

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

3
4 **JOSEPH ROBINSON,**

5 *Applicant,*

6 **vs.**

7 **CITY OF RIVERSIDE, permissibly self-insured**

8 *Defendants.*
9

Case No. **ADJ10758803**
(Riverside District Office)

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

10 Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers'
11 compensation administrative law judge (WCJ) on November 20, 2017, wherein the WCJ found in
12 pertinent part that applicant sustained injury to his lumbar spine and that he did not sustain injury to his
13 neck, upper extremities, and lower extremities.

14 Applicant contends that the medical report of qualified medical examiner (QME), Dr. Fenison, is
15 not substantial medical evidence because it appears that Dr. Fenison does not understand the concept of
16 cumulative trauma injuries.

17 We received a Report and Recommendation on Petition for Reconsideration (Report) from the
18 WCJ recommending the Petition be denied. We received an Answer from defendant.

19 We have considered the allegations in the Petition and the Answer and the contents of the Report.
20 Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration,
21 rescind the F&A and return the matter to the WCJ for further proceedings consistent with our decision.

22 **BACKGROUND**

23 Applicant claimed injury to his neck, upper extremities, lumbar spine, and lower extremities
24 while employed by defendant as a police officer during the period from June 15, 2009, through
25 September 7, 2016.

26 On March 1, 2017, applicant was evaluated by Dr. Fenison. (Def. Exh. A, Anthony T. Fenison,
27 M.D., March 22, 2017.) The doctor examined applicant, took a history, and reviewed the medical record.

1 In his report the doctor stated:

2 When speaking with the patient today, he could not recall any specific
3 episodes that took place during that time period, but did document that over
4 the past 20+ years as a Peace Officer being involved in multiple motor
5 vehicle accidents and multiple altercations with assailants. He documents
6 having to chase after individuals, climbing over walls, and performing
jumping activities, and states for the most part that he continued to work
and fight through some of his symptoms so that he could continue to
perform his daily work activity. (Def. Exh. A, p. 2.)

7 He concluded:

8 This examinee has multiple complaints involving his neck and back as well
9 as his upper extremities and his knee joints. However, at this point in time,
10 there does not appear to be any clear link between his musculoskeletal
11 difficulties involving his cervical spine, his bilateral upper extremities or
12 his bilateral knee joints as it relates to his work activities for the City of
13 Riverside. (¶) ... [H]e has not presented to me any information
documenting to me any specific injuries that have taken place during the
timeframe that has been listed that would correlated [sic] with this being an
industrial injury.

14 It does not appear as if he has filed any previous claims except for in 2008
15 for his bilateral upper extremities, nor has he missed any time from work
16 due to some of the other conditions that he discussed; therefore, it is more
likely than not that these incidents would have been considered under "first
aid" versus actual work-related injuries.

17 Therefore, at this point in time, I do find AOE/COE for his lumbar spine
18 and he should continue to treat with Dr. Hopkins to address his current
19 difficulties, but fortunately he does not have any active signs of
20 radiculopathy or any other neurological pathology to warrant aggressive
care. (Def. Exh. A, pp. 13 - 14.)

21 The parties proceeded to trial on October 23, 2017. The issues submitted for decision included parts of
22 body injured, (applicant claimed injury to his cervical spine, upper extremities and lower extremities in
23 addition to the accepted lumbar spine injury), and applicant's contention that the report from Dr. Fenison
24 was not substantial medical evidence. (Minutes of Hearing (MOH), October 23, 2017, p. 2.)

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1 Applicant testified that:

2 His job duties included patrol in a vehicle, responding to calls that could
3 involve robberies, domestic violence or fights, et cetera. He wore a bullet
4 resistant vest and a duty belt with radio, gun, ammo, baton, et cetera. The
5 vest weighed approximately 4 pounds. He wore the vest every day. It is
6 attached by straps over the shoulders and around the torso. (MOH, p. 4.)

7 He later stated that:

8 He was involved in five motor vehicle accidents as a Patrol Officer. He has
9 been going to a chiropractor for the last 20 years for neck and back pain.
10 Neck and back pain have increased over the years. He has pain and
11 numbness in his knees. Before he was a Patrol Officer, he did not have pain
12 in his knees, neck, or low back. (MOH, p. 5.)

13 DISCUSSION

14 It has long been held that a worker's continued exposure to the physical demands of his or her
15 employment may result in a cumulative trauma injury and that cumulative trauma injuries are "...the
16 result of a number of minor strains over a period of time...." (*Fruehauf Corp. v. Workmen's Comp.*
17 *Appeals Bd.* (1968) 68 Cal.2d 569, 574 [33 Cal.Comp.Cases 300]; *Breveridge v. Ind. Accident Comm.*
18 (1959) 175 Cal. App. 2d 592 [24 Cal.Comp.Cases 274].)

19 Labor Code section 3208.1, enacted in 1968, states:

20 An injury may be either: (a) "specific," occurring as the result of one
21 incident or exposure which causes disability or need for medical treatment;
22 or (b) "cumulative," occurring as repetitive mentally or physically
23 traumatic activities extending over a period of time, the combined effect of
24 which causes any disability or need for medical treatment....

25 It is well established that, "... [N]ot all expert medical opinion constitutes substantial evidence
26 upon which the Board may rest its decision. Medical reports and opinions are not substantial evidence if
27 they are...based on...inadequate medical histories and examinations, or on incorrect legal theories."
(*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal. 3d 162, 169 [36 Cal.Comp.Cases 93, 97]; *Place*
v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

A WCJ's findings must be supported by substantial evidence. (Lab. Code, §§ 5903 and 5952

1 subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310];
2 *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

3 Here, Dr. Fenison's explanation for his opinion that applicant did not sustain a cumulative trauma
4 injury appears to indicate that the doctor does not accurately understand the legal definition of a
5 cumulative trauma injury. His opinion appears to be based on an incorrect legal theory and does not
6 constitute substantial evidence. Thus, it is not an appropriate basis for the WCJ's findings.

7 The Appeals Board has the discretionary authority to develop the record when the record does not
8 contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues.
9 (Lab. Code §§ 5701, 5906). "The principle of allowing full development of the evidentiary record to
10 enable a complete adjudication of the issues is consistent with due process in connection with workers'
11 compensation claims." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394, 62
12 Cal.Comp.Cases 924; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 63
13 Cal.Comp.Cases 261).

14 Normally, if the medical record requires further development either after trial or submission of
15 the case for decision, the medical record should first be supplemented by physicians who have already
16 reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67
17 Cal.Comp.Cases 138 (Appeals Board *en banc*)). However, in the present matter, since Dr. Fenison's
18 conclusions regarding applicant's cumulative trauma claim appear to be based on an inaccurate
19 understanding of the concept of a cumulative injury, a supplemental report from the doctor would likely
20 not be substantial evidence. Under the circumstance of this case it appears that it would be appropriate
21 for the parties to seek the opinions of an agreed medical evaluator or in the alternative, the WCJ may
22 choose to appoint a regular physician to evaluate applicant. (Lab. Code, §5701.)

23 Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings
24 consistent with our decision.

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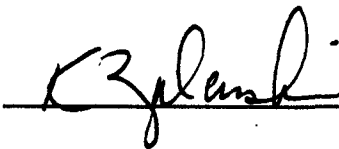
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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings and Award issued
3 by the WCJ on November 20, 2017, is **GRANTED**.

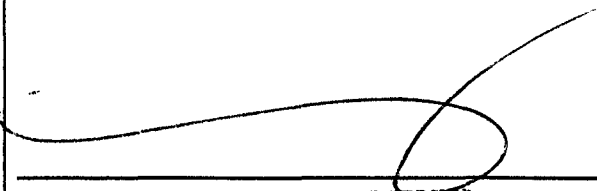
4 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers'
5 Compensation Appeals Board, that the Findings and Award is **RESCINDED** and the matter is
6 **RETURNED** to the WCJ for further proceedings and a new decision consistent with this opinion from
7 which any aggrieved person may timely seek reconsideration.

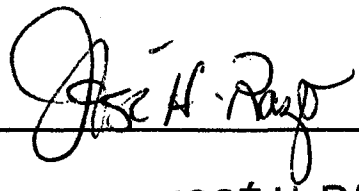
8 **WORKERS' COMPENSATION APPEALS BOARD**

9 
10 **CHAIR**

KATHERINE ZALEWSKI

11 I CONCUR,

12 
13 **MARGUERITE SWEENEY**

14 
15 **JOSÉ H. RAZO**



16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17 **FEB 07 2018**

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

20 **LAW OFFICE OF MATTHEW E. HILL**
21 **JOSEPH ROBINSON**
22 **LAW OFFICES OF PARKER & IRWIN**
23 **DWC MEDICAL UNIT**

24 **TLH/pc**