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