WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NORMA PEREZ, *Applicant*

vs.

CUSTOM PRODUCTS MANUFACTURING, insured and administered by EMPLOYERS COMPENSATION INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ9607136
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, both of which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 13, 2023

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

NORMA PEREZ
LAW OFFICES OF FRANK J. MASTRONI
PEARLMAN, BROWN & WAX

PAG/*cs*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

1.	Award	12/20/2022
2.	Identity of Petitioner	Defendant
3.	Verification	Yes
4.	Timeliness	Petition is timely
5.	Petition for Reconsideration Filed	1/13/2023

6. Petitioner's Contentions:

a. By the order, decision or award made and filed by the Workers' Compensation Administrative Law Judge, the WCJ acted without or in excess of its powers;

b. The evidence does not justify the findings of fact; and

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

This matter came on for two days of trial before the undersigned, with stipulations, issues, and evidence framed and offered on August 4, 2022. On October 4, 2022, Applicant testified on her own behalf, with cross-examination completed the same day. Following the completion of applicant's examination, the matter was submitted for decision. The parties each filed post-trial briefs, which were reviewed and considered. Award issued on December 20, 2022. This was served by mail on the same date.

Defendant filed a timely verified petition for reconsideration of the Findings and Award. Petitioner contends the WCJ erred by: a) failing to consider non-industrial medical apportionment; b) failing to consider non-industrial vocational apportionment; and c) relying on vocational evaluator Kelly Winn's reporting when the same was generated without the assistance of a certified Spanish interpreter.

II

FACTS

From July 25, 2013 through July 25, 2014, Norma Perez, born [], was employed by Custom Products Manufacturing as a sewing machine operator, Occupational Group Number

230[1] The parties stipulated that Ms. Perez sustained injury arising out of and in the course of her employment, on a cumulative trauma basis, to her cervical spine, lumbar spine, bilateral shoulders, psyche (per the opinion of Dr. Marusak), and dental (per the opinion of Dr. Keller).[2] Based on the credible testimony of the applicant and substantial medical evidence admitted at trial, the Court additionally found injury on this basis to applicant's fibromyalgia and internal systems, specifically the Upper Gastrointestinal Tract and Irritable Bowel Syndrome. The Court found that applicant did not meet her burden of proof as to her allegations of injury to her head, bilateral ankles, left knee, or bilateral wrists.

Ms. Perez was evaluated for these conditions by Agreed Medical Evaluators Peter Newton, M.D. (orthopedics)[3] and Gregory Marusak, M.D. (psyche)[4], and Panel Qualified Medical Evaluator Meir Keller, D.D.S. (dentistry)[5], all of whom authored extensive, comprehensive reporting. Ms. Perez was also evaluated by multiple treating doctors, whose reports were reviewed and considered. Ms. Perez was also evaluated vocationally[6] and on that basis claims that she is permanently totally disabled.

A substantial portion of Ms. Perez's testimony[7] on direct examination concerned her sexual exploitation and abuse by company owner Roy Ball; however, Ms. Perez also offered testimony[8] as to her work history, physical limitations, mental state, and her own perception of her ability to be gainfully employed in any capacity. All of applicant's testimony was highly credible and unrebutted. Ms. Perez's presentation at trial was also consistent with the descriptions of her physical condition as set forth by the multiple medical evaluators who reported in this case, as well as Applicant's Vocational Expert, Kelly Winn.

Ms. Perez provided a history, mechanism of injury, and general presentation to all evaluators that is substantially consistent with her testimony at trial. She testified[9] that she does not believe she can work now, and that she has not worked since she last worked for this employer. She testified that sometimes she goes without sleeping for 2 to 3 days, and that she

[1] 08/4/22 SOE at 2:3-8
[2] *Id.*
[3] See Exhibits Xl-X5
[4] See Exhibits X6-X8
[5] See Exhibit I
[6] See Exhibits 13-14
[7] 10/4/22 SOE at pgs 3-4.
[8] 10/4/22 SOE 2:19-23
[9] 10/4/22 SOE 2:19-23

then basically becomes a zombie. On nights when she does sleep, when she wakes, she gets dizzy and has to take her time before getting up. She eats a ready-to-eat food, such as yogurt, to take her medication, and then she has to return to bed or sit down, because it takes time for her body to process the medication. She cannot do many chores at home, and she described performing occasional light tasks, such as washing a few plates or taking the trash from the bathroom, if she was able to sleep the night before, and if the medication helped her body that day. She testified that she cannot do many things because when she moves, she develops pain which then becomes difficult to control.

She testified that she cannot perform tasks in a rush, and that if she does something for 20 minutes, she has to take a rest and take a pill. After she performs light tasks in the morning, she does almost nothing with the rest of her day.[10] When asked on cross-examination what she would need to feel better and lead a more productive life, she responded that she needs a magic wand to take away all of her pain.[11] These descriptions of her day-to-day activities are highly consistent with what she reported to Dr. Marusak[12] and to Ms. Winn[13].

Regarding applicant's credibility, Dr. Marusak states, "In my opinion, the applicant's reporting was highly credible; her narrative was consistent, detailed, and her displays of emotion did not seem exaggerated or contrived. It did not appear that her reporting was malicious or motivated by secondary gain. Results of psychological testing were valid and did not indicate malingering."[14] The Court concurs with Dr. Marusak's assessment. Furthermore, applicant's behavior in open Court as observed by the undersigned is also consistent with her testimony. Ms. Perez was visibly uncomfortable on both days of trial, as well as during the entirety of her testimony. She walked and generally moved slowly. At times, she was observed to close her eyes and grimace; at one point during her testimony, the applicant appeared to be sufficiently physically uncomfortable that the undersigned stopped the examination to allow her to take a break. On the first day of trial, she informed all present that she was not feeling well and was permitted to leave before the disposition was given. The undersigned believes that this behavior was genuine and reflective of applicant's actual discomfort. The undersigned's credibility

[10] 10/4/22 SOE at pages 6-7
[11] 10/4/22 SOE 8:4-5
[12] Exhibit X8 at pg 159
[13] Exhibit 14 at pgs 14-15
[14] Exhibit XS at pg 184

determination is given great weight, because the undersigned had the opportunity to observe the demeanor of the witness. *Garza v. Workmen's Comp. Appeals Bd.*, (1970) 3 Cal. 3d 312, 318-319.

Upon review of the totality of the admitted medical and vocational evidence, as well as applicant's highly credible testimony and presentation in Court, the Court agreed with the conclusion of applicant's vocational expert Kelly Winn and found that applicant has sustained a total loss of earning capacity on an industrial basis, rendering her 100% permanently and totally disabled. Having observed the applicant and compared her testimony with the medical and admitted vocational record, the undersigned was and remains convinced that applicant has suffered a complete loss of earning capacity.

Defendant's Petition for Reconsideration followed. Defendant seeks reconsideration of finding of fact #6, namely that applicant is 100% permanently and totally disabled. Defendant does not seek reconsideration of the balance of the undersigned's decision.

It is worth noting that defendant contends[15] that applicant's combined permanent disability is 51% per the PDRS. The undersigned did not so find. Defendant offers no explanation as to this calculation; defendant did not make this allegation in its pre-trial conference statement, nor did defendant offer any evidence regarding this contention or proffer any of its own rating strings. The only evidence offered at trial as to rating strings was Applicant's proposed strings, admitted for demonstrative purposes as Exhibit 16, but without objection by defendant.

III

DISCUSSION

A.

The undersigned considered both medical and non-medical apportionment in his decision to award 100% permanent total disability.

Defendant argues[16] that the undersigned did not consider substantial evidence of non-industrial medical apportionment of permanent disability as found by Drs. Marusak and Varu. This is not correct.

[15] Petition for Reconsideration at 3:26
[16] Petition for Reconsideration at 4:15-20.

Applicant has claimed a total loss of earning capacity pursuant to *LeBoeuf v. Workers' Comp. Appeals Bd.*, (1983) 34 Cal.3d 234. Applicant has offered the vocational reporting[17] of her expert, Kelly Winn, in support of this contention. Ms. Winn's opinion does not ignore or otherwise disregard medical apportionment; Ms. Winn finds that in consideration of the work restrictions provided for parts of body that have been found 100% industrial *without apportionment*[18], e.g. orthopedics and dental, applicant lacks transferable skills and is not amenable to vocational rehabilitation. Ms. Winn concludes therefore that applicant has a 100% loss of earning capacity on a strictly industrial basis.

Defendant's citation to *Walsh v. Skyline Steel Erectors*, 2021 Cal. Wrk. Comp. P.D. LEXIS 84 is not persuasive. In that case, there was voluminous substantial evidence of pre-existing disability, which was also thoroughly explained by the AME. That evidence was then completely disregarded by the applicant's vocational expert, which is the reason why that opinion was found by the WCAB to not constitute substantial evidence. Here, applicant's expert Kelly Winn does not overlook evidence of non-industrial apportionment, but instead explains why applicant can be found to be 100% on a completely industrial basis. As was the case in *Gonzales v. Northrop Grumman Sys. Corp.*, 2022 Cal. Wrk. Comp. P.D. LEXIS 159, Ms. Winn additionally distinguishes between medical and vocational apportionment, and she finds[19] that she can vocationally apportion 100% of applicant's lost earning capacity to the industrial injury, particularly because the work restrictions that preclude vocational rehabilitation come from body parts that were found 100% industrial. The instant case is distinguishable from *Walsh*.

C.

Defendant did not introduce its vocational report into evidence, and thus the record contains no evidence of non-industrial vocational apportionment

Defendant argues that the undersigned did not account for substantial evidence of non-industrial vocational apportionment. No such evidence was introduced or admitted into the record. Defendant does note applicant's lack of English proficiency and limited education, as was also referenced in Ms. Winn's reporting. However, Ms. Winn did not base her analysis on those

[17] Exhibits 13 and 14.
[18] Exhibit 14 at pg 23; Exhibit 13 at pg 12
[19]

factors and specifically explains[20] that her analysis that applicant is not amenable to vocational rehabilitation is not based on these factors.

It must be noted, as Applicant states in her Answer[21], that defendant has repeatedly[22] referred in its Petition to reporting from vocational evaluator Nick Corso. Defendant did not offer this reporting into evidence, and it is therefore not part of the evidentiary record. 8 C.C.R. 10670; 8 C.C.R. 10803(a)(2). In fact, defendant does not properly cite to the evidentiary record in any portion of its Petition.

In many cases[23], the WCAB has admonished and even imposed sanctions against parties for citing to documents that are not part of the evidentiary record. The undersigned makes no recommendation to the WCAB as to admonishing or sanctioning defendant for this conduct, but leaves the same to the WCAB's discretion.

D.

The lack of an interpreter does not nullify the reporting of Kelly Winn when Ms. Winn was able to converse with the applicant in her native language.

Finally, defendant argues that Ms Winn's reporting may not be accurate, as Ms. Winn did not have an interpreter present during her interview with applicant. Applicant testified[24] that no interpreter was present during her interview with Ms. Winn, as Ms. Winn spoke Spanish. Defendant adduced no testimony or evidence which suggested any language comprehension barrier on the part of Ms. Winn. Furthermore, the Court specifically considered and noted in its decision that applicant's testimony describing her day-to-day activities was highly consistent with Ms. Winn's description[25] in her reporting. Defendant cites to no authority which stands for the proposition that an interpreter is required to be present for an evaluation where the evaluator is otherwise able to communicate with the applicant in her native language. Defendant's allegations of inaccuracy in Ms. Winn's comprehension are conjecture, unsupported by any evidence in the record.

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[20] Exhibit 14 at pg 23
[21] Answer to Petition at 7:26-27
[22] Petition for Reconsideration at 4:5-10; 5:28, 6:6-12, 6:17
[23] *See e,g, Hill v. County of San Bernardino*, 2012 Cal. Wrk. Comp. P.D. LEXIS 74; *Redden v. MJT Enterprise, Inc., dba Blue Ribbon Personnel*, 2015 Cal. Wrk. Comp. P.D. LEXIS 263; *Deza v. The Home Depot*, 2008 Cal. Wrk. Comp. P.D. LEXIS 22.
[24] 08/4/22 SOE at 2:21-25; 3:1-15
[25] Exhibit 14 at pgs 14-15

IV

RECOMMENDATION

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

DATE: January 25, 2023

Adam D. Graff

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

BACKGROUND:

This matter came on for two days of trial before the undersigned, with stipulations, issues, and evidence framed and offered on August 4, 2022. On October 4, 2022, Applicant testified on her own behalf, with cross-examination completed the same day. Following the completion of examination, the matter was submitted for decision. The parties each filed post-trial briefs, which have been reviewed and considered.

From July 25, 2013 through July 25, 2014, Norma Perez, born [], was employed by Custom Products Manufacturing as a sewing machine operator, Occupational Group Number 230. The parties stipulated that Ms. Perez sustained injury arising out of and in the course of her employment, on a cumulative trauma basis, to her cervical spine, lumbar spine, bilateral shoulders, psyche (per the opinion of Dr. Marusak), and dental (per the opinion of Dr. Keller). Ms. Perez additionally claims injury on this basis to her internal, head, fibromyalgia, bilateral ankles, left knee, and bilateral wrists.

Ms. Perez was evaluated for these conditions by Agreed Medical Evaluators Peter Newton, M.D. (orthopedics) and Gregory Marusak, M.D. (psyche), and Panel Qualified Medical Evaluator Meir Keller, D.D.S. (dentistry), all of whom authored extensive, comprehensive reporting. Ms. Perez was also evaluated by multiple treating doctors, whose reports have been reviewed and considered. Ms. Perez was also evaluated vocationally and on that basis claims that she is permanently totally disabled.

Applicant testified that she was last employed by Custom Products, and that her last day of work was on or about September 3 or 4, 2014.[26] She testified regarding a specific injury "sometime in 2010" when a box fell on her and caused her to fall onto the ground. She reported the injury to the company owner Mr. Roy Ball, but Mr. Ball did not furnish treatment.[27] Thereafter, she continued working, and her condition worsened.[28] She testified that her job duties following the 2010 specific injury were to organize and assign work to other machine operators,

[26] 10/4/22 SOE 2:19-21
[27] 10/4/22 SOE 2:19-23
[28] 10/4/22 SOE 3:12-13

assemble, produce, pick, check, and prepare orders for delivery. She stated that she had to grab and lift items, and then explain to others what to do with them.[29]

The bulk of applicant's testimony on direct examination concerned the sexual harassment and exploitation that she endured at the hands of Mr. Ball[30]. Applicant testified that Mr. Ball coerced her into engaging in unwanted sexual encounters with him by making threats against her and her family[31]. When she initially refused, he further punished her with heavy manual labor until she acquiesced to his demands[32]. Applicant testified about this abuse in vivid detail, and she also provided a consistent retelling of these events to Psyche AME Dr. Marusak[33]. The applicant's testimony regarding these allegations was credible and unrebutted.

Ms. Perez's testimony as to her work history, physical limitations, mental state, and her own perception of her ability to be gainfully employed in any capacity, was also credible and unrebutted. Ms. Perez's presentation at trial was also consistent with the descriptions of her physical condition as set forth by the multiple medical evaluators who have reported in this case, as well as Applicant's Vocational Expert, Kelly Winn. Ms. Perez was visibly uncomfortable on both days of trial, as well as during the entirety of her testimony. She walked and generally moved slowly. At times, she was observed to close her eyes and grimace; at one point during her testimony, the applicant appeared to be sufficiently physically uncomfortable that the undersigned stopped the examination to allow her to take a break. On the first day of trial, she informed all present that she was not feeling well and was permitted to leave before the disposition was given. The undersigned believes that this behavior was genuine and reflective of applicant's actual discomfort.

Ms. Perez provided a history, mechanism of injury, and general presentation to all evaluators that is substantially consistent with her testimony at trial.

PARTS OF BODY INJURED

As stated *supra*, Applicant claims injury to her cervical spine, lumbar spine, bilateral shoulders, psyche, and dental. Ms. Perez additionally claims injury on this basis to her internal, head, fibromyalgia, bilateral ankles, left knee, and bilateral wrists. Defendant admits injury to

[29] 10/4/22 SOE 3:7-12
[30] 10/04/22 SOE 3:14-25; 4:1-15.
[31] 10/04/22 SOE 3:18-20.
[32] 10/04/22 SOE 4:3-12.
[33] *See* Exhibit XS at pg 153-155.

applicant's cervical spine, lumbar spine, bilateral shoulders, psyche (per the opinion of Dr. Marusak), and dental (per the opinion of Dr. Keller). Ms. Perez additionally claims injury on this basis to her internal, head, fibromyalgia, bilateral ankles, left knee, and bilateral wrists.

AME Dr. Newton evaluated applicant four times[34] in the field of orthopedics and was subject to cross-examination[35]. Dr. Newton has opined that applicant sustained injury to her neck, bilateral shoulders, and low back as the result of a specific injury of July of 2014. Dr. Newton explains on page 31 of his May 16, 2017 report that although the applicant has objective findings related to her right ankle and left knee, these are not consistent with the claimed mechanism of injury. Dr. Newton further elaborates[36] on this during his cross-examination. Applicant did not introduce any evidence to controvert Dr. Newton's findings regarding claimed musculoskeletal injuries. An AME's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive[37]. As to the musculoskeletal injuries claimed by applicant, the Court finds injury to applicant's cervical spine, lumbar spine, and bilateral shoulders. The applicant has not met her burden of proof with respect to her claims of injury to her bilateral ankles, left knee, or bilateral wrists.

The Court notes that Dr. Newton has found injury to the cervical spine, lumbar spine, and bilateral shoulders solely as the result of a specific injury on or about July 25, 2014. This is not the mechanism of injury alleged in the application for adjudication of claim in case ADJ7599488. However, given defendant's stipulations regarding injury, it appears that the parties are aware that due to the findings by AME Dr. Marusak and PQME Dr. Keller that the permanent disabilities from applicant's injuries cannot be apportioned between her multiple dates of injury, applicant is entitled to a single combined Award. The parties have apparently chosen the instant case as the vehicle for that Award. This will be discussed further *irifra*.

The court has reviewed the reporting[38] of AME Dr. Marusak and finds the same to be substantial and persuasive. Accordingly, the Court finds industrial injury to psyche.

The court has reviewed the reporting[39] of PQME Dr. Keller and finds the same to be substantial and persuasive. Accordingly, the Court finds industrial injury to dental/facial pain. To

[34] *See generally* Exhibits X1-X4
[35] *See generally* Exhibits *XS*
[36] Exhibit *XS* at 21:22-25; 22:1-25; 23:1-8.
[37] Power v. WCAB, (1986) 51 CCC 114, 117
[38] Exhibits X6 - XS.
[39] Exhibit 1

the extent that applicant's claim of injury to the "head" concerns her dental-related facial pain, the Court finds such claim to be industrial. However, the applicant did not introduce any substantial evidence of direct injury to the "head". Accordingly, the applicant has not met her burden of proof with respect to her claims of injury to her "head".

With regard to her claims of internal injury, applicant introduced reporting from Dr. Paresh Varu, M.D. Dr. Varu finds that applicant has suffered "Nsaid-induced Gastropathy" and Irritable Bowel Syndrome. Dr. Varu finds[40] that the Upper GI issues were industrially aggravated, and that the irritable bowel syndrome was industrially caused. Applicant's presentation to Dr. Varu is consistent with her testimony[41] at trial regarding these issues. The Court finds Dr. Varu's reporting to be substantial and persuasive. The Court finds injury to internal systems, specifically the Upper Gastrointestinal Tract and Irritable Bowel Syndrome.

With regard to her claim of injury to fibromyalgia, applicant introduced reporting from Rheumatologist Dr. Allen Salick, M.D. As explained in his November 29, 2016 report[42] Dr. Salick evaluated the applicant specifically for Fibromyalgia, to include clinical examination and diagnostic testing to rule out other conditions that might mimic the syndrome. According to Dr. Salick, applicant meets the 1990 American College of Rheumatology criteria for diagnosis of Fibromyalgia. Applicant also credibly testified[43] to having many of the co-morbid conditions identified on pages 6 and 9 of Dr. Salick's report. The Court finds Dr. Salick's opinion regarding applicant's claim of fibromyalgia to be substantial and persuasive.

The Court notes that Orthopedic AME Dr. Newton has opined that applicant does not have fibromyalgia. Considering the totality of the record and applicant's credible testimony regarding her pain and general physical limitations, as well as both doctors' recognized areas of specialty (Rheumatology vs. Orthopedic Surgery), the Court finds Dr. Salick's opinion to be more persuasive regarding this subject. The Court finds injury to fibromyalgia on an industrial basis.

TEMPORARY DISABILTY

[40] Exhibit 10 at pg 5
[41] 10/4/22 SOE 5:6-12
[42] Exhibit 12
[43] 10/4/22 SOE 5:6, 18-21; 6:24-25; 7:1-8

In multiple documents offered into evidence, reference is made to the applicant being terminated from her position. Applicant allegedly[44] testified during her deposition that she was terminated as of September 2, 2014 because there was no position available for her. She told[45] Dr. Marusak that she was terminated by letter, with the allegation being that her employer could not accommodate her restrictions. She told[46] Dr. Newton that she was given modified work, but that after September 2, 2014, her employer was no longer able to accommodate her and took her off work.

This allegation is supported in Dr. Newton's record review - on page 14 of his May 16, 2017 report (Exhibit X3), Dr. Newton reviews the August 26, 2014 doctor's first report of Dr. Mansour Benlevy, M.D. Dr. Benlevy placed the applicant on modified work with no heavy lifting, and with a follow-up scheduled for September 2, 2014. Less than a week later, while the applicant was on modified duty, the employer terminated applicant's employment. Applicant remains on modified duty thereafter.

Upon becoming temporarily partially disabled, the employer was obligated to furnish modified work to the applicant. Once the applicant demonstrates temporary partial disability, in order to avoid liability for temporary total disability under the odd lot doctrine, the burden shifts to the employer to demonstrate the availability of modified work. Defendant has not met this burden. Accordingly, applicant is entitled to receive temporary total disability benefits beginning September 2, 2014.

Dr. Marusak opined[47] that applicant was temporarily partially disabled on a psychiatric basis from September 2, 2014 -July 26, 2016. Applicant did not introduce any substantial medical evidence which demonstrates entitlement to temporary total disability for the period from July 27, 2016- September 2, 2016.

Based on the substantial medical evidence provided, the Court finds that applicant was entitled to temporary total disability benefits for the period running from September 2, 2014 - July 26, 2016, at the rate of $487.55 per week, to be adjusted by the parties with jurisdiction reserved over any dispute, less an attorney's fee of $7,240.12.

[44] Exhibit X8 at pg 14.
[45] Exhibit X8 at pg 152.
[46] Exhibit X4 at pg 22
[47] Exhibit X8 at pg 188

PERMANENT AND STATIONARY DATE

Applicant claims a permanent and stationary date of December 22, 2020, based on the reporting[48] of the same date by Dr. Varu. Defendant claims that the date should be July 26, 2016, based on the reporting[49] of AME Dr. Marusak.

An injured worker who claims injury to multiple body parts/systems is not considered to be permanent and stationary until all injured parts of body are considered to be permanent and stationary[50]. Accordingly, as Dr. Varu does not find applicant to have reached maximum medical improvement on an internal basis until December 22, 2020, the Court finds applicant to be permanent and stationary for all body systems as of December 22, 2020.

PERMANENT DISABILTY/APPLfCANT'S CLAIM OF PERMANENT TOTAL DISABILTY

As stated *supra*, the Court has found injury to applicant's cervical spine, lumbar spine, bilateral shoulders, psyche, dental, fibromyalgia, upper gastrointestinal tract and irritable bowel syndrome. Applicant has proffered proposed rating strings relating to these body systems as set forth in Exhibit 16. The Court finds that the reporting[51] from which the impairment ratings are derived constitutes substantial medical evidence.

Ordinarily, as explained in Benson v. The Permanente Medical Group (en banc), (2007) 72 CCC 1620, an applicant's disability from multiple injuries cannot be combined into a single un-apportioned award. Provided that the evaluating physicians are able to provide a substantial opinion on apportionment of disability between injuries, an applicant will be entitled to multiple separate awards based on the disability attributable to each separate injury. However, in cases where a doctor is unable to specifically parcel out the permanent disability between multiple dates of injury, due to the failure of apportionment, an applicant is entitled to a combined award of permanent disability.[52]

The panel decision of City of Cathedral City v. WCAB (Fields), (2013) 78 CCC 696 (writ denied) is instructive on this point. In that case, applicant was evaluated by AMES in

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[48] Applicant's Exhibit 10 at pg 5
[49] Exhibit X8 at pg 187
[50] *See generally American Ins. Co. v. WCAB (Mathal)*, (2003) 68 Cal. Comp. Cases 926.
[51] *See generally* Exhibits XI, X8, 9, 10, and 12.
[52] *Id* at 1631-34

orthopedics and internal medicine for claims of multiple injuries to multiple body parts. The orthopedic AME apportioned permanent disability to applicant's lumbar spine between a specific date of injury and a period of cumulative trauma. However, the internal AME found that the permanent disability from applicant's multiple industrial internal conditions could not be apportioned between the two injuries, and that the disability was "inextricably intertwined" between the injuries. Accordingly, the WCAB reversed the WCJ's F&A for two separate awards and instead issued a combined single award of permanent disability. There are many cases thereafter that have followed this logic.

Again, the parties have apparently recognized that this situation has presented in applicant's claims, as multiple doctors, including AME Dr. Marusak, have found that they cannot apportion disability between applicant's specific injuries and her CT. The Court infers the same given defendant's stipulation to injury to neck, back, and bilateral shoulders on the instant cumulative trauma case, despite that Dr. Newton apportioned all of applicant's disability from those parts of body to her July, 2014 specific injury. Accordingly, applicant is entitled to a single combined Award in case ADJ9607136.

Applicant has claimed a total loss of earning capacity pursuant to *LeBoeuf v. Workers' Comp. Appeals Ed.*, (1983) 34 Cal.3d 234. Applicant has offered the vocational reporting[53] of her expert, Kelly Winn, in support of this contention. Ms. Winn finds that in consideration of the work restrictions provided for parts of body that have been found industrial without apportionment, applicant lacks transferable skills and is not amenable to vocational rehabilitation. Ms. Winn concludes that applicant has a 100% loss of earning capacity on an industrial basis.

As stated *supra*, the Court found applicant's testimony to be highly credible with respect to all issues considered. She testified[54] that she does not believe she can work now, and that she has not worked since she last worked for this employer. She testified that sometimes she goes without sleeping for 2 to 3 days, and that she then basically becomes a zombie. On nights when she does sleep, when she wakes, she gets dizzy and has to take her time before getting up. She eats a ready-to-eat food, such as yogurt, to take her medication, and then she has to return to bed or sit down, because it takes time for her body to process the medication. She cannot do many

[53] Exhibits 13 and 14.
[54] 10/4/22 SOE 2:19-23

chores at home, and she described performing occasional light tasks, such as washing a few plates or taking the trash from the bathroom, if she was able to sleep the night before, and if the medication helped her body that day. She testified that she cannot do many things because when she moves, she develops pain which then becomes difficult to control.

She testified that she cannot perform tasks in a rush, and that if she does something for 20 minutes, she has to take a rest and take a pill. After she performs light tasks in the morning, she does almost nothing with the rest of her day.[55] When asked on cross-examination what she would need to feel better and lead a more productive life, she responded that she needs a magic wand to take away all of her pain.[56] These descriptions of her day to day activities are highly consistent with what she reported to Dr. Marusak[57] and to Ms. Winn[58].

Regarding applicant's credibility, Dr. Marusak states, "In my opinion, the applicant's reporting was highly credible; her narrative was consistent, detailed, and her displays of emotion did not seem exaggerated or contrived. It did not appear that her reporting was malicious or motivated by secondary gain. Results of psychological testing were valid and did not indicate malingering."[59] The Court concurs with Dr. Marusak's assessment. Furthermore, applicant's behavior in open Court as observed by the undersigned, wherein she moved slowly, grimaced in obvious physical discomfort while answering questions, and required rest breaks, is also consistent with her testimony.

Upon review of the totality of the admitted medical and vocational evidence, and applicant's highly credible testimony and presentation in Court, the Court agrees with the conclusion of applicant's vocational expert Kelly Winn. The Court finds that applicant has sustained a total loss of earning capacity on an industrial basis, rendering her 100% permanently and totally disabled.

In accordance with the Board's *en banc* decision in *Brower v. David Jones Constr (en bane)*, (2014) 79 Cal.Comp.Cases 550, permanent disability indemnity is payable following the last payment of temporary disability indemnity. As the Court has found that applicant is entitled to temporary disability indemnity from September 2, 2014 through July 26, 2016, applicant is

[55] 10/4/22 SOE at pages 6-7
[56] 10/4/22 SOE 8:4-5
[57] Exhibit XS at pg 159
[58] Exhibit 14 at pgs 14-15
[59] Exhibit XS at pg 184

entitled to payments of $487.55 per week for the remainder of her life beginning on July 27, 2016, and with statutory increases per Labor Code section 4659(c) beginning 1/1/2017, less credit for permanent disability paid and less credit for attorneys' fees in the amount of $158,970.13, producing a permanent total disability rate to be determined by the parties after commutation of applicant's attorneys' fees. The commutation has been performed by the DEU and is appended to the Findings and Award. The method of commutation shall be selected by applicant.

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the stipulations between the parties, as well as the medical reports of Dr. Newton, Dr. Marusak, Dr. Keller, Dr. Varu, Dr. Schames, and Dr. Salick, it is found that applicant is in need of further medical treatment to cure or relieve from the effects of the injuries herein relating to her cervical spine, lumbar spine, bilateral shoulders, psyche, dental, fibromyalgia, upper gastrointestinal tract and irritable bowel syndrome.

ATTORNEY FEES

The Court finds that applicant's attorneys are entitled to fees on both temporary disability and permanent disability indemnity.

As to temporary disability indemnity, attorneys' fees in the amount of $7,240.12 are found reasonable and awarded.

As to permanent disability indemnity, Attorneys fees in the amount of $158,970.13 are found reasonable and are awarded. The fee is based on 15% of the permanent disability and is awarded in accordance with Title 8, Cal. Code of Regs, § 10775 and the guidelines for awarding attorney fees found in Policy and Procedural Manual Index No.1.140.

As stated *supra*, the attorney fees are to be commuted from the side of the Award, by the method of applicant's choosing (Uniform Reduction vs. Uniformly Increasing Reduction), in accordance with the DEU commutation appended to the Findings and Award.

Date: December 20, 2022

Adam D. Graff

Workers' Compensation Administrative Law Judge