

#### 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.<sup>13</sup>

#### 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.<sup>14</sup> In part, this disability was due to sleep issues.<sup>15</sup> For headaches, Dr. Richman found 2% WPI, with 30% apportionment to nonindustrial factors of disability, and industrial causation entirely to the specific injury.<sup>16</sup>

#### 6. Rheumatology

Dr. Rodney Bluestone served as the parties' rheumatological AME. He concluded that applicant had no industrial injury on a rheumatological basis.<sup>17</sup> Dr. Seymour Levine opined differently, finding permanent disability due to sleep and arousal disorder<sup>18</sup>.

#### 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.<sup>19</sup>

---

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> JX 2, p. 161.

<sup>16</sup> JX 30, pp. 4-5.

<sup>17</sup> Defense Exhibit (DX) 3, p. 19.

<sup>18</sup> Applicant Exhibit (AX) 2, pp. 31-32

<sup>19</sup> JX 1.

## 8. Psyche

Dr. Myron Nathan served as the parties' psyche AME. He found that applicant sustained 14% WPI.<sup>20</sup> Regarding apportionment, Dr. Nathan found 10% apportionment to nonindustrial factors of disability.<sup>21</sup> 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.”<sup>22</sup>

### 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.<sup>23</sup> 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.<sup>24</sup> It would appear, from this AME's record review, the correct end-date for the CT period would be March 31, 2009.<sup>25</sup>

---

<sup>20</sup> JX 7, pp. 138-139.

<sup>21</sup> *Id.*, p. 54.

<sup>22</sup> *Id.*

<sup>23</sup> JX 11, p. 35.

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

<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

*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:<sup>28</sup>

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.

---

<sup>26</sup> See Petition, p. 3, ll. 6-16.

<sup>27</sup> *Id.*, p. 3, ll. 17-23.

<sup>28</sup> 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.<sup>29</sup>

### . 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.<sup>30</sup>

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

---

<sup>29</sup> Minutes of Hearing, p. 6, ¶ 5.

<sup>30</sup> 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.)<sup>31</sup>

#### 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.<sup>32</sup>

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).<sup>33</sup>

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.<sup>34</sup> Regarding this argument, the judge notes that it appears that the respiratory injury is separate, due to mold exposure.<sup>35</sup> 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.

---

<sup>31</sup> As noted above, defendant challenges this finding.

<sup>32</sup> Petition, p. 4, ll. 7-25.

<sup>33</sup><sup>33</sup> *Id.*, p. 5, ll. 17-28.

<sup>34</sup> *Id.*, p. 6, ll. 9-14.

<sup>35</sup> 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.