Compensation**
**Workers' Compensation Appeals Board**
**JUDGE CHRISTOPHER MILLER**

**Richard Kite v. East Bay Municipal Utility District**
**WCAB No. ADJ6719136**

# REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on October 18, 2012,[1] defendant seeks reconsideration of the decision filed herein on October 5, 2012, in this case, which arises out of admitted injuries, over the period of time ending August 14, 2007, to the hips of a 53-year-old forklift driver. Defendant contends, in substance, that it was error to combine the permanent disability stemming from each hip by simple addition, rather than by using the Combined Values Chart, or formula, and that applicant is not entitled to an increase in his permanent disability (PD) indemnity rate pursuant to section 4658, at subd. (d),[2] because he returned to his usual and customary job duties. Applicant has filed an answer. I will recommend that reconsideration be denied.

## BACKGROUND

The salient facts are not disputed, and are fairly summarized in defendant's petition. Briefly, applicant was taken off work to undergo replacement of his right hip on August 15, 2007, returning to work about three months later. He then underwent left hip replacement August 30, 2009, and returned to work December 14, 2009. All of his employment with East Bay Municipal Utility District (EBMUD) has been in the same capacity, as a forklift operator.

The parties agreed on the use of Dr. Ernest Cheng, whose name was chosen from a panel of three qualified medical evaluators (QMEs). (At trial, defendant characterized Dr.

[1] The petition was date-stamped September 18, 2012, in error.
[2] All statutory references not otherwise identified are to the California Labor Code.

Cheng as simply a QME; applicant called him an agreed medical evaluator (AME); the doctor combined the two terms.) In the first of his three reports, dated August 6, 2010, Dr. Cheng finds that applicant's job duties contributed to the osteoarthritis in his hips, that his condition, bilaterally, is permanent and stationary, and that he has been left with permanent impairment ratable under the AMA Guides.[3] The QME rates each hip at 20% whole-person impairment (WPI) under those guides, or 40% considering both hips.[4] He explains his method of combining the impairment: "I do find that there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body. In this case, it is my opinion that the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment."

Defendant, on November 17, 2010, mailed to applicant a Notice of Offer of Regular Work, DWC-AD form 10118,[5] as required by section 4658.

Defendant has paid no permanent disability indemnity.

The case came on for trial September 25, 2012, over the extent of permanent disability and whether defendant's tardy return-to-work offer entitled applicant to an increased indemnity rate under section 4658. I found Dr. Cheng's reasoning, in favoring synergy over reduced combined disability, to be persuasive, and I awarded the disability he recommended. I also found that defendant's failure to send the return-to-work offer until well beyond 60 days from permanent and stationary status entitled applicant to the 15% increase required in the statute.

**DISCUSSION**

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment,* 5th Ed., incorporated into the *Schedule for Rating Permanent Disabilities* effective January 1, 2005 by Lab. Code § 4660, at subd. (b).
[4] These figures are before apportionment, which is discussed in a later report.
[5] Title 8, Cal. Code of Regs., § 10118.

*Permanent impairment – language*

Implicit in defendant's argument against the QME's method of rating applicant's two impaired hips is the notion that "combine" is a term of art, and that it is defined as the combining of impairments using the combined values chart or formula. In other words, *combining* is to be distinguished from adding two impairments, or from combining them through any means other than such chart or formula.[6] However, nowhere in the Labor Code, the rating schedule or the AMA Guides is "combine" defined as entailing that method, or any particular method. The schedule provides that impairments are *generally* combined using the formula. The Guides, upon which the schedule is based, describe several methods of combining impairments, discussed as well *infra*, belying the narrow interpretation of "combine" urged here by defendant.

*Permanent impairment – substance*

With respect to the most appropriate method of combining multiple impairments, the Guides are instructive:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (e.g., blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many workers' compensation statutes contain

[6] The formula, from which the chart was derived, is described in the *Schedule for Rating Permanent Disabilities* (PDRS) (2005), at page 1-10: "Impairments and disabilities are generally combined using the following formula where 'a' and 'b' are the decimal equivalents of the impairment or disability percentages: a+b(1-a)." It represents a slight change from the old formula (and Multiple Disabilities Table derived therefrom), found in the 1997 PDRS at pages 1-9 and 7-12, which added ten percent to the lower rating after reduction.

> provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect an individual's ability to perform activities of daily living.

The rating schedule based on those Guides provides: "Impairments and disabilities are *generally* combined using the [reduction] formula..." PDRS, page 1-10, emphasis added; see fn. 6, *supra.* Finally, the enabling statute, section 4660, states (at subd. (c)) that the rating schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." In other words, the schedule provides evidence that is rebuttable.

In sum, nowhere in the statute, the rating schedule or the AMA Guides do we find the rigid language defendant urges be followed: *Multiple disabilities shall be combined using this formula.*

The appeals board and appellate courts have consistently declined invitations to imply a requirement that permanent impairment and disability be rated in a rigid, lockstep fashion. Cited in the opinion on decision and applicant's answer is one such case. The opinion states:

> To the extent that the AMA Guides express favor toward the combined values method, the doctor's ability to employ a different method found within those Guides receives some support from the line of cases including *Milpitas Unified School District v. Workers' Compensation Appeals Board (Guzman)* (2010) 187 Cal.App.[4th 808] [75 Cal.Comp.Cases 837].

Another is *County of Los Angeles v. Wkrs. Comp. Appeals Bd. (LeCornu)* (2009) 74 Cal.Comp.Cases 645 (writ denied), where the appeals board confirmed that "[t]he rules provide that the Multiple Disabilities Table is a guide only..." and the trial judge has discretion to depart from such a guide.

Turning to the QME's determination that simple addition of applicant's left and right hip impairment provides a more accurate depiction of his overall impairment than application of the reduction formula, the opinion states:

> Dr. Cheng points to the synergistic effect of one hip injury upon another opposite hip injury. I agree. It appears logical that a person who is able to compensate through the opposite member for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.

I remain persuaded that the QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula.

*Untimely return-to-work offer*

At trial and in its petition, defendant acknowledged that its offer to return applicant to his regular work was tardy, but contends that the breach should be excused by the fact that applicant, when the time arose to provide the offer (report of permanent and stationary status), had already returned to work.

The relevant statute is section 4658, which provides, in relevant part, at subd. (d), as follows:

> (2) If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.

(3)(A) If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.

As applicant contends in his answer, the plain language of the statute requires a 15% increase in permanent disability in any case in which the return-to-work offer is not made, using the form mandated by the administrative director, within 60 days of a permanent and stationary (P&S) report, and this is such a case. Defendant argues, rather, that the intent of the statute is to provide an incentive (reduction in PD liability) to return an employee to work, and thus the policy advanced by section 4658 has no application when the employee has already gone back to work.

Defendant cites *City of Sebastopol v. Wkrs. Comp. Appeals Board (Braga)* (2012) 208 Cal.App. 4th 1197 [77 Cal.Comp.Cases 783] in support of its position. There, the employee missed no time from work before his condition was declared P&S. As such, the appeals board and the court concluded that requiring the notice and allowing the 15% reduction in PD indemnity under the circumstances would frustrate the purpose of the statute and render an absurd result. Applicant points out that he was in fact temporarily disabled for the two periods following his hip operations, distinguishing the facts in *Braga*. He also cites two "noteworthy panel decisions" in support of his position.[7] In one, *Jauregui v. Mercy Southwest Hospital* (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 582, the appeals board disagreed with the trial

[7] Noteworthy panel decisions are so designated by the publisher, LexisNexis. Each opens with this disclaimer: "This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board," advising the reader to cite it with care.

judge's conclusion that an employee whose condition becomes P&S as to one body part, while another remains temporarily disabling, must be provided a return-to-work offer. However, the panel upheld the award of enhanced PD indemnity because, when the employer did (timely) provide such notice, it was not a bona fide offer. In *Mansfield v. County of Los Angeles* (2010) Cal. Wrk. Comp. P.D. LEXIS 53, the 15% increase was upheld when the offer was found to be untimely and not compliant with regulations.

In assessing whether the holding in *Braga, supra,* ought to be broadened to include employees who suffer temporary disability, I believe it is necessary to examine both the legislative intent and policy embraced in that decision and, as well, the requirements of the return-to-work offer – the "form and manner prescribed by the administrative director."

On the first point, to apply *Braga* to the facts of this case, as defendant would have us do, requires a measure of retrospection: By the time the return-to-work offer was triggered, the employer could see that applicant had already returned to his regular job, and therefore it could not be said to have an incentive to allow him so to return. However, at this point we have the benefit of additional hindsight: This employer did not, at that time or at any time since, provide any PD indemnity whatsoever, at any weekly rate. Thus, it cannot legitimately claim to have a lack of incentive to reduce a benefit it was not providing.

With respect to the statutory and regulatory requirements of the return-to-work notice itself, it must be noted that there are several. The statute itself requires that the work last "at least 12 months." The regulation (see fn. 5, *supra*) sensibly clarifies that the position be "*expected* to last for a total of at least 12 months of work." (Emphasis added) In addition, the regulation specifies that the offer of employment state the return-to-work date, the job title, the location and shift of the position, and the wage rate. It provides several reasons and an

opportunity for the employee to reject the offer, object to its terms, or waive such objections. Were the application of *Braga* to be extended to employees who actually *do* return to work from temporary disability – that is, if such employees were not entitled to the same assurances as those whose return-to-work and P&S dates coincide – it would appear that the purposes of the statute and the regulation would be thwarted and there may in fact come to be a disincentive for the employee to return to work before that P&S date.

I believe that, under the circumstances presented in this case, the statute must be interpreted literally.

**RECOMMENDATION**

I recommend that reconsideration be denied.

Respectfully submitted,

Dated: October 29, 2012

CHRISTOPHER MILLER
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

**SERVICE:**
BOXER GERSON OAKLAND, US Mail
FINNEGAN MARKS SAN FRANCISCO, US Mail
RICHARD KITE, US Mail

ON: 10/29/2012

BY: