

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JAMES P. MARTINEZ,**

5 *Applicant,*

6 vs.

7 **STATE OF CALIFORNIA, DEPARTMENT OF**
8 **CORRECTIONS, Legally Uninsured; STATE**
9 **COMPENSATION INSURANCE FUND,**

10 *Defendants.*

Case No. **ADJ1183558**
(San Bernardino District Office)

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

11
12 Defendant, State of California, Department of Corrections, legally uninsured, seeks reconsideration
13 of the Findings and Award, issued November 25, 2019, in which a workers' compensation administrative
14 law judge (WCJ) found applicant James P. Martinez sustained 79% permanent disability as a result of an
15 admitted cumulative trauma injury to his neck, low back, knees, shoulders and hypertension, over the
16 period January 6, 1999 through December 17, 2017, while he was employed as a correctional officer.

17 Defendant contests the WCJ's rating of applicant's permanent disability, arguing that the WCJ
18 erred in adding the disability from applicant's hypertension to the combined rating of applicant's
19 orthopedic disabilities. Defendant contends that substantial medical evidence does not support adding
20 applicant's permanent disability, and that applicant has not rebutted the presumption favoring the use of
21 the combined values chart (CVC) of the permanent disability rating schedule to rate multiple impairments.

22 Applicant has filed an Answer to defendant's Petition for Reconsideration. The WCJ has prepared
23 a Report and Recommendation on Petition for Reconsideration, in which he recommends that defendant's
24 petition be denied.

25 As we find an absence of substantial medical evidence in the record to support the use of the
26 additive method to rate applicant's permanent disability, we will grant reconsideration to amend the
27 Findings and Award using the CVC to rate applicant's permanent disability.

I.

Applicant sustained an admitted cumulative trauma injury to his neck, low back, knees, shoulders and hypertension, over the period January 6, 1999 through December 17, 2017, while he was employed as a correctional officer.

He was evaluated for his orthopedic injuries by Dr. Steiger, and by Dr. Hyman for his hypertension. The WCJ issued a request for a formal rating on October 31, 2019, stating:

Rate per the AMA Guides' per Dr. Steiger reporting of 5/20/19, WPIs for the following:

Cervical Spine 16; Lumbar Spine 11; Right Knee 8; Left Shoulder 2; right shoulder 2; No apportionment.

Rate per AMA Guides per Dr. Hyman reporting hypertension WPI 17%, Apportion 10% to prior adjusted PD rating per L.C. Sect. 4664 and apportion 55% of new PD to non-industrial causation per L.C. Sect. 4663. No presumption applies under L.C. Sect. 3212.2.

Application of the Combined Values Chart to the extent consistent with your rating procedures is to be applied to the factors listed by Dr. Steiger noted above. Use the addition method as to the hypertensive factors given by Dr. Hyman as noted above in conjunction with the overall rating.

The DEU rating was a combined 66% orthopedic permanent disability and a 13% hypertension permanent disability, which added together equaled the 79% permanent disability awarded by the WCJ.¹

The only reference in the record discussing the basis for the use of the additive method for rating applicant's hypertension is in Dr. Hyman's deposition testimony.

In his testimony, Dr. Hyman stated that the reason the disability from applicant's hypertension should be added to his orthopedic disability is due to the absence of overlap between the disabilities.

Q. You diagnosed applicant with hypertension with hypertensive changes to the eye and a 17 percent whole person impairment, correct?

A. Correct.

¹ It appears that there is an error in the rating instructions to apportion applicant's hypertension. Dr. Hyman apportioned 10% to a prior award and 55% to industrial causes. (Jt. Exh. 4, Dr. Hyman QME Report, 7/12/18, p. 4.) Yet, the rating instructions provided for apportionment of 55% to non-industrial causation. The correct result would be a 16% permanent disability rating, based upon the rating string:

04.01.00.00- 17% - [1.4] 24 - 4901 - 32 - 39

-10

55% (29) 16 PD

1 Q. The applicant also has a claim for orthopedic injuries. When the parties
2 or the trier of fact aggregates the disabilities between hypertension and the
3 orthopedic injuries, in what manner should that be done?

4 A. Additive.

5 Q. Why is that additive?

6 A. Because the disabilities from orthopedic and heart don't overlap. They're
7 entirely different organ systems with different kinds of impairments.
8 (Jt. Exh. 1, Dr. Hyman deposition, 5/31/19, 4:19-25; 5:1-7.)

9 He explained that applicant's hypertension does not impair his activities of daily living, and there
10 is no overlap between his orthopedic and internal medicine impairments. (Jt. Exh. 1, Dr. Hyman deposition,
11 5/31/19, 7:25, 8:1-8.) Dr. Hyman found applicant's hypertension "was never labor disabling and would not
12 prevent him from performing his regular job with the employer." (Jt. Exh. 4, Dr. Hyman QME Report,
13 7/12/18, p. 4.)

14 Finding Dr. Hyman to be a medical expert and his explanation to be "well-reasoned," the WCJ
15 concluded that combining, rather than adding, the hypertension and orthopedic impairments "would fail to
16 give an accurate assessment of the disabling effect of both areas of injury suffered by applicant." (Opinion
17 on Decision, p. 3.)

18 II.

19 Defendant argues that the WCJ erred by instructing the DEU to use the addition method to combine
20 applicant's WPI ratings, rather than use the CVC, because just as the rating under the AMA Guides is
21 presumed correct, the use of the CVC is presumed to provide the correct permanent disability rating where
22 there are multiple disabilities.

23 In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal. Comp. Cases 213,
24 215-216 (writ denied), the Appeals Board held that the WCJ properly relied upon the opinion of a panel
25 QME, that there was a "synergistic effect" of an injury to the bilateral hips versus body parts from different
26 regions, to support combining the permanent disability stemming from the injury to each of the injured
27 worker's hips by using simple addition, rather than using the CVC. The Board found that, although the
2005 Permanent Disability Rating Schedule provides that impairments are generally to be combined using

1 the CVC, the AMA Guides describe several methods of combining impairments, and the rigid application
2 of the CVC is not mandated. Moreover, the scheduled impairment rating is rebuttable, and the panel QME
3 appropriately determined that the impairment resulting from the employee's left and right hip injuries was
4 most accurately combined by using simple addition rather than by using the combined values formula. The
5 QME used the term "synergistic effect" to justify the use of the additive method because it described the
6 greater impact on the resultant disability.

7 The record here does not provide support for adding the hypertension and orthopedic impairments,
8 as there is no substantive reasoning offered to justify that choice. As defendant argues, in multiple
9 decisions, panels of the Workers' Compensation Appeals Board have required some reasoning for the
10 decision to add impairments, as opposed to the mere assertion found here.

11 In *Taina v. County of Santa Clara/Valley Med. Ctr.*, 2018 Cal. Wrk. Comp. P.D. LEXIS 344, the
12 addition of orthopedic and psychiatric impairments was upheld where both Agreed Medical Examiners
13 found an absence of overlapping impairments and described a synergistic disabling effect on applicant's
14 earning capacity.

15 In *Melgoza v. Prkacin Co.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 104, a panel denied a challenge to
16 a permanent disability rating adding the permanent disability from three upper extremity impairments,
17 wrist and bilateral shoulders, before combining them with ratings of all other body parts, as the additive
18 rating was determined to be based upon substantial medical evidence. The QME in *Melgoza* testified that
19 these separate impairments should be added because the applicant was more functionally impaired due to
20 the synergy between the shoulders.

21 In *Leo v. Greenspan Adjusters Int'l, Inc.*, 2016 Cal. Wrk. Comp. P.D. LEXIS 431, a panel reversed
22 a permanent disability rating that added impairments from the lumbar spine, cervical spine and pain,
23 finding the explanation offered by the QME was not substantial evidence. The QME's explanation, offered
24 in his deposition testimony, was similar to that provided here; that the impairments should be added
25 because they represent two different parts of the spine, without more. Because the QME did not articulate
26 a reason for not applying the CVC, beyond the statement that the body parts did not overlap, there was no
27 substantial evidence in the record to establish that adding the impairments would provide a more accurate

1 rating of applicant's overall impairments than would use of the CVC.

2 The issue here is to determine the most accurate rating, not whether there is a synergistic
3 relationship between the impaired body parts. As explained in *De La Cerda v. Martin Selko & Co.* (2017)
4 83 Cal. Comp. Cases 567 (writ den.), the fact that a QME or AME report does not use the term "synergistic"
5 to advocate for the use of the additive rating method is not determinative of the validity of using that
6 method. The impairments may be added if substantial medical evidence supports the physician's opinion
7 that adding them will result in a more accurate rating of the applicant's level of disability than the rating
8 resulting from the use of the CVC."
9

10 Here, Dr. Hyman did not offer a rationale for adding applicant's impairments beyond the fact that
11 the hypertension and orthopedic disabilities did not overlap. Without more, this does not constitute
12 substantial medical evidence to establish the primacy of the additive method over the use of the CVC,
13 otherwise, the CVC would become irrelevant in any case involving injury to multiple body parts.

14 Rating all of applicant's permanent disability using the CVC results in 72% permanent disability,
15 based upon the following rating strings, with the corrected hypertension apportionment.

16 Hypertension	04.01.00.00 - 17% - [1.4] 24 - 490I - 32 - 39
	- 10
	55% (29) 16 PD
18 C Spine	15.01.01.00 - 16% - [1.4] 22 - 490I - 29- 36 PD
19 L Spine	15.03.01.00 - 11% - [1.4] 15 - 490I - 21- 26 PD ²
20 Lt Shoulder	16.02.01.00 - 2% - [1.4] 3 - 490I - 5 - 6 PD
21 Rt Shoulder	16.02.01.00 - 2% - [1.4] 3 - 490I - 5 - 6 PD
22 Rt Knee	17.05.04.00 - 8% - [1.4] 11 - 490I - 16 - 20 PD

23 Using the CVC, the final rating is:

24 36 C 26 C 20 C 16 C 6 C 6 = 72 PD
25
26

27 ² The WCJ's Findings and Award stated the permanent disability for the lumbar spine was 25%. We have corrected this to reflect the DEU rating of 26%

1 Accordingly, we will grant reconsideration and amend the Findings and Award to reflect this final
2 rating.

3 For the foregoing reasons,

4 **IT IS ORDERED** that the December 19, 2019 Petition for Reconsideration be, and hereby is,
5 **GRANTED**, and as our Decision After Reconsideration, the November 25, 2019 Findings and Award is
6 **AMENDED** as follows:

7 **FINDINGS OF FACT**

- 8 1. Applicant, James Martinez, born June 10, 1956, while employed at
9 Norco, California as a correctional officer, group 490, during the period
10 1/6/99 to 12/17/17 by State of California, Department of Corrections,
11 legally uninsured, sustained injury arising out of and in the course of his
12 employment to his neck, low back, knees, shoulders, hypertension and
13 soft tissue head. The presumption under Labor Code section 3212.2 has
14 not been established.
- 15 2. The minutes of hearing for the hearings on 10/28/19 are true and correct
16 except as corrected herein and are incorporated by this reference.
- 17 3. Permanent disability for the orthopedic injury for the cervical spine is
18 36%; lumbar spine 26%; left shoulder 6%; right shoulder 6%; right knee
19 20%, combined with 16% hypertensive, after apportionment per Labor
20 Code sections 4664 and 4663, for a final permanent disability of 72%,
21 payable at \$290.00 for 464.25 weeks in the aggregate sum of
22 \$134,922.50, and thereafter a life pension payable at \$92.77 per week,
23 all less advances to date according to proof and attorney's fees as
24 specified below.
- 25 4. Reasonable attorney's fees are 15% of the permanent disability. If
26 commutation is requested a petition and order thereon shall be filed and
27 served. No fee is awarded on the life pension absent further petition and
order thereon.
5. Applicant is in need of further medical treatment subject to Labor Code
sections 4600 and 4610.

6. All other issues are deferred to voluntary efforts at resolution or further hearing upon filing of a D.O.R.

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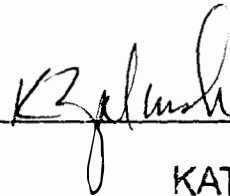
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AWARD

AWARD IS MADE in favor of **JAMES P. MARTINEZ**, and against **STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS**, legally uninsured, as follows:

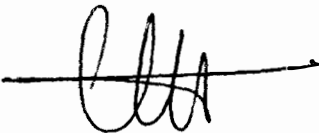
- a. Permanent partial disability and life pension pursuant to Finding No. 3 less attorney fees per Finding No.4 above,
- b. Medical treatment pursuant to Finding No. 5 above;
- c. Other issues are deferred per Finding 6.

**WORKERS' COMPENSATION APPEALS BOARD
CHAIR**

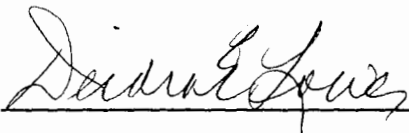


KATHERINE ZALEWSKI

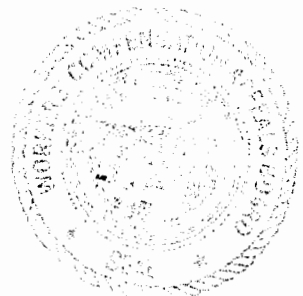
I CONCUR,



KATHERINE WILLIAMS DODD



DEIDRA E. LOWE



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 14 2020

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

**JAMES P. MARTINEZ
 WHITING, COTTER & HURLIMANN
 STATE COMPENSATION INSURANCE FUND/STATE CONTRACT SERVICES**

SV/pc

MARTINEZ, James

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

James P. Martinez

Case No. ADJ11183558

Applicant

vs.

State of California, Dept. of Corrections, Leg.
Unins.; State Comp. Ins. Fund-State Contract
Svcs.(SCIF State)

Defendants.

REPORT AND RECOMMENDATION OF WC JUDGE
ON PETITION FOR RECONSIDERATION

INTRODUCTION

A Petition for Reconsideration has been timely filed and served by defendant on 12/19/19 and apparently verified regarding the Findings & Award issued 11/25/19.

SUMMARY

Defendant admitted injury AOE/COE as noted below for hypertension except injury to the heart was denied as a compensable consequence of the hypertension. The applicant argue for a presumption of injury to the heart. Orthopedic injury was also accepted as industrial.

The defense asserts that the rating instructions given by the WCJ based on his view of the AME in internal medicine Dr. Richard Hyman, MD opinion is invalid because the QME has rendered an insufficient basis for his opinion that the internal AMA finding should not be combined in setting the level of permanent disability but are in fact distinguishable precluding application of the Combined Values Chart of the Permanent Disability Rating Schedule. He indicated addition was appropriate in his deposition.

The WCJ does not adopt the "Facts" set forth in the Petition and will rely on his Findings & Award herein, to wit:

FINDING

1. Applicant, James Martinez, born _____ while employed at Norco, California as a correctional officer group 490, during the period 1/6/99 to 12/17/17 by Dept. of Corrections, State of California Legally Uninsured; State Compensation Ins. Fund-State Adj. Agt., as provided by the Labor Code sustained injury arising out of and in the course of said employment to his neck, low

back, knees, shoulders, hypertension and soft tissue head. The presumption under L.C. Code Section 3212.2 has not been established.

2. The minutes of hearing for the hearings on 10/28/19 are true and correct except as corrected herein and are incorporated by this reference.
3. Permanent disability for the orthopedic injury for the cervical spine is 36%; lumbar spine 25%; Left shoulder 6%; Right Shoulder 6%; Right knee 20% for a combined orthopedic PD of 66% added to which after L.C. 4664 and 4663 apportionment is the hypertensive PD of 13% for a final Permanent Disability of 79% payable at \$290.00 for 577.25 weeks in the aggregate sum of \$167,402.50 and thereafter a life pension payable at \$146.88 per week all less advances to date according to proof and attorney's as specified below.
4. Reasonable attorney's fees are 15% of the permanent disability. If commutation is requested a petition and order thereon shall be filed and served. No Fee is awarded on the life pension absent further petition and order thereon.
5. Applicant is in need of on-going medical treatment subject to L.C. Sect. 4600 and 4610.
6. All other issues are deferred to voluntary efforts at resolution or further hearing upon filing of a D.O.R.

Contention I: The applicant's permanent disability should be rated under the Combined Values Chart because the additive method is not supported by substantial medical evidence.

Response: Although sufficient evidence standing alone, neither the PDRS nor the AMA based rating system preclude the QME from interpreting those sources if it is necessary in order to give an accurate measure of the residual impairment of future earning capacity, Athens Adm. v. WCAB (Kite) (WD-2913) 78 CCC 213; Guzman v Milpitas USD (2009) 74 CCC 470; Almaraz v. Environmental, etc. (2009) 74 CCC 1084.

As noted by applicant's counsel in his trial brief the WCJ in the "context of a formal rating is to frame instructions, based on substantial medical evidence, that specifically and fully describe whole person impairment to be rated. (See Blackledge v. Bank of America (2010) 75 Cal Comp. Cases 613 [En Banc])"

The WCJ has adopted the deposition statement by the QME DR. Hyman as the accurate approach to rating the disability herein.

FURTHER RESPONSE: The WCJ incorporates in material part his Opinion on Decision herein, to wit:

"OPINION ON DECISION/J.MARTINEZ/ADJ11183558

INJURY AOE/COE-PRESUMPTION

The heart has not been injured based on the analysis of Dr. Hyman regarding the hypertensive diagnosis, as damage to the eye is not within the provision for end organ qualification so as to raise the presumption under 3212.2 and the preclusion of apportionment under L.C. Section 4463 (e).

PERMANENT DISABILITY/APPORTIONMENT

The apportionment discussion under L.C. Section 4663 by Dr. Steiger is deficient in so far as it purports to identify as a basis for orthopedic apportionment the function of the natural aging process. The references to prior injuries including in 1999 are not documented in the medical records or otherwise discussed in terms of the guidelines in the Sanchez v. County of Los Angeles (2005 En Banc) 70 CCC 1440; Strong v. City & County of San Francisco (2005) 70 CCC 1460; Kopping v. WCAB (2006) 71 CCC 1229 opinions. The defense has not met the burden of proof under L.C. Sect. 3202.5, 4628, 4664 or 4663. The 10 % apportionment has not been established as to any of the body areas involved with the orthopedic injury.

L.C. Section 4660 in designating the PDRS provides for a 1 increase in rating of disability based on age. In order to rebut the PDRS further explanation is required demonstrating an independent factor outside the normal aging progress.

Given that the basis for L.C. Section 3212.2 has not been established, Dr. Hyman provided apportionment pursuant to L.C. Sect. 4664 and 4663 that appears valid given the prior award for hypertension and the non-industrial risk factors described in applicant personal habits and other medical conditions.

The WCJ has reviewed the DEU rating given pursuant to his formal instructions and adopts same. The testimony of the rater does not alter the WCJ's view on this issue.

Permanent disability and life pension are payable as follows: 79% payable at \$290.00 per week for 577.25 weeks in the aggregate sum of \$167,402.50 less attorney's fees of 15% on accrued and continuing PD payments and less PD advances thereon to date according to proof. If commutation is sought by counsel a petition shall be filed and served.

Thereafter a life pension is payable at \$146.88 p/w. No attorney's fees are payable at this time on the Life Pension but will be considered on petition by counsel if requested subject to further order.

L.C. SECTION 4660/ RATING OF PERMANENT DISABILITY

The rating of permanent disability is subject to L.C. Sect. 4660 based on the status of the PDRS as prima facie evidence. The defense argues that the Combined Values Chart must be applied in all cases absent substantial medical evidence rebutting the application of the chart.

The WCJ per the cases cited by both applicant and defense notes that the PDRS is a guide for the WCJ which is to be followed based on the entire evidentiary record in determining if it has been rebutted for purposes of determining the ability of the applicant to maintain earning capacity. As noted in Athens Adm., etc. v WCAB (Kite) (W/D March 2013) 78 CCC213 the PDRS although constituting evidence of sufficient weight to establish the level of disability it remains a guide subject to rebuttal or further development of the record. In Kite the expert orthopedic evaluator determined that application of the combining instructions in the PDRS applicable to separate injury to each hip did not give an accurate description of the overall impairment of work capacity whereas addition did. The specialty involved was orthopedics.

In the current case different specialties are involved namely orthopedics and internal medicine related to the circulatory system in the form of hypertension. It is conceded that hypertension can have an impact of physical work functions as well as non-manual labor stress effecting the internal systems and organs. On this issue the applicant cited the deposition testimony of the internal QME herein Dr. Hyman, MD dated 5/31/19. At pages 9-10 Dr. Hyman asserted that Activities of Daily Living were not something he had to take into consideration when deciding that addition was appropriate as opposed applying the CVC in the PDRS. Dr. Hyman testified that he viewed the AMA guides including page 66, table 4-2 for hypertension as outside the application of the CVC, "A. Because they're entirely different disabilities." from the orthopedic injury. The PDRS except for the instruction at page 1-11 discusses Adjusting AMA Impairments and Combining Ratings but focuses on ratings for extremities. Section 8 in the PDRS simply refers to "combining two or more impairments or two or more disabilities". Applicant's counsel argues in support of Dr. Hyman that injuries effecting different body function do not require application of the CVC. Dr. Hyman concluded that work stress was a factor in the development of applicant's hypertensive cardiovascular condition.

The AMA guides page 66 Table 4-2 refer to Class 1 through 4. Each section refers to the status as asymptomatic or symptomatic. Current symptoms discussed in some of the Examples at pages 67 through 69 include exertional symptoms such as with Class 2, "Example 4-3... "Mild exertional dyspnea while jogging."

Dr. Steiger, MD, QME orthopedics specifies in his disability designation for spinal factors for the lumbar spine at DRE III at 11 WPI and for the cervical spine DRE III at 16% WPI. At pages 386 through 387 examples relating to DRE II classification for current symptoms include "Example 15-3 Impairment for Radiculopathy 10% to 13 % ...Unable to do his usual recreational and household activities."

The WCJ sees merit in both sides where some distinct work functions are identifiable as impaired by one injurious mechanism but other functions appear to have some commonality.

An orthopedic impairment impacting ADLs as well as future earning capacity should not reduce an award for impact on emotional, intellectual or other employment activities. Based on Dr. Hyman's reports and deposition remarks. Avoidance of emotional stress accompanied by physiological symptoms would impair employment dealing with other persons with relatively lighter physical demands but in stressful work environments. Dr. Jay, MD in his 10/3/13 report Exhibit 7 in applicant's earlier case with the defendant noted that "avoidance of undue emotional stress" was a factor in loss of earning capacity. Dr. Hyman provided an expert medical opinion to the effect that combining the orthopedic with the internal medicine would fail to give an accurate assessment of the disabling effect of both areas of injury suffered by applicant. There was no rebuttal of this expert opinion which the WCJ finds well-reasoned.

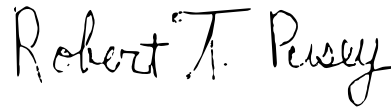
FUTURE MEDICAL TREATMENT

Applicant requires access to ongoing care for his orthopedic and internal medical conditions in accordance with L.C. Sect. 4610, jurisdiction is reserved thereon per the Labor Code L. C. Section 4600 and 4610."

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety.

Executed: 12-23-19



ROBERT T PUSEY
Workers' Compensation Judge

Martinez, J. /ADJ11183558
Served by mail through the WCAB
at San Bernardino, California.

SERVICE:

JAMES MARTINEZ, US Mail
SCIF STATE EMPLOYEES RIVERSIDE, US Mail
STATE OF CA DEPT OF CORRECTIONS, US Mail
WHITING COTTER SANTA ANA, US Mail

On: all parties as shown on Official Address Record
ON: 12/23/2019
BY: A RAYOS-VAZQUEZ