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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARTHA IBRAHIM,

Applicant,

vs.

THE STATE OF CALIFORNIA,
DEPARTMENT OF CORRECTIONS AND
REHABILITATION, legally uninsured; STATE
COMPENSATION INSURANCE FUND,

Defendants.

Case Nos. ADJ1411734 (MON 0361062) MF
ADJ130407 (MON 0361061)
ADJ4416246 (MON 0361065)
ADJ1320492 (MON 0361064)
ADJ3297635 (MON 0361063)
ADJ7166968
ADJ8574761
ADJ9019769
ADJ9045920
(Marina del Rey District Office)

**OPINION AND DECISION
AFTER
RECONSIDERATION**

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

Defendant seeks reconsideration of the Joint Findings of Fact and Award, (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 14, 2016 wherein the WCJ found in pertinent part that: in addition the other body parts claimed, applicant sustained injury to her neck, thoracic spine, shoulders, elbows, wrists, hands and lumber spine on June 27, 2007 (ADJ130407) and on January 24, 2010 (ADJ166968); that applicant sustained injury to her knees, ankles, and feet on May 10, 2013 (ADJ9019769); and that applicant's industrial injuries caused a combined total of 84% permanent disability.¹

Defendant contends that Phillip Kanter, M.D., the orthopedic Agreed Medical Examiner (AME) did not properly address causation regarding the various dates of injury and as such the AME's opinions are not substantial evidence regarding injury in ADJ130407 and ADJ7166968.

¹ The Joint Findings of Fact regarding applicant's injury claims are more fully discussed in the Background section below.

1 Defendant also contends that the undivided award of permanent disability indemnity caused by
2 applicant's various injuries is not based upon substantial evidence.

3 We have received a Report and Recommendation on Petition for Reconsideration (Report) from
4 the WCJ recommending the Petition be denied. We have received an Answer from applicant.

5 We have considered the allegations in the Petition and the Answer and the contents of the Report.
6 Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration,
7 rescind the F&A and return the matter to the WCJ for further proceedings consistent with our decision.

8 BACKGROUND

9 Applicant was employed by defendant as a Youth Correctional Counsel starting in May of 2000.
10 Over the course of her employment applicant claimed the following injuries:

11 Injury to her heart, colon, and psyche and injury in the form of hepatitis, hypertension, diabetes,
12 and GERD, on December 6, 2003. (ADJ3297635)

13 Injury to her head, neck, low back, thoracic spine, both hands, both wrists, both elbows, both
14 shoulders, both ankles, to her heart, colon, upper and lower gastrointestinal system, and psyche and
15 injury in the form of hypertension, diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia
16 on March 7, 2007. (ADJ1411734)

17 Injury to her head, neck, back, both hands, both wrists, both elbows, both shoulders, both knees,
18 both ankles, to her heart, colon, her upper and lower gastrointestinal system, and psyche and injury in the
19 form of hypertension, diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia on June 27,
20 2007. (ADJ130407)

21 Injury to her head, neck, back, both hands, both wrists, both elbows, both shoulders, both knees,
22 both ankles, to her heart, colon, her upper and lower gastrointestinal system, and injury in the form of
23 hypertension, diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia on September 26,
24 2007. (ADJ4416246)

25 Injury to her head, neck, back, both hands, both wrists, both elbows, both shoulders, both knees,
26 both ankles, to her colon, her upper and lower gastrointestinal system, her urinary system, and psyche
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1 and injury in the form of hypertension, diabetes, GERD, sleep disorder, sexual dysfunction and
2 fibromyalgia during the period of May 1, 2000 through March 27, 2008. (ADJ1320492)

3 Injury to her neck, back, both hands, both wrists, both elbows, both shoulders, both knees, her
4 colon, her upper and lower gastrointestinal system, and psyche and injury in the form of hypertension,
5 diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia on January 24, 2010.
6 (ADJ7166968)

7 Injury to her head, neck, back, both hands, both wrists, both elbows, both shoulders, both knees,
8 both ankles, to her colon, her upper and lower gastrointestinal system, and psyche and injury in the form
9 of hypertension, diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia during the period
10 of February 1, 2012 through September 25, 2012. (ADJ8574761)

11 Injury to her neck, back, both hands, both wrists, both elbows, both shoulders, both knees, her
12 colon, her upper and lower gastrointestinal system, and psyche and injury in the form of hypertension,
13 diabetes, GERD, sleep disorder, sexual dysfunction and fibromyalgia on May 10, 2013. (ADJ9019769)

14 Injury to her head, neck, back, both hands, both wrists, both elbows, both shoulders, both ankles
15 to her heart, colon, her upper and lower gastrointestinal system, and psyche and injury in the form of
16 hypertension, diabetes, and GERD on June 12, 2013. (ADJ9045920)

17 Applicant was evaluated by the orthopedic AME, Phillip J. Kanter, M.D., the psychiatric AME,
18 Raymond J. Friedman, M.D., Ph.D., and the internal medicine AME, Richard M. Hyman, M.D.

19 In his initial report Dr. Kanter described factors of impairment as a result of injury to applicant's
20 cervical, thoracic, and lumbar spine, both shoulders, both elbows and both wrists. (Court Exh. V, Phillip
21 J. Kanter, M.D., December 2, 2011, pp. 40 – 41.) The doctor discussed apportionment of applicant's
22 disability caused by industrial and non-industrial factors. (Court Exh. V, pp. 39 – 40.) In a subsequent
23 report he stated that applicant had disability in both knees and both ankles due to the May 10, 2013 fall
24 which was a consequence of her industrial injuries. (Court Exh. W, Phillip J. Kanter, M.D., January 8,
25 2014, pp. 41 – 42.) Dr. Kanter discussed apportionment of applicant's lumbosacral spine disability
26 caused by industrial and non-industrial factors in the March 24, 2014 report. (Court Exh. X, Phillip J.
27 Kanter, M.D., March 24, 2014, p. 7.) In the most recent report the doctor stated that he had received and

1 reviewed medical records pertaining to twenty-one claim forms he was provided. (It appears that some of
2 the forms repeat previously identified dates of injury.) The doctor stated that when he examined applicant
3 she attributed her symptoms to the June 27, 2007 and January 24, 2010 injuries and that he was not aware
4 of any of the injuries identified in the documents he had recently received. (Court Exh. S, Phillip J.
5 Kanter, M.D., August 25, 2015, p. 5.)

6 The internal medicine AME, Dr. Hyman, evaluated applicant on January 24, 2012 and concluded
7 that applicant had 8% impairment due to her hypertension (35% work related), that she had 8%
8 impairment as a result of her diabetes (40% industrial), 15% impairment caused by her irritable bowel
9 syndrome (apportioned in the same manner as her orthopedic condition), and 15% impairment due to
10 esophageal reflux (50% due to anatomical and mechanical factors and 50% due to weight gain and
11 nonsteriodal anti-inflammatories). (Court Exh. Y, Richard M. Hyman M.D., January 30, 2012, pp. 6 – 7.)
12 In his April 9, 2014 supplemental report the doctor noted that he had been asked to address “*Benson*
13 apportionment” and stated, “With ten different claims of orthopedic injury ...the situation is inextricably
14 intertwined from an internal medicine standpoint.” (Court Exh. Z, Richard M. Hyman M.D. April 9,
15 2014, p.5). The doctor then addressed “nonindustrial” factors of apportionment and reiterated his
16 opinions stated in his prior report. (Court Exh. Z, p.5)

17 On February 9, 2012 applicant was evaluated by the psychiatric AME, Dr. Friedman; the doctor
18 took a history, reviewed medical records and concluded that applicant’s psychiatric condition was not
19 permanent and stationary. (Court Exh. T, Raymond J. Friedman, M.D., Ph.D., February 29, 2012, p.42.)
20 Dr. Friedman re-examined applicant on May 1, 2014 and in his May 5, 2014 report he stated that 25% of
21 applicant’s psychiatric disability was due to fibromyalgia, and he deferred “to appropriate medical
22 specialists” regarding causation of the fibromyalgia. The doctor then stated that 65% of applicant’s
23 psychiatric disability was due to “numerous and various specific and cumulative trauma injuries...The
24 various injuries are inextricably intertwined and it is simply not possible to apportion psychiatric
25 disability between the various...injuries.” (Court Exh. U, Raymond J. Friedman, M.D., Ph.D., May 5,
26 2014, p.43.)

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1 The parties proceeded to trial on March 3, 2016. The issues submitted for decision for each claim
2 included parts of body injured and permanent disability/apportionment. Defendant disputes the WCJ's
3 findings that applicant injured her neck, thoracic spine, shoulders, elbows, wrists, hands and lumbar spine
4 on June 27, 2007 (ADJ130407); that applicant injured her neck, thoracic spine, shoulders, elbows, wrists,
5 and lumbar spine on January 24, 2010 (ADJ166968); and that applicant has 84% permanent disability as
6 a result of her injuries.

7 DISCUSSION

8 It is settled law that when multiple industrial injuries combine to cause permanent disability, the
9 permanent disability caused by each injury must be separately awarded, unless the evaluating physician
10 cannot parcel out, with reasonable medical probability, the approximate percentages of the overall
11 permanent disability caused by each industrial injury. (*Benson v. The Permanente Medical Group* (2007)
12 72 Cal.Comp.Cases 1620 (Appeals Board *en banc*), affirmed sub nom. *Benson v. Workers' Comp.*
13 *Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].)

14 In the present matter, as noted above, the orthopedic AME Dr. Kanter, evaluated applicant and
15 referred only to the July 27, 2007 and January 24, 2010 dates of injury. The doctor stated his opinions
16 regarding industrial and non-industrial factors contributing to applicant's disability but he did not
17 indicate what portion of applicant's disability was caused by the July 27, 2007 injury and by the
18 January 24, 2010 injury. Also, Dr. Kanter was unaware of any other injury claims until he received
19 documents and records referred to in the August 25, 2015 report. The doctor gave no opinion regarding
20 whether any of the other injuries contributed in any way to applicant's overall orthopedic disability.
21 (Court Exh. S).

22 Turning to apportionment of disability caused by applicant's orthopedic, psychiatric and internal
23 injuries, the WCJ must determine what percentage of applicant's permanent disability was directly
24 caused by the industrial injuries and what percentage of disability was caused by other factors.
25 (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*).) Regarding the issues
26 of permanent disability and apportionment, applicant has the burden of establishing the percentage of
27 permanent disability caused by the industrial injury and defendant has the burden of establishing the

1 percentage of disability caused by other factors. (*Escobedo, supra.*) It is well established that the
2 employer has the burden of proof to establish apportionment of permanent disability with substantial
3 evidence. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107, 1114-1115 [71
4 Cal.Comp.Cases 1229].) Substantial medical evidence supporting apportionment must be based on
5 reasonable medical probability, correct history and legal theory and not speculation, and set forth
6 reasoning for the physician's opinion and not merely an unsupported conclusion. (*E.L. Yeager*
7 *Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928-929 [71
8 Cal.Comp.Cases 1687].)

9 Labor Code section 4663 provides that apportionment of permanent disability must be based on
10 causation, and requires the evaluating physician to address causation of permanent disability by finding
11 what approximate percentage of permanent disability was caused by the direct result of the industrial
12 injury, and what percentage was caused by other factors, both before and subsequent to the injury.
13 Section 4663(c) states that "In order for a physician's report to be considered complete on the issue of
14 permanent disability, the report must include an apportionment determination....If the physician is
15 unable to include an apportionment determination in his or her report, the physician shall state the
16 specific reasons why the physician could not make a determination...The physician shall then consult
17 with other physicians or refer the employee to another physician from whom the employee is authorized
18 to seek treatment or evaluation in order to make the final determination." (Lab. Code § 4663(c).)

19 The internal medicine and psychiatric AMEs stated that applicant's injury claims are
20 "inextricably intertwined" and neither doctor stated an opinion regarding disability caused by the
21 separate injuries. Also, it is noted that although the doctors stated their conclusions that the injury claims
22 are inextricably intertwined, neither doctor gave an analysis or explanation of the basis for their
23 respective opinions. Based upon the requirements of section 4663(c), when considered in conjunction
24 with the *Benson* decision, it appears that it may be appropriate for the AMEs in this matter to consult
25 with other physicians if they are unable to determine the amount of disability caused by applicant's
26 various industrial injuries.

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1 The Appeals Board has the discretionary authority to develop the record when the record does not
2 contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues.
3 (Lab. Code §§ 5701, 5906). "The principle of allowing full development of the evidentiary record to
4 enable a complete adjudication of the issues is consistent with due process in connection with workers'
5 compensation claims." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394, 62
6 Cal.Comp.Cases 924; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 63
7 Cal.Comp.Cases 261).

8 In this matter the only evidence submitted at trial was the medical-legal reports from the three
9 AMEs. As discussed herein, those reports are not substantial evidence regarding causation and
10 apportionment of applicant's permanent disability.

11 Accordingly, we rescind the F&A and return the matter to the WCJ for further development of the
12 record in compliance with Labor Code section 4663 and the *Benson* decision.

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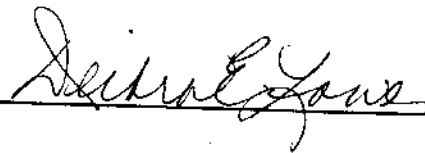
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1 For the foregoing reasons,

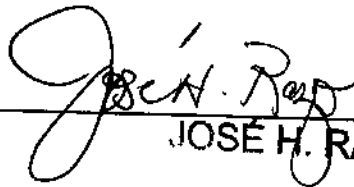
2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings of Fact and Award issued on July 14, 2016 is **RESCINDED** and the matter is
4 **RETURNED** to the WCJ for further proceedings consistent with this decision.
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6 **WORKERS' COMPENSATION APPEALS BOARD**
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11 DEIDRA E. LOWE

12 I CONCUR,

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14 **JOSÉ H. RAZO**
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18 **FRANK M. BRASS**
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20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **JUL 28 2017**

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

24 **MARTHA IBRAHIM**
25 **FORD & WALLACH**
26 **STATE COMPENSATION INSURANCE FUND**

27 **TLH/abs**

IBRAHIM, Martha