WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANNETTE KAMMIEN, ***Applicant***

vs.

COUNTY OF SAN BERNARDINO SHERIFFS DEPARTMENT, permissibly self-insured, administered by THE COUNTY OF SAN BERNARDINO, ***Defendants***

Adjudication Number: ADJ12136545
San Bernardino District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

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

We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 5, 2022

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

ANNETTE KAMMIEN
WHITING, COTTER & HURLIMANN, LLP
MICHAEL SULLIVAN & ASSOCIATES

AS/ara

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

REPORT AND RECOMMENDATIONS
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation:	Sheriff Deputy
	Applicant's Age:	57
	Date of Injury:	CT January 20, 1996 through March 5, 2019
	Parts of Body Injured:	Lumbar spine, right knee, right ankle, left ankle, upper GI tract, hypertensive heart disease Cervical spine (disputed), hiatal hernia (disputed)
2.	Identity of Petitioner:	Defendant has filed the Petition
	Timeliness:	The Petition is timely
	Verification:	A verification is attached to the Petition
3.	Date of service of Findings and Award:	September 27, 2022

II
CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers;

2. The evidence does not justify the findings of fact;

3. The findings of fact do not support the order, decision, or award.

III
FACTS

The Applicant, Annette Kammien, sustained a cumulative trauma injury from January 20, 1996 through March 5, 2019 to her lumbar spine, right knee, right ankle, left ankle, upper GI tract, and in the form of hypertensive heart disease while working for the County of San Bernardino as a Sheriff Deputy. The Applicant further claimed injury to her cervical spine and in the form of a hiatal hernia.

Petitioner had initially denied this claim in its entirety on June 3, 2019. (Defendant's Exhibit A.) The parties subsequently participated in the QME Panel process, securing medical-legal reporting from Orthopedic Panel Qualified Medical Evaluator Dr. George Watkin and Internal Medicine Panel Qualified Medical Evaluator Dr. James Lineback. Dr. Watkin provided opinions regarding Applicant's various orthopedic-related complaints. Dr. Lineback provided opinions regarding Applicant's internal-related complaints, specifically the Applicant's GERD condition affecting the upper GI tract, hypertensive heart disease, and hiatal hernia. At some point, Defendant would

accept liability for this cumulative trauma injury. Though the exact date of acceptance of this claim is not known based on the current record, Defendant started issuing permanent disability indemnity as of November 23, 2020, suggesting acceptance at least by this date. (Defendant's Exhibit C.)

The parties proceeded to Trial on July 12, 2022. The parties submitted medical reports from both Dr. Watkin and Dr. Lineback, which the undersigned WCJ relied upon in issuing its findings. The undersigned WCJ issued an Opinion on Decision on September 27, 2022, finding, among other things, that the Applicant's hiatal hernia condition was presumed industrial in accordance with Labor Code section 3212, that the Applicant was entitled to an unapportioned Award for her GERD, that the Applicant was entitled to retroactive temporary total disability from March 12, 2019 through April 26, 2019 at the rate of $1,539.71 per week, and that the Applicant was entitled to a penalty as to the retroactive temporary total disability under Labor Code section 5814.

The WCAB served the undersigned's Opinion on Decision and Findings and Award on September 27, 2022. On October 17, 2022, Defendant filed a verified Petition for Reconsideration, contending that the WCJ acted without or in excess of its powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

IV
DISCUSSION

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a "final" order, decision, or award. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers' Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

> (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
> (b) That the order, decision, or award was procured by fraud.
> (c) That the evidence does not justify the findings of fact.
> (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
> (e) That the findings of fact do not support the order, decision, or award.

Defendant (hereinafter "Petitioner") asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

Whether Defendant Rebutted the Hernia Presumption under Labor Code section 3212

Any part of a hernia that develops or manifests itself in cases involving a member of a sheriff's office during a period while this member is in the service of that office shall be presumed to arise out of and in the course of employment. (*Lab. Code* § 3212.) This presumption is disputable and may be controverted by other evidence. (*Lab. Code* § 3212.) To rebut the presumption relating to a hiatal hernia under Labor Code section 3212, Defendant must show a contemporaneous nonindustrial sole cause of the specific disease or injury. *(City and County of San Francisco v. WCAB (Wiebe)* (1978) 22. Cal.3d 103, 109-112.)

The Petitioner asserts that Internal PQME Dr. Lineback's opinions serve to rebut the hernia presumption under Labor Code section 3212, which in turn should allow for an apportioned Award for the permanent disability related to Applicant's GERD. In support of its argument, the Petitioner first contends that there is no requirement that the non-industrial event (in this case, the non-industrial gastric sleeve) and the diagnosis of the hiatal hernia occur contemporaneously. Secondly, Petitioner contends that the non-industrial gastric sleeve was in fact the sole cause of the hiatal hernia.[1]

By way of background, the Applicant underwent a gastric sleeve procedure in 2011, which was undisputedly non-industrial in nature. Internal PQME Dr. Lineback explained that the gastric sleeve, which involved the removal of over 80% of the stomach, created a scenario where the stomach can more easily prolapse into the chest, resulting in a hiatal hernia. (Defendant's Exhibit E, pg. 3.) And he further opined that a hiatal hernia increased the probability of GERD. (*Ibid.*)

The Court agrees with the Petitioner in that there is no requirement that the non-work related event and the subsequently *diagnosis* of the hiatal hernia need to occur contemporaneously. According to *Wiebe*, a Defendant needs to show that the contemporaneous non-worked related event occurred at the same time of the *development* of the hiatal hernia, and that said non-worked related event was the sole cause of the hernia.

Here, although Internal PQME Dr. Lineback provided a compelling anatomical picture as to how a hiatal hernia can develop after a gastric sleeve procedure given the increased propensity of the stomach prolapsing into the chest, the undersigned WCJ did not find this sufficient to rebut the hernia presumption. Specifically, Dr. Lineback did not explicitly state or explain that the gastric sleeve procedure and the development of the hiatal hernia occurred simultaneously. And the gap in time between the gastric sleeve in 2011 and the eventual diagnosis of the hiatal hernia in 2014 quite simply raised questions as to the timeline of events: Does a hiatal hernia develop immediately or over time after a gastric sleeve given that the procedure creates a scenario that *increases the propensity* of prolapse occurring? If the hiatal hernia developed at the same time the Applicant underwent the gastric sleeve, why was the hernia not diagnosed at the same time or sooner? Alternatively, if it is more likely that a hiatal hernia anatomically develops over the course of time post-gastric sleeve, are there other factors that may contribute to the development of the hernia? If

[1] Of note, Petitioner focuses on whether the hernia presumption under Labor Code section 3212 has been rebutted, inferring that there is no dispute as to whether the Applicant's hiatal hernia developed or manifested during her employment as a Sheriff Deputy.

there is the possibility that other factors contributed to the development of the hernia, can it be concluded that the gastric sleeve was the *sole* non-industrial cause of the same?
As alluded to above, Dr. Lineback also failed to provide any definitive discussion or analysis as to whether the non-industrial gastric sleeve was the *sole* cause of the hiatal hernia. Petitioner proposes that because Dr. Lineback did not identify any other causes for the hiatal hernia, the gastric sleeve must be the sole cause. (Defendant's Petition for Reconsideration, page. 8, lines 19-21.) However, without Dr. Lineback definitely stating that the gastric sleeve was the sole cause of the hiatal hernia, the undersigned WCJ cannot conclude that there were no other causes contributing to the development of the hiatal hernia.

Thus, the undersigned WCJ continues to believe that the Petitioner did not meet its burden in rebutting the hernia presumption under Labor Code section 3212. Accordingly, the undersigned WCJ maintains that the Applicant's hiatal hernia is presumed compensable and that the Applicant's permanent disability Award as to her GERD remains unapportioned.

Whether Applicant is Entitled to Retroactive Temporary Total Disability Indemnity

Determining whether an Applicant, who has retired from her employment, is entitled to temporary disability indemnity requires a factual inquiry as to the Applicant's willingness to work. (*Gonzalez v. WCAB* (1998) 63 Cal. Comp. Cases 1477.) If it was the Applicant's intention to retire from work for all purposes, then it cannot be said that she is willing to work, and therefore her earning capacity would be zero. (*Ibid.*) Alternatively, if the Applicant had intended to only retire from her particular employment at the time, then she may be entitled to temporary disability indemnity. (*Ibid.*)

The Petitioner contends that the Applicant needed to provide evidence of her willingness to work after retiring from the County of San Bernardino as a Sheriff Deputy, and that her failure to do so eliminates her entitlement to temporary disability post-retirement. (Petition for Reconsideration, pg. 11, lines 6-9.) Though this argument appears congruent with the aforementioned holdings, it does not consider the scenario where an injured worker's decision to retire was motivated by the industrial injury.

The Court of Appeal in *Gonzalez, supra*, clearly delineates a subsidiary rule that if the *job-related injury caused the worker to retire for all purposes* or interferes with plans to continue working elsewhere, *then the worker cannot be said to be unwilling to work* and would have an earning capacity diminished by the injury. (*Emphasis added.*) Accordingly, the Court of Appeal envisioned a scenario where an Applicant can retire for all purposes and still be entitled to temporary disability if the decision to retire was a function of the job-related injury. Under this scenario, the undersigned WCJ does not believe that there is a requirement that the Applicant show her intention to pursue other employment after her retirement from the County of San Bernardino. (See *County of Kern v. WCAB (Castellanos)* (2017) 82 CCC 598 (writ denied), an injured worker was entitled to temporary disability after she was forced to retire when the effects of her industrial injury made her work increasingly difficult.)

Here, the Applicant testified credibly and without rebuttal that her injuries were a factor in choosing to retire from the County of San Bernardino as a Sheriff Deputy. Specifically, she testified that her work became too painful, that she had difficulty sitting and standing, that the

handcuff cases caused pain in her back, and that her knees were bothering her. (MOE/SOE July 12, 2022, pg. 6, lines 5-9.) Because her retirement was motivated by her industrial injury, she cannot be said to have been unwilling to work. Therefore, the undersigned WCJ maintains that the Applicant would be entitled to temporary disability even after retiring.

Next Petitioner argues that even if the Applicant is entitled to temporary disability after retirement, the court cannot rely upon the reporting from Dr. Jia Li, who certified the Applicant to be temporarily totally disabled after a March 12, 2019 visit. (Applicant's Exhibit 15.) Specifically, Petitioner contends that Dr. Li was never properly designated as the Applicant's primary treating physician. Petitioner further suggests that the Applicant had privately retained Dr. Li, and that opinions by a doctor privately obtained by the injured worker cannot be the sole basis of an Award in accordance with *Valdez v. WCAB* (2013) 57 Cal.4th 1231, a holding also codified in Labor Code section 4605. However, the record suggests that Dr. Li, or the facility he was associated with, was in fact the Applicant's primary treating physician at least at the time of the March 12, 2019 visit, and that the Applicant did not intend to privately retain Dr. Li's services of which she would pay at her own expense.

The identity of the primary treating physician is a question of fact. Most often the primary treating physician can be easily identified with some type of writing, typically prepared by the Applicant or through her counsel. However, in this case, the parties did not offer any such "4600 letter," and the parties could not stipulate to the identity of the Applicant's primary treating physician. However, Dr. Li held himself out as the Applicant's primary treating physician as to this cumulative trauma injury, at least at the time of the March 12, 2019 report. The report itself is titled "Primary Treating Physician's Progress Report (PR-2)," which is the required form that primary treating physicians are mandated to use pursuant to California Code of Regulations section 9785(f)(8). (Applicant's Exhibit 15.) The report further memorializes that the treatment was for Applicant's lumbar spine resulting from a cumulative trauma claimed through the present, evidencing treatment for this particular injury. (*Ibid*.) Dr. Li also provided the Applicant with an updated treatment plan after the Applicant appeared to have presented herself to the medical clinic earlier than scheduled; the updated treatment plan included taking medications as directed and undergoing a MRI. (*Ibid*.) This suggests that Dr. Li was serving as the primary treating physician as it appears that he was managing her care for the purpose of rendering or prescribing treatment per California Code of Regulations section 9785(a)(1). Lastly, Dr. Li rendered opinions necessary to determine the Applicant's eligibility for compensation in accordance with California Code of Regulations section 9785(d), specifically by keeping her off of work.

Furthermore, Defendant did not offer any evidence showing that the Applicant retained the medical services of Dr. Li at her own expense in accordance with Labor Code section 4605. To the contrary, the admitted evidence would suggest that the Petitioner in fact authorized and paid for treatment with Dr. Li or the medical facility he was associated with. The medical reporting from Dr. Li memorializes his affiliation with the San Bernardino County Center for Employee Health and Wellness. Petitioner's benefits printout evidences payment for some of the treatment provided by this facility, though not specifically the March 12, 2019 date of service. The benefits printout shows payments for two dates of service on March 5, 2019 and April 5, 2019 to an entity called the "Center for Employee Health & …" (Defendant's Exhibit D.) Of further significance, these medical services paid by the Petitioner occurred before Petitioner's denial of the claim on

June 3, 2019, or during the investigation period under Labor Code section 5402(c) upon which Petitioner would have been liability for medical treatment of up to $10,000.00.
Petitioner cannot in good faith argue that the Applicant sought treatment with Dr. Li at the Center for Employee Health and Wellness facility *at her own expense* when it had paid for medical services provided by the same facility on this claim. Based on the totality of the circumstances, the undersigned WCJ believes that Dr. Li was serving in the capacity as the Applicant's primary treating physician at the time of the March 12, 2019 visit, and that the Applicant did not intend to consult with Dr. Li at her own expense.

Accordingly, having previously found Dr. Li's reporting to be substantial medical evidence to support a finding of temporary total disability, the undersigned WCJ maintains that the Applicant should be entitled to retroactive temporary total disability from March 12, 2019 through April 26, 2019 at the weekly rate of $1,539.71, giving further consideration to Labor Code sections 4661.5 and 4458.5.

Whether an increase in Indemnity is Appropriate under Labor Code section 5814

When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25% or up to $10,000.00, whichever is less. (*Lab. Code* § 5814, subd. (a).)

Petitioner suggests that simply having the issue of temporary disability raised and adjudicated at the July 12, 2022 Trial sufficiently shows the existence of a "good faith dispute" so as to shield itself from a penalty under Labor Code section 5814. Put another way, Petitioner proposes that the mere fact that temporary disability was disputed and listed as an issue for Trial signifies that it could not have unreasonably delayed or refused the payment of compensation to the Applicant. While this argument appears compelling, it implies that an injured worker may never be entitled to a penalty under Labor Code section 5814 so long as temporary disability is raised as an issue for Trial.

Here, after the Application for Adjudication of Claim for this cumulative trauma injury was filed on April 24, 2019, the Petitioner would timely deny the case in its entirety on June 3, 2019, terminating the Petitioner's obligation to pay any disability benefits. (Defendant's Exhibit A.) However, at some point during the pendency of the case, the Petitioner had accepted liability for this cumulative trauma. Based on the current record, it is unclear as to when the Petitioner eventually accepted liability for this injury. Nonetheless, it is reasonable to infer that the Petitioner accepted liability at least on or before November 23, 2020, which is the date it issued its Notice of Regarding Permanent Disability Benefits Payment Start. (Defendant's Exhibit C.) An insurance carrier would not be expected to pay an injured worker indemnity, specifically permanent disability indemnity, unless the claim was accepted.[2]

California Code of Regulations section 10109 impresses upon a claims administrator the duty to investigate a claim. Additionally, a claims administrator is required to conduct further

[2] The benefits printout further confirms that the initial payment of permanent disability indemnity was issued on November 24, 2020 for the period from July 3, 2020 through November 20, 2020. (Defendant's Exhibit D.)

investigation if further information is later received that might affect the benefits due. (*Cal. Code Regs.*, § 10109(c). The duty to investigate a claim includes a duty to act in an expeditious manner to determine liability for the payment of compensation, which requires that the employer or insurance carrier take the initiative in providing benefits. (*Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227, 234.)

Based on these rules, the Petitioner had a duty to investigate this claim for the purposes of administering the appropriate benefits to the Applicant. And as California Code of Regulations 10109, subsection (c) requires, it would not be unreasonable to expect Defendant to revisit any potential claims for retroactive temporary disability that may be owed after it had rescinded its denial and accepted liability for the claim. And if after further investigation the Petitioner believed that there was a "good faith dispute" that genuinely raised doubt as to Applicant's entitlement to any retroactive temporary disability, Petitioner may be appropriately shielded from any penalty under Labor Code section 5814.

However, Petitioner failed to offer any evidence, documentary or testimonial, which would demonstrate the existence of a "good faith dispute" that would cast genuine doubt as to its potential liability for retroactive disability at the time any such disability could have been reasonably been paid. If Petitioner disputed Dr. Li's capacity as the primary treating physician, a letter objecting to the same would have been reasonable. If Petitioner disputed Dr. Li's opinions regarding disability status or periods of disability, it would have been reasonable to see a notice of denial of temporary disability benefits or an objection letter of some sort, such as one contemplated under Labor Code section 4062. Petitioner failed to offer any evidence that would memorialize its good faith dispute as to any potential retroactive temporary disability. And it appears clear that the Petitioner and its counsel were in possession of Dr. Li's March 12, 2019 report as early as March 14, 2019 and May 20, 2019, respectively, as indicated by what appears to be the receipt stamps within the report.

Simply listing temporary disability as an issue for Trial more than three years after Dr. Li certified the Applicant as temporarily totally disabled cannot automatically eliminate any discussion as to whether benefits were unreasonably delayed or refused, especially in light of the Petitioner's duties under California Code of Regulations section 10109. Accordingly, the undersigned WCJ believes that Petitioner's conduct arose to the level of unreasonableness as contemplated under Labor Code section 5814 by failing to issue temporary disability indemnity and failing to provide any evidence showing that it had delayed benefits because of some legal, medical, or factual basis that raised genuine doubt as to its liability for the same.

Thus, the undersigned WCJ maintains that the Applicant was temporarily totally disabled from March 12, 2019 through April 29, 2019 based on Dr. Li's reporting, and that the Applicant is entitled to a 20% penalty in accordance with Labor Code section 5814.

V
RECOMMENDATIONS

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

DATE: October 28, 2022

JASON L. BUSCAINO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE