

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

DARLENE GIST, *Applicant*

vs.

**COUNTY OF LOS ANGELES, DEPARTMENT OF PUBLIC SOCIAL SERVICES,
Permissibly Self-Insured, Adjusted by SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10065606 (MF), ADJ11140372, ADJ15674888
Long Beach District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration in order to study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

¹ Commissioner Sweeney, who was on the panel that issued this decision, no longer serves on the Appeals Board. Another panelist was appointed in her place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 17, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 27, 2023

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

**DARLENE GIST
HIDNDEN & BRESLAVSKY
ZGRABLICH & MONTGOMERY**

AS/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

The following information shall be contained in the introduction of the report:

Defendant¹ has filed a timely and verified petition for reconsideration (Petition) to this judge's decision on July 1, 2022. That decision, which was served on June 17, 2022, issued a 76% award without *Benson*² apportionment amongst a specific injury and a cumulative injury. Defendant has several complaints about the decision, and urges separate awards with much lower permanent disability.

Applicant³ has filed a timely and verified answer (Answer) to the Petition. Applicant generally supports the decision, although she also urges that the award should be increased due to a mistaken nonindustrial apportionment for her psyche injury. (Defendant urges that there should be no award on permanent disability at all for psyche.)

As both parties have urged some action by the appeals board, this judge has submitted this report and cases for the board's review. However, this judge recommends that the board vacate the findings and award, and remand this matter for further development of the record. As will be summarized, both parties are arguing about complex issues over which there is no substantial medical evidence to make final decisions.

¹ COUNTY OF LOS ANGELES, DEPARTMENT OF PUBLIC SOCIAL SERVICES, permissibly self- insured, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, INCORPORATED (SEDGWICK 51350 ONTARIO), as represented by ZGRABLICH MONTGOMERY WOODLAND HILLS.

² *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [74 Cal. Comp. Cases 113].

³ DARLENE GIST, represented by HINDEN BRESLAVSKY LOS ANGELES, sustained injury to both elbows, both hands, dental, cervical spine, lumbar spine, respiratory system, headaches, gastrointestinal system, to at least two dates of injury, as found and as alleged by the parties.

II.

FACTS

A. Procedural History, Especially as to Cumulative Trauma Claims

Applicant has filed six cases over the years regarding the injuries at issue now. Of these cases, three of them were dismissed at trial by agreement of the parties:

- ADJ7724606, with alleged date of injury 01/01/1998 - 09/14/2010.
- ADJ7719288, with alleged date of injury 01/01/1998 - 09/14/2010.
- ADJ8149230, with alleged date of injury 01/01/1998 - 03/31/2009.

Of the remaining three cases, the parties agreed that applicant sustained a specific date of injury on July 29, 2015 (Case No. ADJ10065606). They disagreed on which of the remaining two cases should be controlling regarding the correct cumulative injury period: August 14, 2014 to November 15, 2017 (Case No. ADJ11140372), as defendant urged, or 1998 to June 6, 2012 (Case No. ADJ15674888), as applicant urged. In the end, this judge found that applicant was closer to being correct on the cumulative trauma period, although it ended on March 31, 2009.⁴

B. Challenged Decision

As confirmed by applicant's brief testimony at trial, her credibility with the doctors is not in dispute. At issue is how to interpret and apply the significant amount of medical evidence in this matter. It should be noted that the parties have engaged in substantial medical discovery, involving numerous doctors for various body parts. The underlying decision relied quite a bit on the parties' post-trial briefing, in order to attempt to ascertain points of agreement and disagreement.

⁴ Even this finding of the judge was pushing the limits of the medical evidence presented. And it will be noted below that, tentatively, there appears to be multiple cumulative trauma periods amongst the various body parts at issue, without clear evidence on what they ought to be.

Below is a restatement of this judge's opinion on decision.

C. Summary of Evidence on Body Parts

1. Orthopedic

Dr. Peter Newton served as the parties' orthopedic agreed medical examiner (AME), evaluating applicant's lumbar and cervical spine, and both elbows and hands. He found that applicant sustained 7% whole person impairment (WPI) to the lumbar spine;⁵ 7% WPI to the cervical spine;⁶ 3% WPI to the right upper extremity; and 3%⁷ WPI to the left upper extremity.⁸ Regarding apportionment, Dr. Newton found the disability entirely industrial, and he could not apportion amongst the injury dates.⁹

2. Gastrointestinal

Dr. Arthur Lipper served as the parties' internal AME. Regarding applicant's gastrointestinal (GI) issues, he found 6% WPI to the upper GI, with 75% apportionment industrial factors of causation, and noted that he could not apportion amongst the injury dates.¹⁰ For the lower GI, Dr. Lipper found 5% WPI, with no apportionment to nonindustrial factors, and again could not apportion amongst the injury dates.¹¹

3. Respiratory

Dr. Lipper also evaluated applicant for respiratory issues. He found 10% WPI, without industrial apportionment, and likewise could not apportion amongst dates of injury.¹²

⁵ Joint Exhibit (JX) 11, p. 37.

⁶ *Id.*

⁷ JX 19, p. 16.

⁸ *Id.*

⁹ JX 11, pp. 36-37. Defendant disagrees with this assessment, as will be explained later .

¹⁰ JX 20, pp. 2-4.

¹¹ *Id.*

¹² *Id.*; see also JX 27, p. 2. As defendant argues and as noted below, defendant urges that this is instead a cumulative injury separate from other injuries.

4. Face and Dental

Dr. Jeffrey Miller served as the parties' dental AME. He found that applicant sustained 4% WPI to face and dental issues, without nonindustrial apportionment, and he also could not apportion amongst the dates of injury.¹³

5. Neurologic

Dr. Lawrence Richman served as the parties' neurological AME. Regarding cognitive impairment, Dr. Richman found applicant sustained 6% WPI, without apportionment, and found causation entirely to the specific injury in July 2015.¹⁴ In part, this disability was due to sleep issues.¹⁵ For headaches, Dr. Richman found 2% WPI, with 30% apportionment to nonindustrial factors of disability, and industrial causation entirely to the specific injury.¹⁶

6. Rheumatology

Dr. Rodney Bluestone served as the parties' rheumatological AME. He concluded that applicant had no industrial injury on a rheumatological basis.¹⁷ Dr. Seymour Levine opined differently, finding permanent disability due to sleep and arousal disorder¹⁸.

7. Eyes

Dr. Marvin Teitelbaum served as the parties' ophthalmological qualified medical examiner (QME). From a report in 2010, it appears the doctor found no industrial causation.¹⁹

¹³ JX 25, pp. 4-5. The parties' post-trial briefs regarding rating issues were very helpful in determining these and other issues. The parties did disagree on how exactly to characterize the WPI found by Dr. Miller. Neither party objected to the formal rating provided regarding this issue.

¹⁴ JX 2, pp. 161-162; JX 30, p. 4. This finding of WPI is with benefit from the formal rating on how to interpret Dr. Richman's report.

¹⁵ JX 2, p. 161.

¹⁶ JX 30, pp. 4-5.

¹⁷ Defense Exhibit (DX) 3, p. 19.

¹⁸ Applicant Exhibit (AX) 2, pp. 31-32

¹⁹ JX 1.

8. Psyche

Dr. Myron Nathan served as the parties' psyche AME. He found that applicant sustained 14% WPI.²⁰ Regarding apportionment, Dr. Nathan found 10% apportionment to nonindustrial factors of disability.²¹ Regarding the industrial factors of causation, Dr. Nathan specified:

“[Of industrial causation, 65% is due to] permanent physical industrial injury/injuries and disability which are inextricably intertwined and deferred to the trier of fact. . . . [to] only her neurologic and orthopedic disability. 25% of the applicant's permanent disability has been caused as a result of the lack of personnel actions and personnel actions.”²²

D. Summary of Evidence re. Date of Injury – Cumulative Trauma Period

The parties disputed the correct cumulative trauma (CT) period, which would in part determine the appropriateness of providing permanent disability indemnity due to applicant's psyche injury. It turns out that as determined by the orthopedic injury, the correct CT period would have ended in 2009. Dr. Newton had originally believed the CT period ended on June 6, 2012, as applicant urged.²³ But this did not appear logical, as defendant urged, because as

acknowledged in testimony, applicant had not worked between 2010 and 2014.

Dr. Newton was deposed in January 2020. He clarified that the correct end period for the orthopedic CT was in 2009.²⁴ It would appear, from this AME's record review, the correct end-date for the CT period would be March 31, 2009.²⁵

²⁰ JX 7, pp. 138-139.

²¹ *Id.*, p. 54.

²² *Id.*

²³ JX 11, p. 35.

²⁴ JX 19, p. 17; to summarize: “Yes. I guess I incorrectly put 2012. So it should be 2009.”

²⁵ See JX 11, p. 23, summarizing a medical report from Dr. Lawrence Domaracki in June 2012, as this indicates the last day of work for applicant.

The defendant's Petition contends that this observation was incorrect, because "Applicant is currently working" and thus, the cumulative period should end on November 14, 2017. Defendant does not appear to articulate why the cumulative period should end on that date, or what the "date of injury" under Section 5412 ought to be.²⁶

As a consequence of this, defendant contends that applicant is not entitled to a permanent and disability award by application of Section 4660.1(c)(1) due to a post-2014 date of injury.

Defendant does not address whether an exception to the statutory bar would apply.²⁷

E. Decision: Legal Conclusions

1. Parts of Body Injured

Based on the medical evidence provided, the following conclusions are made on the disputed body parts:²⁸

Respiratory System: Yes, per AME Dr. Lipper.

- Asthma: This will be deferred, in the event it becomes an issue with regard to future medical treatment.
- Allergies: This is deferred, as it is unclear to what body part (claimed or admitted) this would pertain to. It may be raised if necessary if it becomes an issue with regard to future medical treatment.
- Eyes: This is denied, per QME Dr. Teitelbaum.
- Head, including Headaches: It is found that headaches is an injured body part, per AME Dr. Richman. Head is deferred, in the event it becomes an issue with regard to future medical treatment.
- Gastritis, IBS: It will be found generally that there is industrial injury to applicant's gastrointestinal system. A more specific finding is deferred in the event it becomes relevant to future medical treatment.

²⁶ See Petition, p. 3, ll. 6-16.

²⁷ *Id.*, p. 3, ll. 17-23.

²⁸ Technically, with regard to the claimed CT ending in 2012 (Case No. ADJ15674888), all body parts were in dispute. However, many body parts were admitted as injured for the claimed CT ending in November 15, 2017 (Case No. ADJ11140372), as well as for the specific injury. Thus, no mention will be made in this section regarding the following body parts: Head, neck, cervical spine, lumbar spine, left hip, right ear, memory loss, dental, elbows.

- Hands, wrists, fingers: At least regarding the hands, this is industrial per AME Dr. Newton. The wrists and fingers may be deferred in the event the parties dispute over whether further medical treatment is claimed for these body parts.
- Knees: This issue is deferred in the event it becomes relevant to further medical treatment. Applicant is not claiming permanent disability based on claimed injury to the knees. It is unknown whether AME Dr. Newton gave any opinions regarding the knees.
- Nose, Throat: It is noted that dental is an accepted body part. These other related body parts are deferred, in the event it becomes relevant to future medical treatment.
- Brain, including Sleep Disorder; Fatigue: Per AME Dr. Richman, it is found that applicant sustained injury to cognitive impairment and sleep. Whether it is useful to find injury to the brain and fatigue is deferred to whether it becomes relevant for future medical treatment.
- Psyche: Per AME Dr. Nathan, applicant sustained psyche injury.
- Fibromyalgia: Per AME Dr. Bluestone, applicant did not sustain injury resulting in fibromyalgia. It is noted that Dr. Levine's opinion to the contrary will not override the parties' AME, and that his focus on sleep and arousal disorder seems to be included in the parties' neurological AME, Dr. Richman.

2. Permanent and Stationary Date

Although presented as an issue, the parties stipulated that for the cumulative trauma injury, the permanent-and-stationary date is November 13, 2018.²⁹

. Correct CT Period; Inclusion of Psyche Disability

The judge found that as the parties' orthopedic AME found, applicant's correct CT period ended in 2009.³⁰

With that, the judge finds that with regard to permanent disability, applicant's industrial impairment for psyche is to be considered. This is because the statutory exclusion for permanent disability indemnity for psyche as a compensable consequence injury would not apply to 2009 dates of injury. (It is also noted that, even if one found a later date of injury as defendant urges, or

²⁹ Minutes of Hearing, p. 6, ¶ 5.

³⁰ As noted above, this date will be more specifically be found as March 31, 2009. It does not appear relevant to attempt a more precise or accurate finding on the date.

adopted the 2015 specific injury, the extent of applicant’s injuries would appear to qualify as a “catastrophic injury,” providing an exception to the statutory exclusion.)³¹

4. Benson Apportionment

The judge found that applicant’s two injuries are “inextricably intertwined” for purposes of making one award of permanent disability on both injuries. This is the clear opinion of most of the doctors in this case, and their opinions are substantial evidence.

Defendant challenges this finding in a few respects:

First, defendant urges that Dr. Richman separated out the headache complaints, with 2% WPI, due solely to the 2015 specific injury.³²

Second, defendant notes that Dr. Newton clearly found that the cervical spine is due to the 2015 specific injury, and other orthopedic body parts are due to the cumulative trauma (although indicating such CT period ended in 2012, not later).³³

Third, defendant argues that there is no basis for an inextricably intertwined award for the respiratory issues. Instead, applicant’s respiratory issues are due to “a cumulative trauma internal medicine injury,” rather than being related to orthopedic and other injuries.³⁴ Regarding this argument, the judge notes that it appears that the respiratory injury is separate, due to mold exposure.³⁵ However, there is no clear evidence as to what the cumulative trauma period ought to be for this injury, or a Section 5412 date of injury.

³¹ As noted above, defendant challenges this finding.

³² Petition, p. 4, ll. 7-25.

³³ *Id.*, p. 5, ll. 17-28.

³⁴ *Id.*, p. 6, ll. 9-14.

³⁵ See JX 10, 10/10/2018 report, p. 6: “With regard to [applicant’s] respiratory symptoms, there is a description of a history of recurrent bronchitis, further aggravated as a result of alleged industrial exposures. I note the reporting of the ‘mold’ findings and appreciate that this exposure may result in subsequent development of a reactive airways syndrome, etc.

The judge noted that sole exception concerns applicant's psyche claim, in that Dr. Nathan apportioned 25% causation to "personnel actions," as opposed to being a compensable consequence of the orthopedic and other injuries. This part of applicant's psyche disability is not part of applicant's claim, and it is unknown whether there is a correct factual basis for this part of the psyche disability. It is, for purposes of these cases submitted, treated as further nonindustrial factors of causation.

Applicant objects to this nonindustrial apportionment, arguing that as this aspect of applicant's claim is less than 35% of causation of permanent disability, this ought to be awarded as well.³⁶

5. Permanent Disability

The judge found that, as neither party objected to the recommended rating nor a timely request for cross-examination of the disability evaluation specialist, that applicant was entitled to one permanent disability award on both cases, for 76%.

Defendant contends that the DEU erred in the WPI used for the psyche injury.³⁷ Applicant urges that defendant waived this argument by not requesting cross-examination of the rating specialist.³⁸ As noted above, applicant contends there should be a slightly higher PD award based on the psyche injury.

³⁶ Answer, p. 9, l. 13 to p. 10, l. 18.

³⁷ *Id.*, p. 5, ll. 5-12.

³⁸ Answer, p. 9, ll. 1-10.

III. DISCUSSION

The reason why further development of the medical evidence is necessary is, in part, illustrated by how the parties' contentions raise even more questions regarding the substantiality of the evidence.

Regarding the cumulative trauma period as determined by the orthopedic AME, as noted above, this judge made a determination regarding the correct cumulative period end-date and the Section 5412 date of injury from the AME's deposition. Even then, the AME was not clear, and the judge relied on a treating report to determine when applicant's last day of work was in 2009. Defendant contends that this was an "artificial CT ending" date, excluding subsequent industrial exposure by the applicant. But defendant does not cite any medical reporting to support its position that the correct CT period ended in 2017, even though "Applicant is currently working and has therefore had continuous industrial exposure."³⁹

Clearly, instead of testing the limits of the substantiality of the medical reporting on the correct cumulative period (or periods) for applicant's orthopedic injury, further medical discovery would be recommended.

Second, there is no medical evidence at all regarding what ought to be applicant's separate industrial injury to his respiratory system due to mold exposure. Defendant simply assumes this ought to be the same cumulative period as it has contended (ending in 2017), even while it also points out that applicant is still working. The parties ought to further develop the medical evidence to question Dr. Lipper about the period (or periods) of injurious exposure and applicant's Section 5412 date of injury.

³⁹ Petition, p. 3, ll. 7-8.

Third, while defendant appears to argue correctly that there may be a separate award for applicant's headaches and his neck injury due to the 2015 specific injury, it must also be noted that many of applicant's body parts injured appear to be compensable consequence injuries, particularly, applicant's injuries to gastrointestinal system, dental, and psyche. It is not yet clear whether the disabilities to these body parts can be given a Benson apportionment, or as applicant urges, there should be one award.

Fourth, applicant's urging of a higher psyche industrial disability ignores that applicant's potential claim of psyche injury due to possible personnel actions would not be a compensable consequence of applicant's other injuries. Instead, this is a separate injury, assuming defendant either agrees there was such industrial stressors or such is proven at trial.

IV.

RECOMMENDATION

The judge does not mean to be harshly critical of the litigants in this matter. They have clearly engaged in a large amount of medical discovery in these cases. This judge, and perhaps the parties, had hoped that there could be a final decision based upon the evidence presented. Unfortunately, given the parties' contentions on appeal, it appears that more medical discovery is now required in order to make a final decision on the issues presented. Therefore, the judge respectfully recommends that the appeals board vacate the findings and award and on remand order further development of the medical record.

DATE: July 25, 2022

JOHN A. SIQUEIROS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE