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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RICHARD GOMEZ,

Plaintiff and Respondent,

v.

LOS ANGELES COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION,

Defendant and Appellant.

B237426

(Los Angeles County
Super. Ct. No. BS129005)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Reversed.

Robert Van Der Volgen and Jorja L. Frank for Defendant and Appellant.

Lewis, Marenstein, Wicke, Sherwin & Lee, Thomas J. Wicke, and Allison E. Barrett for Plaintiff and Respondent.

Appellant Los Angeles County Employees' Retirement Association (LACERA) appeals from a judgment granting respondent Richard Gomez's petition for a writ of mandate. (Code Civ. Proc., § 1094.5.)

Government Code section 31720 authorizes a service-connected disability retirement if the employee's "incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity." In order to show that the employment contributed substantially to the incapacity, the applicant must provide substantial evidence of a real and measureable connection between the disability and the job. (*Bowen v. Association of Retirement* (1986) 42 Cal.3d 572, 578-579 (*Bowen*).)

After over 14 years of service as a deputy sheriff, Gomez applied for a service-connected disability retirement based on two contributing causes: a nonindustrial tumor in his spine and several industrial injuries to his lower back. LACERA found that Gomez's disability was the result of the nonindustrial tumor and not the industrial injuries. Accordingly, LACERA granted Gomez a nonservice-connected disability retirement.

After exhausting his administrative remedies, Gomez successfully petitioned for a writ of mandate. The superior court found that the primary cause of the disability was the nonindustrial tumor and the contributing causes were the industrial orthopedic injuries. Based on these findings, the superior court concluded that the industrial injuries contributed substantially to the incapacity. It entered a judgment directing LACERA to vacate its prior decision and to enter a new decision granting Gomez a service-connected disability retirement.

LACERA contends on appeal that the evidence was insufficient to show that the industrial injuries contributed substantially to the incapacity. We agree. Based on our determination that Gomez failed to demonstrate a real and measurable connection between the disability and the employment, we reverse.

BACKGROUND

In October 1989, Gomez was hired as a deputy sheriff by the Los Angeles County Sheriff's Department. The position of deputy sheriff is classified as "Class 4-Arduous" and "involves frequent heavy lifting over 25 pounds, often combined with bending, twisting, or working above ground on irregular surfaces. It includes those positions which occasionally demand extraordinary physical activity such as those in safety positions."

I. The Prior Injuries and Symptoms

During his career of over 14 years as a deputy sheriff, Gomez rarely missed work notwithstanding several job-related accidents that resulted in orthopedic injuries to his lower back. Gomez's industrial injuries were sustained in motor vehicle accidents in April 1993 and November 1997, and while scaling a wall during a foot pursuit in January 1998. After the April 1993 motor vehicle accident, Gomez had back pain for three days. After the November 1997 motor vehicle accident, Gomez had back pain and missed three days of work. After the January 1998 foot pursuit in which Gomez scaled a wall and landed on his knees, he was in pain throughout his body, including his neck and back, missed about two days of work, and began going to physical therapy.

In July 1998, Gomez had a motor vehicle accident that exacerbated the injury from the January 1998 incident. While returning from a physical therapy appointment, Gomez's car was rear-ended by a vehicle traveling 35 miles per hour. After the July 1998 accident, he took pain medications prescribed by his physician Dr. Schafer, received acupuncture and chiropractic treatments, and missed about a day of work each month. However, his July and September 1998 MRI's failed to reveal any structural abnormalities in his spine.

In October 1998, Gomez was still in pain, which he attributed to his industrial injuries and the weight of the gun belt and bullet proof vest that he wore while working on patrol. His September 1998 MRI showed "a 3 mm. central disc protrusion at L5-S1"

and a “lesion” at “L4” that was a “possible hemangioma” (“a congenital anomaly in which blood vessel proliferation leads to a mass that resembles a neoplasm”). He went to an orthopedic surgeon, Dr. Gonzalo Covarrubias, who recommended that he “undergo EMGs and nerve conductions,” with possible “needling of the L4 body and possible injection with methacrylate or bone filler.”

By March 1999, Gomez’s back pain was much worse and was radiating from his lower back to his right thigh. He went to a neurosurgeon, Dr. Israel Chambi, who found that the radiating pain was “consistent with a mass lesion involving the right L3 nerve root.” Dr. Chambi thought that his September 1998 MRI showed a “mass lesion at L2-L3 on the right,” which could be a “neurofibroma” (“a benign encapsulated tumor”). Dr. Chambi recommended that Gomez have exploratory surgery.

Gomez elected not to have surgery at the time. He continued working full time as a deputy sheriff, but transferred in May 1999 from patrol to custody work because the pain in his back was making it difficult to run and chase suspects, wear over 20 pounds of gear (including a Kevlar vest and gun belt), and carry a 45- to 50-pound bag of equipment to and from the patrol car.

II. The Discovery and Treatment of the Spinal Tumor

On October 13, 2000, Gomez was at work when he began having trouble walking because of extreme pain radiating down his leg. He went to a hospital and was placed on temporary leave.

Between October 13, 2000, and his surgery in November 2000, Gomez was in severe pain for which he received three epidural injections.

On October 23, 2000, Gomez was examined by Dr. Ronald S. Kvitne, an orthopedic surgeon. Gomez told Dr. Kvitne that he believed the pain was from industrial orthopedic injuries sustained in his April 1993, November 1997, and July 1998 motor vehicle accidents, the injuries sustained in the January 1998 foot pursuit, and the weight of his gun belt and bullet-proof vest. Without expressing an opinion regarding causation, Dr. Kvitne concluded that Gomez was suffering from “Lumbar myofascial pain

syndrome — chronic sustained in January 1998 through October 7, 2000,” “Meralgia paresthetica of the right hip and thigh,” and “Abnormality of the L4 vertebral body/etiology undetermined.”

The spinal tumor was discovered as a result of an October 31, 2000 MRI scan. The scan revealed “a 4-cm enhancing dumbbell-shaped mass involving the right L2-L3 intervertebral foramen, as well as degenerative disc disease at L5-S1, and evidence for an L4 hemangioma.” Gomez was examined by Dr. Steven Becker, an orthopedic surgeon, who thought that the “intraspinous tumor at the L2-L3 region” was the likely cause of his severe pain and “diffuse neurologic deficits.”

As a result of the tumor’s discovery, Gomez had exploratory back surgery in November 2000. During the nine-and-one-half-hour surgery, Dr. Jeffrey Gross discovered and removed a “fist sized tumor” that was “wrapped around the [spinal] cord.” The lesion proved to be a “rare” and “rather aggressive tumor” that had infiltrated and damaged one or more nerve roots, which were “sacrificed” in order to resect the tumor from within the spinal canal. Dr. Gross performed a “decompressive laminectomy” and inserted “a large dural grafton auto-osseous patch” to stabilize the spine.¹

The tumor was identified as “a primitive neural ectodermal tumor involving the L2-L3 nerve roots in the right neural foramina of the lumbar spine.” (Although the record indicates that a primitive neural ectodermal tumor is not identical to an “Ewing’s sarcoma,” both terms are used to refer to the tumor throughout the record.)

After the surgery, Gomez was treated for the tumor with chemotherapy, radiation therapy, and proton beam radiation therapy. In her January 30, 2002 report, Dr. Judith K. Sato, Gomez’s oncologist at the City of Hope, wrote that he had completed the above

¹ According to Dr. Gross’s surgical report, “[T]he surgery consisted of a right L3 hemilaminectomy, right L2 hemilaminotomy, right L4 hemilaminotomy, right L2-L3 complete facetectomy, a right L3-L4 medial facetectomy, resection of interspinous tumor, resection of extraspinal tumor and placement of the local bone autograph and a right L3 neurectomy as well as a right L2-L3 intertransverse posterior arthrodesis.”

treatments and Gomez stated that he was “improving. He has been receiving physical therapy on a 3 x a week basis and he was able to participate in a four mile hike and complete that and he has had no change in his pain or radiation of his pain. He has stopped taking all of the OxyContin, oxycodone and Ativan in hopes of being able to drive a car as soon as possible. He has decided, however, not to return to work until May 2002 and regain more of his strength.”

III. The Residual Effects of the Tumor

It is undisputed that as a result of the tumor, the nerve damage caused by the tumor, and the medical treatments necessitated by the tumor, Gomez has a limited range of motion in his right leg and cannot perform activities requiring the use of the hip flexors, such as running. There is a high risk that the cancer will recur.

It is undisputed that, as a result of the tumor, Gomez is physically incapable of performing the job of deputy sheriff. When Gomez returned to work in June or July 2002, he was given a series of temporary modified alternate duty assignments. Following his initial assignment at Biscailuz Recovery Center, he was assigned to Twin Towers Correctional Facility to perform “medical backgrounds.” He was then assigned to the discovery unit to review paperwork.

After Gomez returned to work, he continued to be monitored by his oncologist, Dr. Sato. In her October 9, 2002 report, she noted that Gomez had lost consciousness and “sustained significant trauma to his back” from a nonindustrial fall. According to her November 5, 2002 report, his most recent scans showed no indication of metastatic disease, but “the local soft tissue mass had increased in size and was involving both the L2-3 and L3-4 interspace.”

While working in the temporary modified alternate duty assignments, Gomez applied for workers’ compensation disability benefits for the period October 10, 2000, through June 2, 2002. Gomez also applied for a service-connected disability retirement.

IV. The Medical Reports Pertaining to the Workers' Compensation Application

In connection with his workers' compensation claim, Gomez was examined by Dr. James Padova, an internist, in January 2002. Dr. Padova noted that the spinal tumor had caused permanent "neurologic effects in the right lower extremity." Based on medical studies that failed to show a "relationship between police work and the development of spinal cord tumors of this type," Dr. Padova found no connection between Gomez's employment and the "permanent neurologic residuals" caused by "the tumor progression and its necessary surgical and radiation therapy." Given the absence of a work-related disability, Dr. Padova concluded apportionment was not an issue.

Gomez was examined by two agreed medical evaluators, Dr. Charles Sadler in July 2002 and Dr. Joseph Alban in August 2003. Of the two reports, Dr. Sadler's was less informative because he did not have Gomez's medical records and therefore could not form an opinion on causation.

Dr. Alban's report, on the other hand, included a review and analysis of Gomez's medical records. According to Dr. Alban's report, Gomez's August 2003 spinal x-rays showed "no significant degenerative changes or abnormal soft tissue calcifications," "good alignment," "normal vertebral height," and "intact disc spaces." The lumbar spine x-rays showed "five lumbar vertebrae in good alignment" and "[p]ostoperative changes . . . at L2 through L4 with evidence of posterior decompression at L3-4 with a large amount of bone graft on the right side."

Dr. Alban arrived at three diagnoses: (1) "Cervical, dorsal, lumbar spine musculoligamentous strain"; (2) "Residuals of lumbar decompression and grafting for Ewing sarcoma"; and (3) "Radicular pain, right lower extremity and right knee."

Dr. Alban adopted a theory of dual causation that attributed the disability to both industrial and nonindustrial causes. He recommended that the disability be apportioned evenly between the industrial orthopedic injuries and the nonindustrial tumor, but gave no further explanation. He simply stated that the "disability is likely the result of both the Ewing's sarcoma and the various injuries he sustained at work. The cause of Ewing's sarcoma is unknown, but is most likely non-industrial. For this reason, I believe it is

most appropriate to apportion his spinal disability as 50% industrial and 50% non-industrial.”

V. The Medical Reports Pertaining to the Service-connected Disability Retirement Application

In connection with his service-connected disability retirement application, Gomez was examined by two LACERA panelists: Dr. Dennis C. Jerome, an internist, in September 2004, and Dr. Roy J. Caputo, an orthopedist, in November 2004. Both physicians found that Gomez was permanently disabled as a result of the cancer, which was not work-related. Neither physician adopted a theory of dual causation.

Dr. Caputo concluded that the work-related injuries were minor and did not cause the disability, which he attributed to the spinal tumor: “With regard to the issue of causation, Mr. Gomez was capable of performing his usual and customary job duties until he developed constant back pain in May of 1999. Approximately a year later the tumor was diagnosed and surgery was performed. He did sustain numerous lower back injuries during the course of his employment but these were all judged to be minor based on the fact that the patient required little, if any[,] treatment for [these] injuries and had always recovered. Clearly he is currently disabled by his lumbar spine tumor at this time. This tumor is deemed to be nonindustrial as there is no medical evidence that would suggest this tumor is caused by his work activities as a Los Angeles County deputy sheriff. Therefore, based on the available information I have, it is clear to this examiner that Mr. Gomez’s disability is secondary to his lumbar spine tumor. There is no evidence that there is any real or measurable industrial contribution to this patient’s current disability as the spine tumor is felt to be nonindustrial and has no relationship to his previous spine injuries, nor his work activities as a Los Angeles County deputy sheriff. Therefore, there is no real and measurable industrial contribution to the patient’s current disability.”

VI. The Collapsed Vertebra

While the workers' compensation and disability retirement applications were pending, Gomez began having increasingly severe pain in his lower back. A September 2004 MRI scan revealed that his L3 vertebra had collapsed or fractured.

According to Dr. Sato, the collapsed vertebra, and not the prior industrial accidents, was causing Gomez's residual pain. In her September 22, 2004 report, Dr. Sato attributed the collapsed vertebra to the "significant bone necrosis" from the radiation therapy for the cancer. She ruled out any connection between Gomez's increased pain and his prior job-related injuries, stating that the September 2004 MRI scan showed "no obvious protrusion of any discs." She noted that Gomez had raised "numerous questions about Worker's Compensation," but that his pain had "nothing to do with any prior accidents or car accidents while on the job," but was "due to the collapse of his vertebra." She referred Gomez to an orthopedic surgeon to discuss a possible biopsy and surgery to support the collapsed vertebra.

VII. Gomez Received a Nonservice-connected Disability Retirement and Workers' Compensation Benefits

In February 2005, LACERA awarded Gomez a nonservice-connected disability retirement based on its determination that he was permanently incapacitated by a disability (the cancerous tumor in his spine) that was not work-related. Based on his belief that the employment-related injuries had contributed substantially to the incapacity, Gomez filed an administrative appeal.

In April 2005, Gomez was awarded workers' compensation benefits for the period October 10, 2000, through June 2, 2002. The workers' compensation judge found that the cancer was not work-related, but that the prior injuries to the "low back, spine, right lower extremity, neck, headaches and right knee" were work-related and had resulted in a compensable "disability after apportionment of 42%." The workers' compensation judge apportioned 50 percent of the disability to nonindustrial causes and 50 percent to industrial causes.

VIII. LACERA's Denial of a Service-connected Disability Retirement

In March 2009, an administrative hearing was held on Gomez's appeal from LACERA's denial of a service-connected disability retirement.

A. *Gomez's Exhibits*

Of Gomez's 13 exhibits at the March 2009 administrative hearing,² the strongest support for his claim of a service-connected disability consisted of the August 29, 2003

² Gomez's 13 exhibits consisted of:

1. The October 9, 1998 CT scan showing a possible hemangioma at the L4 vertebra;
2. The March 9, 1999 letter by Dr. Chambi recommending surgery for a possible "mass lesion involving the right L3 nerve root," which was consistent with Gomez's "intense, excruciating pain in the right back with radiation to the right thigh, down to the medial aspect of the thigh";
3. The October 13, 2000 occupational injury report documenting Gomez's hospital visit for extreme back pain that radiated down his leg and made it difficult for him to walk;
4. The October 23, 2000 report by Dr. Kvitne documenting Gomez's belief that his back pain was the result of several work-related accidents and the weight of his gun belt and bullet-proof vest;
5. The October 30, 2000 MRI showing a "dumbbell shaped mass involving the right L2-3 intervertebral foramen measuring 2.0 cm. x 2.0 cm x 4.0 cm";
6. The July 24, 2002 report of Dr. Sadler, the agreed medical examiner who was not given Gomez's medical records and therefore did not offer an opinion as to the cause of his disability;
7. The August 29, 2003 report of Dr. Alban, the agreed medical examiner who adopted a theory of dual causation and apportioned the disability as 50 percent industrial and 50 percent nonindustrial;
8. The October 12, 2000 report by Gomez's supervisor, which documented his claim of industrial injury to his back, hip, buttocks, and leg from wearing a vest and gun belt, driving in a patrol car, and an "off-duty traffic collision on 07-02-98 that aggravated the injury";
9. The October 11, 2000 handwritten statement by Gomez to his employer documenting the pain in his back that was caused by wearing a vest and gun belt and by the July 1998 automobile accident, which left him with constant pain and numbness that had spread to his right hip, buttocks, and thigh;

(Fn. continued.)

report of Dr. Alban, the agreed medical examiner in the workers' compensation case, and the April 18, 2005 findings, award, and order of the workers' compensation judge.

As previously mentioned, Dr. Alban adopted a theory of dual causation that for the period October 10, 2000, to June 2, 2002, attributed 50 percent of Gomez's disability to industrial causes and 50 percent to nonindustrial causes. The workers' compensation judge followed this recommendation in the award. Because both Dr. Alban's report and the workers' compensation award were directed at a disability period ending on June 2, 2002, they did not consider the effect of the collapsed vertebra in September 2004.

B. LACERA's Exhibits

LACERA's exhibits at the March 2009 administrative hearing included the reports of Dr. Gross, Dr. Sato, Dr. Padova, Dr. Jerome, and Dr. Caputo. None of these reports found a causal connection between Gomez's disability and the prior orthopedic injuries.

LACERA also submitted the June 19, 2008 report of Dr. Marvin Pietruszka, an internist, who found no indication in the medical literature of a causal link between "exposure or trauma" and a primitive neural ectodermal tumor, which is attributed to a mutation that occurs during the embryological development stages. Dr. Pietruszka found no medical evidence to link Gomez's tumor to his employment. He concluded that the injuries to Gomez's back were minor and were not disabling because he always recovered with little or no treatment. He believed that the collapse of the L3 vertebra was most likely caused by the tumor or the surgical treatment of the tumor.

10. The June 24, 2002 notice of Gomez's temporary modified alternative duty reassignment;

11. The April 18, 2005 findings, award, and order of the workers' compensation administrative law judge, which found that Gomez's injury to his back, neck, headaches, and right knee had caused a disability after apportionment of 42 percent, 50 percent of which was apportioned to industrial causes and 50 percent to nonindustrial causes;

12. The class specification for the position of Deputy Sheriff; and

13. Gomez's medical records from Bristol Park Medical Group.

C. Dr. Edwin Haronian's Report

After the March 2009 hearing, Gomez submitted an additional report by Dr. Haronian, an orthopedic surgeon who examined him in August 2009 at the request of his attorney.

Preliminarily, we note that Dr. Haronian prepared his report without reviewing either Dr. Gross's report of the November 2000 surgery or Dr. Sato's records of Gomez's postsurgical care. Accordingly, Dr. Haronian did not review the September 22, 2004 report in which Dr. Sato attributed Gomez's residual back pain to the collapse of the L3 vertebra, which had "nothing to do with any prior accidents or car accidents while on the job." Nor did he review the September 2004 scan that showed "no obvious protrusion of any discs," which Dr. Sato cited in support of her finding that the prior orthopedic injuries were not causing the residual back pain.

Dr. Haronian agreed with Dr. Caputo's determination that the work-related injuries were minor, stating: "There was also an evaluation by Dr. Caputo who indicated that the disability was not service connected He indicated that the patient sustained multiple prior injuries, but those were minor in his opinion. He indicated that the tumor was non-industrial, and I am in agreement with the above related to his opinions."

However, Dr. Haronian disagreed with Dr. Caputo's opinion that the disability was not work-related. Without considering the effect of the September 2004 collapse of the L3 vertebra, Dr. Haronian stated that, in his opinion, it was impossible to determine whether the disability "is completely related to his work or is not related to his work." He concluded that the industrial injuries played a greater causal role in the disability than the tumor. He believed it probable that without the work injuries, Gomez would have been able to work as a deputy sheriff after the surgery. He based this conclusion on: (1) the use of epidural injections, which indicated that the lower back injuries were significant; and (2) the moderate size of the incision, which suggested that the "surgical intervention" was not "aggressive."

Based on his conclusion that the work injuries were more debilitating than the tumor, Dr. Haronian attributed over 50 percent of the disability to the employment. He stated: “In reviewing the patient’s history, however, there is clear evidence that the patient had multiple injuries prior to being diagnosed with a spinal tumor; however, an objective finding within the medical records is the fact that the patient was receiving epidural injections which does indicate that there was a significant amount of pathology and symptoms prior to the development of the tumor. The medical records and the history that was provided by the patient indicate[] that there was progressive worsening of his condition, and there was a sudden significant change in his condition with the development of the tumor. [¶] At this time, there is obviously no question about the fact that the patient is incapacitated from performing his work-related activities; however, in my opinion, with reasonable medical probability, there is indication that more than 50% of the patient’s incapacity for his duty is related to his work-related activities. It is probable that the patient may have been able to return back to work absent the exposure to the industrial injuries and in presence of the surgery that he underwent for his tumor.”

D. LACERA’s Additional Reports

After the March 2009 hearing, LACERA submitted Dr. Pietruszka’s May 19, 2009 letter, which stated that in his opinion, the work-related injuries were not connected to the disability, which were caused by the tumor, the surgery, and the postsurgical treatment of the tumor. Dr. Pietruszka suggested that if Gomez wished to claim a service-connected disability retirement based on his work-related injuries, the evidence should be further reviewed “with the back tumor excluded as a factor.”

LACERA also provided Dr. Caputo’s supplemental report dated May 11, 2009, which expressed his opinion that the disc protrusion at L5-S1 would not have prevented Gomez from performing his usual and customary job duties. In Dr. Caputo’s view, the incapacity was not caused by the disc protrusion, but by the spinal tumor and the treatment of the tumor. The tumor did not grow as a result of the employment, but would have grown and damaged the spine regardless of the employment. Accordingly,

Dr. Caputo found no real and measurable connection between the employment and the disability.

E. LACERA Adopted the Referee's Findings and Reaffirmed Its Decision to Award a Nonservice-connected Disability Retirement

In June 2010, the referee, Louis M. Zigman, issued his findings and recommendation that Gomez be given a nonservice-connected disability retirement.

Zigman found, based on undisputed evidence, that when Gomez was in pain as a result of his work-related injuries, he had missed very few days of work. He also found, based on undisputed evidence, that Gomez was still in pain as a result of the spinal tumor and the treatment of the tumor, which caused significant and permanent changes to his back and leg.

Zigman found that the cancer could have been present as early as September 1998. When Dr. Chambi found a lesion in March 1999, he recommended exploratory surgery. Gomez did not have surgery at that time, but was treated for an orthopedic condition. By the time the tumor was removed in November 2000, it had nearly doubled in size and had damaged the nerve roots and spine. The tumor was the dominant and major cause of the incapacity.

Zigman found no basis to conclude that the incapacity was dually and independently caused by the work-related injuries. Dr. Haronian's assumption that the epidurals were given to treat a serious orthopedic condition was not supported by the evidence. It was more reasonable to infer, based on the fact that the epidurals were given within days of the surgery, that the injections were given to relieve the pain from the tumor's rapid growth and damage to the nerve roots. Dr. Haronian's assumption, based solely on the incision's moderate size, that there was no aggressive surgical intervention was belied by the detailed surgical report of Dr. Gross, which Dr. Haronian did not review.

Zigman was not persuaded by Dr. Haronian's conclusion that more than 50 percent of the disability was caused by work-related activities. Zigman pointed out

that the work injuries were not disabling and did not result in the loss of more than a few days of work.

Similarly, Zigman was not persuaded by Dr. Alban's recommendation to apportion the disability evenly between industrial and nonindustrial causes: "Other than 'stating' that there was a 50/50 basis for apportionment, Dr. Alban did not explain why. Again, the fact that there were bulges and/or some objective findings does not necessarily mean that the applicant was incapacitated by them — especially when the evidence clearly shows that the reason the applicant's pain became disabling in October 2000 was the spinal tumor."

Based on his independent review of the evidence, Zigman found that: (1) Gomez was permanently incapacitated from his employment; (2) the permanent incapacity was the result of the tumor; (3) the employment did not substantially cause, aggravate, or accelerate the permanent incapacity; and (4) the permanent incapacity was not the result of any other independent orthopedic injury.

After Zigman issued his tentative findings, Gomez objected that Zigman had failed to consider his theory of dual causation that the work injuries had contributed substantially to the permanent disability caused by the tumor. Zigman dismissed the objection, stating that he had considered the dual contribution theory, but the evidence failed to show a real and measurable connection between the incapacity and the employment.

In August 2010, LACERA accepted Zigman's findings and reaffirmed its prior decision to award Gomez a nonservice-connected disability retirement.

IX. The Petition for Writ of Mandate

In October 2010, Gomez filed a petition for administrative mandamus. (Code Civ. Proc., § 1094.5.) In October 2011, the superior court entered a judgment requiring LACERA to vacate its award of a nonservice-connected disability retirement and to grant Gomez a service-connected disability retirement.

In its statement of decision, the trial court disagreed with Zigman’s finding that the evidence *clearly* showed that the pain became disabling in October 2000 as a result of the spinal tumor. In addition to the objective evidence of prior orthopedic injuries—the September 1998 MRI showed a “3 mm disc protrusion at L5-S1” and the October 2000 MRI showed a bulging disc at L3-4—Gomez complained of lower back pain resulting from the orthopedic injuries. Although Gomez continued working full time with few absences until October 2000, he was in constant pain after the July 1998 accident and transferred to a custodial assignment in May 1999 in order to alleviate that pain.

The trial court acknowledged that the evidence was undisputed that prior to July 1998, Gomez’s orthopedic injuries had resolved in a matter of days without further significant pain. The trial court criticized Dr. Pietruszka’s statement that “Gomez always recovered from his work-related injuries with little or no treatment,” as a conclusion that was “unsupported by the evidence.” It rejected the opinions of Dr. Caputo and Dr. Pietruszka that the injuries were minor and were not connected to the incapacity, stating that their opinions lacked analysis. It similarly rejected Dr. Alban’s recommendation to apportion the disability evenly between industrial and nonindustrial causes.

After recognizing that Dr. Haronian’s report could be criticized for failing “to explain why the work injuries were incapacitating” and for “not discussing when the tumor developed, and when the tumor began to cause pain, as opposed to simply concluding that the epidural injections occurred prior to the tumor’s development,” the trial court concluded that his report provided substantial evidence of a work-related disability. It stated that Dr. Haronian’s “opinion constitutes substantial evidence that Gomez had a work-related back injury prior to development of the tumor, his condition got progressively worse, and the tumor added to the problem by causing a significant change in his orthopedic condition.”³

³ The trial court stated: “In contrast, Haronian opined that Gomez’ back injury pre-existed the tumor. Haronian knew about the MRI showing a hemangioma in October (Fn. continued.)”

Although the trial court agreed with Dr. Haronian's conclusion that the disability was work-related, it disagreed with his finding that the industrial injuries were the primary cause of the disability. Whereas Dr. Haronian found that the industrial injuries were the primary cause of a disability that was exacerbated by the nonindustrial tumor, the trial court found that the nonindustrial tumor was the primary cause of a disability that was exacerbated by the industrial injuries.

The trial court expressed its conclusion as follows: "In sum, there only need be substantial evidence of a real and measurable connection between Gomez' work-related injuries and his permanent disability. [Citation.] There is objective MRI evidence that shows other spine injury unrelated to the tumor, and Haronian's opinion constitutes substantial evidence that this work-related injury contributed to his permanent disability. The Referee correctly concluded that the existence of 'bulges and/or some objective findings does not necessarily mean' that Gomez was incapacitated by them, but there is no adequate medical opinion to controvert Haronian's opinion that the work injuries contributed to his permanent disability. While the tumor plainly was the principal reason for Gomez' permanent disability, the injury in July 1998 (and the cumulative impact of prior injuries) meet the requirement of real and measurable contribution. The [Workers' Compensation Appeals Board] award is evidence supporting this conclusion."

Based on the above findings, the trial court entered a judgment requiring LACERA to vacate its award of a nonservice-connected disability retirement and to grant

1998 [internal record reference omitted], yet he concluded that Gomez' receipt of epidural injections indicates significant pathology prior to 'development of the tumor.' [Internal record reference omitted.] Haronian can be criticized for not discussing when the tumor developed, and when the tumor began to cause pain, as opposed to simply concluding that the epidural injections occurred prior to the tumor's development. Nonetheless, his opinion constitutes substantial evidence that Gomez had a work-related back injury prior to development of the tumor, his condition got progressively worse, and the tumor added to the problem by causing a significant change in his orthopedic condition."

Gomez a service-connected disability retirement retroactive to the date of his nonservice-connected disability retirement. LACERA timely appealed from the judgment.

DISCUSSION

The sole question on appeal is whether substantial evidence supports the superior court's findings that Gomez's incapacity resulted from industrial orthopedic injuries to the lower back and that the employment contributed substantially to the incapacity. (Gov. Code, § 31720.)⁴

I. Burden of Proof

The test for industrial causation under Government Code section 31720 requires substantial evidence of a real and measurable connection between the disability and the job. (*Bowen, supra*, 42 Cal.3d at p. 578.) When the Legislature amended section 31720 in 1980 to include the phrase, "and such employment contributes substantially to such incapacity," it intended "to disapprove language in the case of *Heaton v. Marin County Employees Retirement Bd.* (1976) 63 Cal.App.3d 421, which held that an 'infinitesimal contribution' of the member's employment to the member's permanent incapacitation might suffice to qualify the member for a service-connected disability retirement." (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 964 (*Valero*)). The amendment "was not intended to disapprove the holding of *DePuy v. Board of Retirement* (1978) 87 Cal.App.3d 392, that the causal connection between the member's disability and the member's job must be 'real and measurable.' (*Id.* at p. 399; see *Bowen, supra*, at p. 579.)" (*Valero, supra*, 205 Cal.App.4th at p. 964.)

⁴ Government Code section 31720 authorizes service-connected disability retirement benefits if the employee's "incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity." (§ 31720, subd. (a).)

Under section 31720, the employment must contribute *substantially* to the incapacity. “The substantial contribution test “would not include *any* contribution of employment to disability, no matter how small and remote.” [Citation.]” (*Valero, supra*, 205 Cal.App.4th at p. 964.) The term “substantial contribution” has been construed to mean that “a disability applicant’s employment must contribute substantially to, or be a real and measurable part of, the employee’s permanent disability, in order to qualify for a disability retirement.” (*Ibid.*)

Accordingly, Gomez had the “burden to affirmatively show a real and measurable connection between his . . . disability and his employment.” (*Valero, supra*, 205 Cal.App.4th at p. 966.) Unless this prima facie showing was made, LACERA had no burden to negate or disprove the existence of a causal connection between Gomez’s employment and the disability.

II. Standard of Review

“After a retirement board has reached a decision, the superior court exercises its independent judgment in reviewing the administrative decision of the board. [Citations.] On an appeal from the superior court, an appellate court applies the substantial evidence test. ‘After the trial court has exercised its independent judgment in weighing the evidence, our task is to review the record to determine whether the trial court’s findings are supported by substantial evidence. [Citation.] The trial court’s decision should be sustained if it is supported by credible and competent evidence. [Citation.]’ (*Wieser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.)” (*Valero, supra*, 205 Cal.App.4th at p. 965.)

“[T]he relevant and considered opinion of one physician, though inconsistent with other medical opinions, normally constitutes substantial evidence. [Citations.] Medical reports and opinions are not, however, substantial evidence if they are based on surmise, speculation, or conjecture, or if they are known to be erroneous or based on inadequate medical histories and examinations. [Citations.]’ (*Patterson v. Workers’ Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 921.)

“[A] physician’s opinion based upon a misunderstanding of applicable legal standards or the relevant facts cannot constitute substantial evidence to support the Board’s determination. [Citations.] [¶] Moreover, when the Board relies upon the opinion of a particular physician in making its determination, it may not isolate a fragmentary portion of his report or testimony and disregard other portions that contradict or nullify the portion relied on; it must give fair consideration to all of his findings. [Citations.]’ (*City of Santa Ana v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 212, 219.)” (*Rosas v. Workers’ Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1702.)

“An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value (*Brant v. Retirement Board of S. F.* [(1943)] 57 Cal.App.2d 721; see *Estate of Stone* [(1943)] 59 Cal.App.2d 263). . . . [¶] [T]he value of an expert’s opinion is dependent upon its factual basis [citations].” (*Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692-693.)

III. Analysis

In support of its finding of industrial causation, the trial court cited: (1) the September 1998 and October 2000 MRI studies that confirmed the existence of prior orthopedic injuries to the lower back; and (2) Dr. Haronian’s opinion that the orthopedic injuries were the primary cause of a disability that was made worse when the tumor caused “a significant change in his orthopedic condition.”

Based on the above evidence, the trial court found that the primary cause of the disability was the nonindustrial tumor and the secondary causes were the industrial injuries, which established the necessary industrial disability for a service-connected disability retirement. We examine whether the trial court’s conclusion was supported by the evidence.

The September 1998 MRI, which showed a “3 mm. central disc protrusion at L5-S1,” and the October 2000 MRI, which “showed a bulging disc at L3-4,” were taken

before the surgery and the collapse of the L3 vertebra, which caused significant changes to the lumbar spine. According to Dr. Caputo's supplemental May 11, 2009 report,⁵ which Dr. Haronian did not mention (Dr. Haronian prepared his report before Dr. Caputo's supplemental report was prepared), the disc protrusion at L5-S1 would not have prevented Gomez from performing his usual and customary job duties. According to Dr. Sato's September 22, 2004 report, which Dr. Haronian did not mention, the September 2004 scan showed "no obvious protrusion of *any* discs." (Italics added.)

As for Dr. Haronian's report, a significant gap exists in his assumption that the epidurals were given to treat a serious orthopedic condition. Dr. Haronian did not mention that the epidurals were given immediately before the surgery, when the tumor was rapidly growing in and around the spine and the nerve roots, causing extreme pain to radiate down the leg. These factors, which Dr. Haronian did not consider, reasonably support the referee's finding that the epidurals were given to relieve the pain from the tumor's rapid growth and damage to the nerve roots and undermine the doctor's alternative theory.

The question we face is whether the September 1998 and October 2000 MRI scans and Dr. Haronian's report provided substantial evidence in support of the trial court's findings. We conclude they did not.

By relying on the September 1998 and October 2000 MRI scans to establish the existence of orthopedic conditions, Dr. Haronian relied on outdated and incomplete information that failed to consider the effects of the surgery, the collapsed vertebra, and the September 2004 scan that showed no obvious bulges. Dr. Haronian's opinion that the orthopedic conditions were serious was based solely on the use of epidural injections. This was nothing more than speculation. There was ample evidence, which he did not

⁵ The statement of decision refers to Dr. Caputo's first supplemental report dated November 24, 2008, but not the second supplemental report dated May 11, 2009, which discussed the disc protrusion at L5-S1.

consider, that the epidurals were given to relieve the pain from the growing tumor and nerve damage caused by the tumor.

A medical report that is based on surmise, speculation, or conjecture, or is known to be based on inadequate medical histories and examinations is not substantial evidence. (*Patterson v. Workers' Comp. Appeals Bd.*, *supra*, 53 Cal.App.3d at p. 921.) The evidence relied upon by the trial court falls under this category.

Based on our independent review of the entire record, we conclude, as a matter of law, that the evidence leads to only one reasonable conclusion: the work-related industrial injuries did not contribute substantially to the incapacity, and there is no substantial evidence of a real and measurable connection between the disability and the employment. Accordingly, the trial court's finding of an industrial disability must be reversed for insufficient evidence.

DISPOSITION

The judgment is reversed. LACERA is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.