

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**
3

4 **SHERIEE BORELA,**

5 *Applicant,*

6 **vs.**

7 **STATE OF CALIFORNIA, DEPARTMENT OF**
8 **MOTOR VEHICLES, Legally Uninsured;**
9 **STATE COMPENSATION INSURANCE**
10 **FUND/STATE CONTRACT SERVICES,**
11 **Adjusting Agency,**

12 *Defendants.*

Case No. ADJ7181658
(Oakland District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

13 Defendant, State of California, Department of Motor Vehicles, legally uninsured, seeks
14 reconsideration of the Findings and Award, issued February 24, 2014, in which a workers' compensation
15 administrative law judge (WCJ) found applicant Sheriee Borela sustained 73% permanent disability as a
16 result of a May 29, 2009 industrial injury to her neck, back, chest, face, knees and psyche, while
employed as a Licensing Examiner.

17 Defendant challenges the WCJ's rating of applicant's permanent disability, contending the WCJ
18 erred in instructing the Disability Evaluation Unit to combine the ratings for applicant's orthopedic and
19 psychiatric impairments "in an additive fashion," rather than instructing the rater to use the method for
20 combining ratings provided in the Combined Values Chart of the 2005 Schedule for Rating Permanent
21 Disabilities. Applicant has filed an answer to defendant's petition, and the WCJ has prepared a Report
22 and Recommendation on Petition for Reconsideration.

23 Following our review of the record, and for the reasons set forth below, we shall grant
24 reconsideration, rescind the Findings and Award and return this matter for a new permanent disability
25 rating utilizing the Combined Values Chart (CVC) of the 2005 Schedule for Rating Permanent
26 Disabilities.

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I.

Applicant was injured in a motor vehicle accident May 29, 2009, while working as a Licensing Examiner by the Department of Motor Vehicles. The parties stipulated that applicant sustained injuries to her neck, low back, chest, face, knees and psyche. At trial on December 4, 2013, the issues for determination included permanent disability and apportionment. The medical evidence included reports from Agreed Medical Examiners, Dr. Steiner in Orthopedics and Dr. Sussman in Psychology.

Dr. Steiner provided WPI ratings for applicant's orthopedic disability, assigning a 7% WPI for the right knee, 18% WPI for the cervical spine and 13% WPI for the lumbar spine. He noted that applicant's "condition is neither complex nor extraordinary and the use of the standard methodology provides and [sic] accurate disposition of this case regarding the multiple body parts involved. This is in conjunction with the *Almaraz/Guzman II* decision." (Joint Exh. 101, 9/25/2012 Report, p. 20.)

Following the hearing, the WCJ issued rating instructions to the DEU, which set out the Whole Person Impairment (WPI) ratings from the AMEs. The WCJ also instructed the rater that "the orthopedic and psychiatric ratings are to be combined in an additive fashion, as there is no overlap with no Orthopedic add-on for pain."

The rater issued a rating of 73% permanent disability, after apportionment of the psyche impairment, representing the sum of the permanent disability for each body part. The WCJ did not explain the basis for her determination to add the separate ratings for each body part, rather than utilize the CVC.

II.

In her Report and Recommendation on Petition for Reconsideration, the WCJ first suggests that defendant waived its right to challenge the permanent disability rating since defendant did not formally object to the rating instructions when they were issued and did not request the opportunity to cross-examine the disability evaluator. The WCJ suggests that a party may not seek reconsideration to object to rating instructions if an objection is not timely raised prior to the issuance of a final order.

While defendant may not have moved to strike the rating instructions, defendant's failure to move to strike does not preclude defendant from challenging the ultimate rating, as the final permanent

1 disability rating must be based on substantial evidence, and must be subject to review on reconsideration.

2 As to the merits of defendant's petition, we concur with defendant that the WCJ abused her
3 discretion by not applying the CVC to rate applicant's permanent disability. Defendant argues that the
4 WCJ should have used the CVC to reach the final permanent disability rating, rather than simply adding
5 each impairment, and that she abused her discretion by failing to provide a legal justification for not
6 following the CVC in the permanent disability rating schedule.

7 We note that the AME's opinion did not state that adding the orthopedic and psychiatric
8 permanent disability would be a more accurate measure of applicant's overall level of permanent
9 disability, as opposed to combining the orthopedic and psychiatric permanent disability under the CVC.

10 This method was approved in *EBMUD v. Workers' Compensation Appeals Board (Kite)* (2013)
11 78 Cal.Comp.Cases 213, where the Qualified Medical Evaluator recommended the addition of the
12 separate ratings for the right and left hips, as the best way to combine the impairments, rather than using
13 the CVC, which would reduce the overall permanent disability rating.

14 However, a significant difference between the instant case and the facts in *Kite* is the role of the
15 medical evaluator in determining the most accurate method for combining the separate ratings. In *Kite*, it
16 was the QME who opined that there was a "synergistic effect of the injury to the same body parts
17 bilaterally versus body parts from different regions of the body. In this case, it is my opinion that the best
18 way to combine the impairments to the right and left hips would be to add them versus using the
19 combined values chart, which would result in a lower whole person impairment." (2012 Cal. Wkr. Comp.
20 P.D. LEXIS 640.) Here, Dr. Steiner indicated that applicant's "condition is neither complex nor
21 extraordinary" and does not recommend the combination of the separate disabilities in the manner
22 applied by the WCJ.

23 The PDRS provides that the CVC is "generally" used to combine multiple disabilities, but that
24 other methodology may be used depending upon the relevant circumstances. Here, the WCJ did not
25 articulate a reason for not following the rating schedule, but asserts in her Report and Recommendation
26 on Petition for Reconsideration that the use of the CVC is not mandatory because the AME did not apply
27 a standard scheduled rating, and thus the WCJ should not be constrained to apply a standard combination

1 of ratings using the CVC.

2 In the absence of medical evidence that justifies an alternative approach, such as the QME's
3 opinion in *Kite, supra*, there is no medical justification for the WCJ's rating instruction. Under
4 *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 [en banc], the WCJ's role in the context
5 of a formal rating is to frame instructions, based on substantial medical evidence, that specifically and
6 fully describe whole person impairments to be rated. The WCJ appropriated the role of the medical
7 expert when she made a medical determination as to how to combine the separate impairments in the
8 absence of specific medical evidence to substantiate her choice.

9 Accordingly, we shall grant reconsideration, rescind the Findings and Award and return this
10 matter to the trial level for a new permanent disability rating using the Combined Values Chart.

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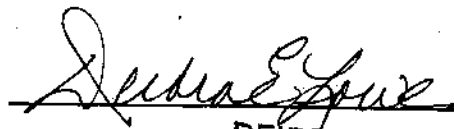
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1 For the foregoing reasons,

2 **IT IS ORDERED** that the March 17, 2014 Petition for Reconsideration be, and hereby is,
3 **GRANTED**, and as our Decision After Reconsideration, the Findings and Award, issued February 24,
4 2014, is **RESCINDED**, and the matter shall be **RETURNED** to the trial level for further proceedings
5 and a new final decision.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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10 **DEIDRA E. LOWE**

11 **I CONCUR,**

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15 **FRANK M. BRASS**

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17 
18 **MARGUERITE SWEENEY**



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

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22 **MAY 13 2014**

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

25 **SHERIEE BORELA**
26 **BOXER & GERSON**
27 **STATE COMPENSATION INSURANCE FUND**

SV/jp

BORELA, Sheriee

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

CASE NUMBER: ADJ7181658

SHERIEE BORELA

-vs.-

DMV;

SCIF STATE EMPLOYEES

ROHNERT PARK;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Deborah Lieberman

DATE: 3/18/14

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Defendant filed a Petition for Reconsideration arguing against my rating instructions and the formal rating in which ratings for the separate body parts injured were calculated in an additive fashion, without use of the Multiple Disability Tables. There was no objection to the Rating Instructions or Formal Rating and no request to cross-examine the rater. Therefore, I believe that his current objection is untimely and Defendant in failing to object to the instructions and rating (issued on 1/29/14 well prior to the 2/25/14 Findings and Award) forfeited its opportunity to object to the formal rating instructions. There is a statutory period to object to Rating Instructions and/or TO request cross-examination of the DEU Rater, and this time period was allowed, and indeed, exceeded, as I awaited any objections, which were not forthcoming. A Petition for Reconsideration is not the proper remedy for an objection to rating instructions. On this basis alone I recommend denying the Petition for Reconsideration.

Defendant argues that I did not discuss my Rating Instructions, per se, in my Opinion on Decision. Indeed, in this case with dueling Vocational Reports and lengthy sub-rosa video, my Opinion largely addresses these issues and that of credibility. I found that the Applicant did not successfully rebut the DFEC rating schedule and issued instructions in accord with the AME evaluators. There is no statutory requirement for what an Opinion on Decision must contain, and indeed many Judges write much briefer ones than that in the present case. I discussed the salient issues in the case, the exhibits, testimony, subrosas, credibility and the AME reports. The Opinion on Decision was certainly adequate and appropriate.

Dr. Steiner was the Orthopedic AME and issued numerous reports. Notably, Dr. Steiner assessed permanent disability using an Almaraz based rating, and not the scheduled ratings. The

computation of such a rating when it addresses multiply injured body parts, is not addressed in the Rating Schedule. I believe that on this basis alone Defendant's objection fails. The fact that this is a rating which stands in rebuttal to the standard AMA scheduled ratings would free it from any constraints on/or mandates for use of the Multiple Disabilities Table. The use of the table was never mandatory, although advised in the majority of cases. The Defendant cites no authority for mandatory use of the Multiple Disability Tables.

Given all of the above, and most importantly the fact that there was no timely objection to the Rating Instructions or Formal Rating, I believe my decision should be upheld.

RECOMMENDATION: DENY RECONSIDERATION

DATE 3/18/14



Deborah Lieberman
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

ABACI AND MASSEY PAIN MANAGEMENT, US Mail
BOXER GERSON OAKLAND, US Mail
DMV, US Mail
MEDICAL COLLECTION BENICIA, US Mail
SCIF STATE EMPLOYEES ROHNERT PARK, US Mail
SHERIEE BORELA, US Mail

On: ☐ parties and lien claimants present
☒ all parties as shown on Official Address Record

NOTICE TO:

Pursuant to Rule 10500, you are designated to serve this/these document(s) forthwith on all parties shown on the Official Address Record.

ON: 3.18.14

BY: 

SHERIEE BORELA