

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

3
4 **CHRISTOPHER RICE,**

5 *Applicant,*

6 **vs.**

7 **CITY OF JACKSON, Permissibly Self-Insured,**
8 **Adjusted by YORK SERVICES GROUP, INC.,**

9 *Defendants.*

Case No. ADJ8701916
(Sacramento District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

10
11 On June 5, 2014, we granted reconsideration in this matter to provide an opportunity to further
12 study the legal and factual issues raised by the petition for reconsideration. Having completed our review,
13 we now issue our Decision After Reconsideration.

14 Applicant, Christopher Rice, seeks reconsideration of the Findings of Fact and Awards, issued
15 March 14, 2014, in which a workers' compensation administrative law judge (WCJ) found that applicant,
16 as a result of his industrial cumulative trauma injury to his neck while employed as a police officer over
17 the period ending April 22, 2009, sustained 20% permanent disability, after 49% apportionment to
18 applicant's "personal history including genetic issues," as found by the Panel Qualified Medical
19 Evaluator (QME).

20 Applicant contests the WCJ's apportionment of his permanent disability, arguing that the QME's
21 apportionment to genetic risk factors is not substantial medical evidence. Defendant has filed an answer
22 and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration.

23 For the reasons set forth below, we shall amend the WCJ's determination to defer the issue of
24 permanent disability and return this matter to the trial level for an unapportioned award of permanent
25 disability.

26 **I.**

27 Applicant, while employed as a police officer by the City of Jackson, sustained an admitted

1 cumulative trauma injury to his neck over the period ending April 22, 2009. The matter was tried on the
2 issue of apportionment of applicant's permanent disability, with applicant contending that defendant
3 failed to establish apportionment to non-industrial factors, and defendant asserting that there should be
4 apportionment to applicant's "personal history," cumulative trauma from prior employment and a motor
5 vehicle accident.

6 Applicant was evaluated by Dr. Sloane Blair as a panel QME on November 7, 2011. Dr. Blair
7 diagnosed applicant with cervical radiculopathy and cervical degenerative disc disease. In her initial
8 medical records review, Dr. Blair noted applicant's prior treatment for cervical strain in 2003, knee and
9 shoulder pain in 2004, leading to knee surgery, and low back pain in 2008. Applicant then reported
10 thoracic strain and shoulder pain on April 22, 2009, with no "associated incident." Applicant had cervical
11 surgery at C6-7 in July of 2009, which only provided relief for nine months, when his neck pain returned.

12 Dr. Blair further noted that applicant's prior medical history included a 1998 motor vehicle roll-
13 over accident, and "knee surgery in December 1998; as gleaned from the medical records, this involved
14 the ACL reconstruction. There was a shoulder surgery in December 2004; again, as gleaned from the
15 medical record."

16 Under family history, Dr. Blair noted applicant's father's "history of hip replacement and
17 significant back problems in his late 40s and early 50s; his back problems are now improved."

18 Dr. Blair found applicant was not yet permanent and stationary due to applicant's need for further
19 cervical surgery, but offered an impairment rating for applicant's current condition. She discussed
20 causation and apportionment as follows:

21 Causation stems from (1) his work activities with the City of Jackson since
22 his employ in 8.05; (2) his prior work activities, including the construction
23 and scaffold activities for which he was seen in 2003 complaining of neck
24 pain; (3) his personal injuries include the motor vehicle accident of 1998,
25 as well as his recreational activities, for example, his rowing activity was
26 sufficient to cause his ACL and meniscal injury; therefore, they would
27 likely have an impact on his cervical spine; (4) his personal history. There
are twinning studies out of Minnesota and other research that indicate
heritability and genetics play a significant role in the genesis of
degenerative disease of the spine. This is rational, as the collagen, which is
the building block of all of our tissues, and its assembly, tensile strength,
and other mechanical forces are related to the DNA and genetic coding. His
father was noted to have a very significant history of back problems, as
well as a need for a hip replacement, which indicates degenerative issues as

1 part of his family history. I would include in this group his brief and short
2 history of smoking, and his diagnosis of lateral epicondylitis.

3 I apportion 25 percent to his employment with the City of Jackson, 25
4 percent to his previous employment injury, 25 percent to his personal
5 injuries, and 25 percent to his personal history.

6 Subsequent to applicant's second cervical surgery in February of 2013, Dr. Blair provided a final
7 evaluation. In her May 4, 2013 report, she changed her opinion on applicant's apportionment referencing
8 scientific publications that highlight the role of genetics as a factor in the causation of cervical spine
9 disability.

10 Apportionment, however, in my opinion, has changed. Since his evaluation
11 on 11.7.11, there are specific publications that have lent even more support
12 to the causation of genomics/genetics/heritable issues in terms of his injury.
13 These specific references are Orthopedic Knowledge Update, copyright
14 2011, The American Academy of Orthopedic Surgeons, Chapter 13, Work
15 Related Illness, Cumulative Trauma, and Compensation, Melhorn, M.D., et
16 al, pages 147-154. Spine Publication of the North American Spine
17 Society, July/August 2012, The Role of Genetics in Degenerative Disc
18 Disease, Stitzlein, M.D., pages 20-25. The Journal of the American
19 Academy of Orthopedic Surgeons, Volume 20, #8, August 2012,
20 Orthogenomics, an Update, Matzko, et al, page 536-546.

21 In light of these more recently published studies supporting genomics as a
22 significant causative factor in cervical spine disability, my apportionment
23 now changes. I apportion. 49 percent to his personal history, including
24 genetic issues, and 17 percent each to his employment with the City of
25 Jackson, his previous employment history, and his personal injuries.

26 In a supplemental report dated July 15, 2013, in response to questions by applicant's attorney, Dr.
27 Blair stated her opinion "to a reasonable degree of medical probability that genetics played a role in Mr.
Rice's injury," citing studies that found most of disc disease "is familial." She cited a study that stated
"degeneration in adults may be explained up to 75 percent by genes alone." Dr. Blair further indicated
that no evaluation of applicant's immediate family would be necessary, since "the evidence is fairly
strong that there is predominantly genetic causation, unless there is a clear traumatic injury, which, in
Mr. Rice's case, there was not."

The WCJ relied upon Dr. Blair's apportionment determination that 49% of applicant's disability
was caused by "his personal history, including genetic issues." But the WCJ found no basis to apportion
to applicant's prior industrial and non-industrial injuries, noting in his Opinion on Decision that "Dr.

1 Blair has not provided sufficient information to identify the nature of any prior cervical problems and
2 'how and why' any such problems are related to applicant's current level of permanent disability. Thus,
3 there is not lawful apportionment to each of the two sets of events preceding the immediate injury,
4 herein."

5 II.

6 Apportionment of permanent disability is "based on causation" and the "employer shall only be
7 liable for the percentage of permanent disability directly caused by the injury arising out of and occurring
8 in the course of employment." (§§ 4663, subd. (a) & 4664, subd. (a).) "The plain reading of 'causation'
9 in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70
10 Cal.Comp.Cases 604, 611 (en banc).) Examining physicians therefore must "make an apportionment
11 determination by finding what approximate percentage of the permanent disability was caused by the
12 direct result of injury arising out of and occurring in the course of employment and what approximate
13 percentage of the permanent disability was caused by other factors both before and subsequent to the
14 industrial injury, including prior industrial injuries." (§ 4663, subd. (c).)

15 For a medical opinion on apportionment to constitute substantial evidence,

16 . . . a medical opinion must be framed in terms of reasonable medical
17 probability, it must not be speculative, it must be based on pertinent facts
18 and on an adequate examination and history, and it must set forth
reasoning in support of its conclusions.

19 For example, if a physician opines that approximately 50% of an
20 employee's back disability is directly caused by the industrial injury, the
21 physician must explain how and why the disability is causally related to
22 the industrial injury (e.g., the industrial injury resulted in surgery which
caused vulnerability that necessitates certain restrictions) and how and
why the injury is responsible for approximately 50% of the disability.

23 And, if a physician opines that 50% of an employee's back disability is
24 caused by degenerative disc disease, the physician must explain the
25 nature of the degenerative disc disease, how and why it is causing
26 permanent disability at the time of the evaluation, and how and why it is
responsible for approximately 50% of the disability. (*Escobedo*, 70
Cal.Comp.Cases at 621-622.)

27 The issue here is whether Dr. Blair's apportionment to "genetic" factors is permissible. From her

1 appportionment analysis, Dr. Blair is assigning causation to applicant's genetic makeup and not to specific
2 debilitating factors causing his current level of disability. Just as the WCJ found Dr. Blair's
3 appportionment to prior injuries failed to satisfy the *Escobedo* requirements, finding causation on
4 applicant's "genetics" opens the door to appportionment of disability to impermissible immutable factors.
5 Further, relying upon applicant's genetic makeup leads Dr. Blair to appportion the causation of applicant's
6 injury rather than appportionment of the extent of his disability. Without proper appportionment to specific
7 identifiable factors, we cannot rely upon Dr. Blair's determination as substantial medical evidence to
8 justify appportioning 49% of applicant's disability to non-industrial factors.

9 Accordingly, we will amend the WCJ's determination to defer the issue of permanent disability,
10 as well as the award of attorney fees, and return this matter to the trial level for a new unappportioned
11 award of permanent disability.

12 For the foregoing reasons,

13 **IT IS ORDERED** that as our Decision After Reconsideration, the Findings of Fact and Awards,
14 issued March 14, 2014, is **AMENDED** as follows:

15 **FINDINGS OF FACT**

16 1. Applicant, Christopher Rice, born May 25, 1979, while employed during a cumulative
17 period through April 22, 2009, as a police officer, occupational group 490, by the City of Jackson
18 permissibly self-insured, sustained injury arising out of and in the course of employment to his neck.

19 2. The issue of permanent disability is deferred.

20 3. Applicant is in need of further treatment to cure or relieve from the effects of the injury.

21 4. Applicant's attorney has performed services, the reasonable value of which is deferred
22 pending a new award of permanent disability.
23

24 **AWARD**

25 **AWARD IS MADE** in favor of **CHRISTOPHER RICE** and against **CITY OF JACKSON**, as
26 follows:

27 a. Further medical treatment in accordance with Findings of Fact 3.

