

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **EDGAR DIAZ,**

5 *Applicant,*

6 *vs.*

7 **STATE OF CALIFORNIA, CORRECTIONS &**
8 **REHABILITATION PAROLE, legally**
9 **uninsured; STATE COMPENSATION**
10 **INSURANCE FUND,**

11 *Defendants.*

Case No. **ADJ7682048 MF**
ADJ7682067
(Marina del Rey District Office)

12 **OPINION AND DECISION**
13 **AFTER RECONSIDERATION**

14 The separate petitions of applicant and defendant for reconsideration of the July 30, 2015 Second
15 Amended Findings Of Fact And Award of the workers' compensation administrative law judge (WCJ)
16 were previously granted in order to allow further study of the record and issues. The WCJ found that
17 applicant's industrial injury to multiple body parts while employed by defendant as a parole officer on
18 January 20, 2011 (ADJ7682067), and during the period of February 1, 1998 through February 22, 2011
19 (ADJ7682048), caused 93% permanent disability after apportionment. In explaining how he reached his
20 decision, the WCJ provided Finding of Fact 2 and Finding of Fact 3 as follows:

21 2) It is found that the report of [applicant's treating physician]
22 Dr. Gottschalk is not substantial medical evidence on the particular issue
23 that the additive method should be used instead of the more generally used
24 CVC [combined values chart] method. It is found that the additive method
25 will be used to combine the ratings of the PD [permanent disability] for the
26 upper digestive tract [gastro-esophageal reflux disease] (GERD) and the
27 lower digestive tract [irritable bowel syndrome] (IBS) from the report of
[Agreed Medical Examiner (AME)] Dr. Richard Hyman but that there is
not sufficient persuasive or substantial medical evidence to allow for any
other body parts to be combined using the additive method and therefore
that all other body parts will be combined using the combined values chart
(CVC).

3) It is found that the defendant has met its burden and that 75% of the
applicant's PD for the applicant's irritable bowel syndrome (lower
digestive tract/GI) is found to be industrial and 25% of PD for this body
part is found to be nonindustrial; there is further evidence for
apportionment based on the credible deposition testimony of Dr. Richard

1 Hyman as indicated on page 19 of his deposition of 1230-2014: It is found
2 that the defendant has met its burden and that 50% of the applicant's PD
3 for the applicant's GERD (upper digestive tract/GI) is found to be
4 industrial and 50% of PD for this body part is found to be non-industrial. In
5 terms of [] apportionment between the two dates of injury [as described in
6 *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74
7 Cal.Comp.Cases 113] (*Benson*)], based on the deposition of Dr. Guy
8 Gottschalk of April 12, 2013 as set out on page 59 lines 9-13 and the report
9 of Dr. Barbara Strong dated August 5, 2013 as set out on page three, it is
10 found that the apportionment between these two dates of injury is
11 inextricably intertwined.

12 Applicant contends that defendant falsely represented that it had denied applicant's claim, that the
13 WCJ improperly received treatment records from Kaiser into evidence, that defendant failed to fully
14 comply with the WCJ's earlier order to produce applicant's employment records, and that proper
15 consideration of the evidence shows that applicant is 100% totally permanently disabled "in accordance
16 with the facts" as set forth in Labor Code section 4662(b).

17 Defendant contends that the WCJ should have used the combined values chart (CVC) to address
18 the permanent disability caused by applicant's IBS and GERD instead of using the additive method, that
19 applicant's primary treating physician, Dr. Gottschalk, should have used the Diagnosis-Related Estimate
20 (DRE) approach to evaluate applicant's spinal injury instead of using the Range of Motion (ROM)
21 method, that applicant's claimed sleep disorder was not properly evaluated, and that Dr. Gottschalk's
22 reporting on applicant's urological injury and sex disorder is not substantial evidence.

23 An answer to applicant's petition was received from defendant, and an answer to defendant's
24 petition was received from applicant.

25 The WCJ provided a Report And Recommendation On Petition For Reconsideration For Second
26 Amended Findings And Award Issued July 30, 2015 (Applicant Report) that addresses the contentions in
27 applicant's petition and recommends that reconsideration be denied.

28 The WCJ also provided a separate Second Report And Recommendation On Petition For
29 Reconsideration For Second Amended Findings And Award Issued July 30, 2015 (Defendant Report)
30 that addresses the contentions in defendant's petition and recommends that reconsideration be denied.

31 Having carefully reviewed the record and considered the allegations of applicant's petition for
32 reconsideration, defendant's petition for reconsideration, the WCJ's Applicant Report and Defendant
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1 Report, which are both adopted and incorporated by this reference, and for the reasons set forth below,
2 the WCJ's July 30, 2015 decision is affirmed as the Decision After Reconsideration of the Workers'
3 Compensation Appeals Board.

4 This case was previously before the Appeals Board when defendant sought reconsideration of the
5 WCJ's earlier May 19, 2014 decision finding that applicant had sustained 100% total permanent
6 disability as a result of his industrial injuries. The WCJ's decision at that time was based on evidence
7 that applicant sustained a total loss of future earning capacity and that the impairment caused by the two
8 injuries is inextricably intertwined as described in *Benson*. On October 3, 2014, the panel issued its
9 Opinion And Decision After Reconsideration, which rescinded the WCJ's finding of total permanent
10 disability because it was not supported by substantial evidence, and further noted that there appeared to
11 be a valid basis for apportionment.

12 Upon return of the case to the trial level, the parties developed the record by obtaining the
13 deposition of Dr. Hyman and by obtaining a supplemental report from the agreed vocational expert.

14 Having carefully reviewed the developed record, the approach taken by the WCJ to calculate
15 applicant's level of permanent disability as described in his Defendant Report and Applicant Report is
16 affirmed because it provides an accurate determination. While Dr. Hyman did not directly opine during
17 his deposition that the additive method should be used to calculate the level of impairment caused by
18 applicant's IBS and GERD, he did testify that using that approach would not be inappropriate because
19 there was no clear overlap in the impairments.

20 It was within the authority of the WCJ to rate applicant's permanent disability the way he did, and
21 the method he used provides an accurate rating of applicant's actual level of permanent disability.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals
3 Board that the July 30, 2015 Second Amended Findings Of Fact And Award of the workers'
4 compensation administrative law judge is **AFFIRMED**.

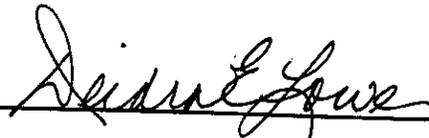
5 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **DEPUTY**

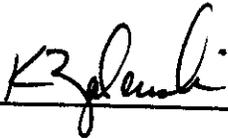
RICK DIETRICH

10 **I CONCUR,**

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13 **DEIDRA E. LOWE**

14 **I CONCUR AND DISSENT (SEE SEPARATE CONCURRING AND DISSENTING OPINION),**

15
16 

17 **KATHERINE ZALEWSKI**

18
19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**



20
21 **NOV 18 2015**

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

24 **EDGAR DIAZ**
25 **MALLERY & STERN**
26 **STATE COMPENSATION INSURANCE FUND**



27 **JFS/abs**

1 **SEPARATE CONCURRING AND DISSENTING OPINION OF COMMISSIONER ZALEWSKI**

2 I concur with the majority's decision regarding applicant's petition for reconsideration, but
3 dissent from the decision not to act upon defendant's contention that the WCJ should have used the CVC
4 to determine the permanent disability caused by applicant's IBS and GERD instead of using the additive
5 method.

6 The WCJ writes in his Defendant Report that he relied upon the reporting of the parties' AME
7 Dr. Hyman and relied upon the decision in *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)*
8 (2013) 78 Cal.Comp.Cases 213 (writ den.) (*Kite*) in reaching his decision to use the additive method to
9 determine the permanent disability caused by applicant's IBS and GERD. However, Dr. Hyman does not
10 actually endorse use of the additive method.

11 In his December 30, 2014 deposition, Dr. Hyman was directly asked if the CVC table or additive
12 method should be used to determine the permanent disability caused by applicant's IBS and GERD. As
13 shown by the deposition transcript, he responded as follows:

14 I have been deposed on this before. Clearly, the hypertension is a separate
15 issue than any of the others. So it should be considered additive. The GI
16 issues are separate from the orthopedic and the psychological although
there are some overlap. And *I tend to think that, when you have a body*
part involved, that those should be combined.

17 So I would think you would combine the disability for the upper and lower
18 GI, but I would leave that one. *It's such a close call. I would leave that*
one up to the trier of fact whether they think they really are. It's not like
19 they have gastritis and GERD, which I think would definitely overlap if
you are talking about upper and lower.

20 And if you say that hypertension and heart disease are two different
21 entities, I think you can make the argument that upper and lower
22 gastrointestinal problems should be additive, but *I'll leave that up to the*
trier of fact. In general, I tend to use the combined values table for the
23 *same body system*, but I definitely think that the hypertension and the
gastrointestinal and the orthopedic and the psych are separate from one
another. (Joint Exhibit Y4, 28:5-25, emphasis added.)

24 As can be seen, Dr. Hymen did not opine that the permanent disability caused by applicant's IBS
25 and GERD should be determined using the additive method. To the contrary, he generally would use the
26 CVC when the same body system is involved, and he specifically stated that he would "leave that up to

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1 the trier of fact.” In short, Dr. Hyman saw the question as a legal issue and not one that was subject to
2 his medical expertise and opinion.

3 Dr. Hyman’s equivocal opinion is not substantial medical evidence and it distinguishes this case
4 from the facts before the panel in *Kite*. In *Kite*, the Qualified Medical Evaluator (QME) relied upon by
5 the WCJ directly opined that the additive method would provide a more accurate depiction of the
6 applicant’s overall impairment than would be obtained by using the CVC to combine ratings for
7 applicant’s left and right hip impairments. The WCJ specifically noted his reliance upon the QME’s
8 opinion that using the additive method would be more accurate, writing in *Kite* as follows:

9 [The QME] points to the synergistic effect of one hip injury upon another
10 opposite hip injury. I agree. It appears logical that a person who is able to
11 compensate through the opposite member for an injury to one limb is to
some extent less disabled or impaired than someone who cannot so
compensate. (*Kite, supra*, 78 Cal.Comp.Cases at p. 216.)

12 In this case, unlike in *Kite*, there is no direct medical opinion that supports the use of the additive
13 method to rate applicant’s gastrointestinal problems. Instead, Dr. Hyman deferred to the trier of fact to
14 make that determination, and the CVC generally should be applied in the absence of evidence supporting
15 use of the additive method.

16 In all events, a panel decision is not binding precedent even if citable, and it has no stare decisis
17 effect. (*Farmers Ins. Group of Companies v. Workers’ Comp. Appeals Bd. (Sanchez)* (2002) 104
18 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers’ Comp. Appeals Bd.* (1999)
19 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745].) Each case must be addressed on its own facts
20 and evidence.

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1 In this case, the record does not support the use of the additive method, and I would apply the
2 CVC to rate the gastrointestinal permanent disability caused by applicant's IBS and GERD.



WORKERS' COMPENSATION APPEALS BOARD

K. Zalewski
KATHERINE A. ZALEWSKI, COMMISSIONER

10 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

11 **NOV 18 2015**

12
13 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
14 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

15 **EDGAR DIAZ**
16 **MALLERY & STERN**
17 **STATE COMPENSATION INSURANCE FUND**

18 **JFS/abs**

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1 Management System (EAMS). Any documents relating to the petitions for reconsideration lodged in
2 violation of this order shall neither be accepted for filing nor deemed filed.

3 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
4 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
5 form.¹ If, however, a proposed settlement is being filed, the petitioners for reconsideration should
6 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
7 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

8 **WORKERS' COMPENSATION APPEALS BOARD**

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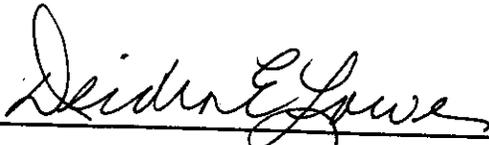
DEPUTY

NICK DIETRICH

11 I CONCUR,

12 

13 **KATHERINE ZALEWSKI**

14 

15 **DEIDRA E. LOWE**

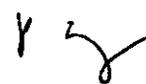


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18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **OCT 16 2013**

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

22 **EDGAR DIAZ**
23 **MALLERY & STERN**
24 **STATE COMPENSATION INSURANCE FUND**



25 **abs**

26 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,
27 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,
etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ7682048 [MF]; ADJ7682067

EDGAR DIAZ,

vs. STATE OF CALIFORNIA,
CORRECTIONS &
REHABILITATION PAROLE,
Legally Uninsured; STATE
COMPENSATION INSURANCE
FUND /CONTRACT SERVICES,
Adjusting Agency

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

ROBERT F. SPOERI

DATES OF INJURY: SPECIFIC: 01-20-2011; CT: 02-01-1998 TO 02-22-2011

**SECOND REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION FOR SECOND AMENDED FINDINGS AND AWARD ISSUED
JULY 30, 2015 (RESPONDING TO DEFENDANT)**

**I
INTRODUCTION**

- | | |
|-------------------------------------|--|
| 1. Applicant's Occupation: | Parole Officer, Group 490 |
| 2. Applicant's Age: | 40 |
| 3. Dates of Injury: | 01-20-2011; 02-01-1998 to 02-22-2011 |
| 4. Body Parts Injured: | Psyche, cardiac, GI, GERD, IBS and
multiple other body systems. |
| 5. Manner In Which Injury Occurred: | Repetitive trauma and specific event |
| 6. Identity of Petitioner: | Defendant |
| 7. Timeliness: | Petition was timely filed |
| 8. Verification: | Petition was verified per LC Section 5902 |

9. Date of issuance of Order:

07-30-2015

10. Petitioner's Contentions:

- a.) The WCJ erred by finding that the additive method should be used instead of the standard CVC method to combine the IBS and the GERD because the applicant failed to meet his burden of proof on this issue.
- b.) The WCJ erred because he used Dr. Gottschalk's reports to calculate the value of PD and Dr. Gottschalk had supposedly improperly used the ROM when he should have used the DRE method to calculate cervical and lumbar PD.
- c.) The WCJ erred in calculating the applicant's sleep disorder as part of the applicant's PD because under the AMA Guides the cause of a sleep disorder cannot be pain from an underlying injury.
- d.) The WCJ erred in relying on the reporting of Dr. Gottschalk in calculating PD in this case because his report is not substantial medical evidence in view of the fact that under the AMA Guides a sleep disorder must be a proven neurological condition associated with an increase of daytime sleepiness.
- e.) The WCJ erred in relying on the report of Dr. Gottschalk in calculating PD in this case because Dr. Gottschalk's report is not substantial medical evidence since Dr. Gottschalk should have analyzed sleep disorder as sleep apnea which is under Chapter 5 of the AMA Guides instead of Chapter 13 of the AMA Guides.

II. FACTS

The facts have already been set out in the Report and Recommendation the WCJ prepared in response to the applicant attorney's Petition For Reconsideration filed on 08-20-2015, and facts have also been well set out in prior pleadings and do not need to be repeated yet again.

III.

DISCUSSION OF PETITIONER'S CONTENTIONS

- a.) The WCJ erred by finding that the additive method should be used instead of the standard CVC method to combine the IBS and the GERD because the applicant failed to meet his burden of proof on this issue.

The defendant has argued that the applicant has failed to meet his burden of proof in rebutting the presumptively correct rating schedule which relies on the use of the Combined Values Chart (CVC) method rather than the additive method to combine injured body parts. In particular, the defendant argues that the applicant failed to show that the gastro-esophageal reflux disease (GERD) and the irritable bowel syndrome (IBS) should have been combined using the additive method, and that the WCJ erred by using the additive method to combine the GERD and the IBS.

The WCJ was relying on the evidence from Dr. Hyman, who was the internal agreed medical examiner (AME) in this case, including his deposition testimony where Dr. Hyman allowed the WCJ to use his discretion on whether to use the CVC or the additive method when combining the IBS and the GERD. The WCJ reviewed the deposition and other reporting of Dr. Hyman and felt that it was substantial medical evidence. Next, the WCJ reviewed the case of *Athens Administrators v. WCAB (Kite)* (W/D-2013) 78 CCC 213. The WCJ felt that the finding in the *Kite* case would support his decision to use the additive method for combining IBS and GERD and his further decision to use the CVC method to combine all of the remaining body parts.

In *Kite*, the applicant injured both hips and the panel QME noted that each hip was worth 20% whole person impairment (WPI). The doctor felt that the hips worked together in a special way. In a situation where someone had injured only one hip, he or she would ambulate by relying more on the other (i.e. the uninjured) hip to help out. But when someone had injured both hips, he or she could not rely on the other hip to help out. The other hip being injured therefore had a synergistic effect on the first hip. His exact words were: "there is a synergistic

effect of the injury to the same body parts bilaterally versus body parts from different regions of the body." The panel QME in *Kite* suggested that this was a special situation which would enable an Almaraz-Guzman rating to allow the additive method instead of the usual CVC method to be used.

Those who felt that the CVC was dead or dying were mistaken, because the standard set out in the *Kite* case appeared to require a special set of circumstances involving body parts that relied upon each other in a rather unique way to meet the test in *Kite* of having a synergistic effect and of course there would have to be substantial medical evidence which would support such a finding. The WCJ feels that in the instant case, we have exactly such a combination, but only for the IBS and GERD and not for the remaining body parts.

The defendant has conceded on page 5 of his Petition For Reconsideration that AME Hyman stated in his deposition that using the additive method to combine the GERD and IBS injuries might be appropriate because they are from the same body system (the digestive tract). Dr. Hyman allowed the WCJ to exercise his discretion on whether to apply the CVC or the additive method for combining GERD and IBS. The *Kite* standard appeared to the WCJ to be a good fit where we had two related body parts (the upper and the lower digestive tract) which relied upon each other in a unique way to work together. For this reason, with the blessing of substantial medical evidence from Dr. Hyman and legal authority from the *Kite* case, along with Labor Code 3202, the WCJ felt he was on solid ground in using the additive method for the IBS and the GERD.

This is in distinction to the opinions of Dr. Gottschalk on the alleged synergistic effect among the orthopedic and psychiatric body parts. The WCJ felt that while Dr. Gottschalk's reporting was indeed substantial medical evidence on the issue of finding injury and levels of PD for the non-internal and non-psychiatric body parts, that Dr. Gottschalk's reporting was not substantial medical evidence on the issue of his finding that there was a synergistic effect among all of the remaining body parts which would allow them to be combined using the additive method instead of the CVC. The WCJ felt and continues to feel that while Dr. Hyman's report concerning the IBS and the GERD met the *Kite* standard (and was substantial evidence on all

issues), that the report of Dr. Gottschalk failed to meet the *Kite* standard and was not substantial evidence on the synergistic effect issue.

In short, the WCJ feels that in the instant case his use of the additive method for GERD and IBS was justified.

- b.) The WCJ erred because he used Dr. Gottschalk's reports to calculate the value of PD and Dr. Gottschalk had supposedly improperly used the ROM when he should have used the DRE method to calculate cervical and lumbar PD.

Defendant has argued that Dr. Gottschalk should have used the Diagnosis-Related Estimate method instead of the Range of Motion (ROM) method to calculate permanent disability (PD) for the spine. Defendant has also argued that by using Dr. Gottschalk's reporting, the WCJ has relied upon evidence that is not substantial.

The WCJ feels that the defense attorney is trying to close the barn door after the horse has left the barn. On 05-19-2014 the WCJ issued his initial Findings of Fact and Award. In Finding Number Six the WCJ stated: "It is found that the reports of Dr. Gottschalk are indeed substantial evidence when addressing applicant's orthopedic, urological and sleep (arousal) injuries." When the defendant filed his Petition For Reconsideration against the Findings of Fact and Award of 05-19-2014, he did not challenge Finding Number Six about Dr. Gottschalk's reports being substantial medical evidence on the limited issues stated in Finding Number Six. The Board, when it remanded the case to the WCJ, did not disturb Finding Number Six. Therefore, it would appear that this Finding of Fact has never been timely challenged.

When the parties re-tried this case after the time the case was remanded, there was never any issue raised about whether the report of Dr. Gottschalk should have used the DRE method instead of the ROM method. Labor Code (LC) 5904 indicates that when an issue is not brought up timely in a Petition For Reconsideration, it is deemed waived. The WCJ feels that the defendant is not able to resurrect a DRE-ROM debate at this time. This issue should have

been addressed in a deposition of Dr. Gottschalk before the time of the mandatory settlement conference (MSC). It was not.

- c.) The WCJ erred in calculating the applicant's sleep disorder as part of the applicant's PD because under the AMA Guides the cause of a sleep disorder cannot be pain from an underlying injury.

In the reports of Dr. Gottschalk it seems that the causes of the applicant's sleep problems were multi-fold. The applicant was on several types of medication, he was weakened by diarrhea/IBS, GERD, and psychiatric concerns. He also had orthopedic limitations which may have contributed to problems with exhaustion and with sleep. There may have been other causes. On top of all of this there was pain from which the applicant suffered along with sleep problems. The exact role which pain played in the applicant's sleep problems is a subject which could have been investigated by means of a deposition which could have occurred before the time of the MSC. Unfortunately, there was no such deposition. If the defendant had had the type of diligent representation back then which it has now, there probably would have been far more thorough discovery before the MSC. But we should not allow the lack of appropriate discovery before the MSC to sidetrack the progress of this case.

The WCJ has already decided the issue of Dr. Gottschalk's report being substantial medical evidence for the limited purposes stated in Finding Number Six in the Findings of Fact and Award dated 05-19-2014 and this particular finding was never timely challenged. The WCJ feels that the report of Dr. Gottschalk has been appropriately rated for this sleep disorder which no one ever challenged by deposition before the MSC and no one ever challenged as being substantial evidence per the Award of 05-19-2014 and that the time to challenge the sleep disorder finding of Dr. Gottschalk has come and gone.

- d.) The WCJ erred in relying on the reporting of Dr. Gottschalk in calculating PD in this case because his report is not substantial medical evidence in view of the fact that under the AMA Guides a sleep disorder must be a proven neurological condition associated with an increase of daytime sleepiness.

The applicant in this case was never deposed. Therefore the information available to the defendant on the applicant's daytime sleepiness at different periods of time has been limited because of the defendant's decisions about pre-MSA discovery. On 05-19-2014 the WCJ indicated in Finding Number Two of his Findings of Fact and Award: "It is found that the applicant also suffered injury AOE/COE in the form of an arousal (sleep) injury" This finding was never timely challenged. This finding was never overturned on remand. As has been mentioned above, Finding Number Six about Dr. Gottschalk's reporting being substantial evidence (on relevant limited issues besides "synergistic effect" and the additive method) has never been timely challenged. Defendant's arguments about Dr. Gottschalk's opinions on the applicant's sleep disorder should have been raised before, and should not be entertained at the present time.

e.) The WCJ erred in relying on the report of Dr. Gottschalk in calculating PD in this case because Dr. Gottschalk's report is not substantial medical evidence since Dr. Gottschalk should have analyzed sleep disorder as sleep apnea which is under Chapter 5 of the AMA Guides instead of Chapter 13 of the AMA Guides.

While the defendant's argument is a creative one, the defense attorney should have deposed Dr. Gottschalk on this issue before the time of the MSA. This was not done. To attempt to speculate at this point in the litigation on how best to approach the sleep claim and whether to use Chapter 5 or Chapter 13 is an esoteric medical question which a team of Workers' Compensation physicians could debate at a seminar. It is not appropriate as a serious arguing point when the defendant failed to depose Dr. Gottschalk on this issue before the MSA, and failed to list this as an issue at the first trial, and failed to list this as one of their points of contention in their initial Petition For Reconsideration. They also failed to list this as a trial issue at any subsequent trial. It is being brought up for the first time at the eleventh hour of the litigation in this case. It is too late to argue this point when the matter is stare decisis.

We only have allegations that Dr. Gottschalk's reports are failing as substantial evidence after the time has passed for challenging the WCJ's particular finding on this issue per the Award of 05-19-2014. While some of the defense attorney's arguments raise interesting questions, these questions come in an untimely fashion. The WCJ does not see a *Blackledge* violation here.

IV.
RECOMMENDATIONS

For the reasons stated above, it is recommended the Petition For Reconsideration be denied.

DATE: 09-08-2015

Robert F. Spoeri

Robert F. Spoeri

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the
Official Address record on the above date.

BY: *L LAMB* 09/08/2015
L LAMB