

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DARLENE GIST, *Applicant*

vs.

**COUNTY OF LOS ANGELES, DEPARTMENT OF PUBLIC SOCIAL SERVICES,
Permissibly Self-Insured, Adjusted by SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10065606 (MF), ADJ11140372, ADJ15674888
Long Beach District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration in order to study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

¹ Commissioner Sweeney, who was on the panel that issued this decision, no longer serves on the Appeals Board. Another panelist was appointed in her place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 17, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 27, 2023

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

**DARLENE GIST
HIDNDEN & BRESLAVSKY
ZGRABLICH & MONTGOMERY**

AS/mc

I certify that I affixed the official seal of the
Workers' Compensation Appeals Board to this
original decision on this date. *mc*

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

The following information shall be contained in the introduction of the report:

Defendant¹ has filed a timely and verified petition for reconsideration (Petition) to this judge's decision on July 1, 2022. That decision, which was served on June 17, 2022, issued a 76% award without *Benson*² apportionment amongst a specific injury and a cumulative injury. Defendant has several complaints about the decision, and urges separate awards with much lower permanent disability.

Applicant³ has filed a timely and verified answer (Answer) to the Petition. Applicant generally supports the decision, although she also urges that the award should be increased due to a mistaken nonindustrial apportionment for her psyche injury. (Defendant urges that there should be no award on permanent disability at all for psyche.)

As both parties have urged some action by the appeals board, this judge has submitted this report and cases for the board's review. However, this judge recommends that the board vacate the findings and award, and remand this matter for further development of the record. As will be summarized, both parties are arguing about complex issues over which there is no substantial medical evidence to make final decisions.

¹ COUNTY OF LOS ANGELES, DEPARTMENT OF PUBLIC SOCIAL SERVICES, permissibly self- insured, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, INCORPORATED (SEDGWICK 51350 ONTARIO), as represented by ZGRABLICH MONTGOMERY WOODLAND HILLS.

² *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [74 Cal. Comp. Cases 113].

³ DARLENE GIST, represented by HINDEN BRESLAVSKY LOS ANGELES, sustained injury to both elbows, both hands, dental, cervical spine, lumbar spine, respiratory system, headaches, gastrointestinal system, to at least two dates of injury, as found and as alleged by the parties.

II.

FACTS

A. Procedural History, Especially as to Cumulative Trauma Claims

Applicant has filed six cases over the years regarding the injuries at issue now. Of these cases, three of them were dismissed at trial by agreement of the parties:

- ADJ7724606, with alleged date of injury 01/01/1998 - 09/14/2010.
- ADJ7719288, with alleged date of injury 01/01/1998 - 09/14/2010.
- ADJ8149230, with alleged date of injury 01/01/1998 - 03/31/2009.

Of the remaining three cases, the parties agreed that applicant sustained a specific date of injury on July 29, 2015 (Case No. ADJ10065606). They disagreed on which of the remaining two cases should be controlling regarding the correct cumulative injury period: August 14, 2014 to November 15, 2017 (Case No. ADJ11140372), as defendant urged, or 1998 to June 6, 2012 (Case No. ADJ15674888), as applicant urged. In the end, this judge found that applicant was closer to being correct on the cumulative trauma period, although it ended on March 31, 2009.⁴

B. Challenged Decision

As confirmed by applicant's brief testimony at trial, her credibility with the doctors is not in dispute. At issue is how to interpret and apply the significant amount of medical evidence in this matter. It should be noted that the parties have engaged in substantial medical discovery, involving numerous doctors for various body parts. The underlying decision relied quite a bit on the parties' post-trial briefing, in order to attempt to ascertain points of agreement and disagreement.

⁴ Even this finding of the judge was pushing the limits of the medical evidence presented. And it will be noted below that, tentatively, there appears to be multiple cumulative trauma periods amongst the various body parts at issue, without clear evidence on what they ought to be.

Below is a restatement of this judge's opinion on decision.

C. Summary of Evidence on Body Parts

1. Orthopedic

Dr. Peter Newton served as the parties' orthopedic agreed medical examiner (AME), evaluating applicant's lumbar and cervical spine, and both elbows and hands. He found that applicant sustained 7% whole person impairment (WPI) to the lumbar spine;⁵ 7% WPI to the cervical spine;⁶ 3% WPI to the right upper extremity; and 3%⁷ WPI to the left upper extremity.⁸ Regarding apportionment, Dr. Newton found the disability entirely industrial, and he could not apportion amongst the injury dates.⁹

2. Gastrointestinal

Dr. Arthur Lipper served as the parties' internal AME. Regarding applicant's gastrointestinal (GI) issues, he found 6% WPI to the upper GI, with 75% apportionment industrial factors of causation, and noted that he could not apportion amongst the injury dates.¹⁰ For the lower GI, Dr. Lipper found 5% WPI, with no apportionment to nonindustrial factors, and again could not apportion amongst the injury dates.¹¹

3. Respiratory

Dr. Lipper also evaluated applicant for respiratory issues. He found 10% WPI, without industrial apportionment, and likewise could not apportion amongst dates of injury.¹²

⁵ Joint Exhibit (JX) 11, p. 37.

⁶ *Id.*

⁷ JX 19, p. 16.

⁸ *Id.*

⁹ JX 11, pp. 36-37. Defendant disagrees with this assessment, as will be explained later.

¹⁰ JX 20, pp. 2-4.

¹¹ *Id.*

¹² *Id.*; see also JX 27, p. 2. As defendant argues and as noted below, defendant urges that this is instead a cumulative injury separate from other injuries.