

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. ADJ2970937 (VNO 0504765)**

5 **JOEL DE LA CERDA,**

6 *Applicant,*

7 **vs.**

8 **MARTIN SELKO & CO.; STATE
9 COMPENSATION INSURANCE FUND,**

10 *Defendants.*

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

11 Applicant, Joel De La Cerda, seeks reconsideration of the Findings of Fact and Award, issued
12 September 13, 2017, in which a workers' compensation administrative law judge (WCJ) found applicant
13 sustained 93% permanent disability, after apportionment, as a result of a June 27, 2003 industrial injury to
14 his neck, low back, right shoulder, cardiovascular system (hypertension), gastrointestinal system (GERD),
15 pulmonary system (RAD), central nervous system (sleep disorder), neurological system (headaches) and
16 psyche, while employed as a laborer by Martin Selko & Company.

17 Applicant contests the WCJ's award of 93% permanent disability, contending that the WCJ should
18 have followed the opinion of the Agreed Medical Examiner (AME), who stated that to most accurately
19 calculate the extent of applicant's permanent disability, applicant's impairment ratings should be added
20 rather than combined using the Combined Value Chart (CVC). Applicant asserts that the opinion of the
21 AME would result in a finding of 100% permanent disability. Applicant further argues that the WCJ should
22 have followed the opinion of the vocational expert who found that due to the effects of his industrial injury
23 applicant was unable to benefit from vocational rehabilitation services and is permanently totally disabled.

24 Defendant has not filed an Answer to applicant's Petition for Reconsideration. The WCJ has
25 prepared a Report and Recommendation on Petition for Reconsideration, in which he recommends that
26 applicant's Petition be denied.

27 For the reasons set forth herein, we will grant reconsideration, rescind the WCJ's determination

1 and return this matter to the trial level for further clarification by the AME of the reason he states that
2 applicant's impairment ratings should be added to accurately reflect his permanent disability.

3 I.

4 Applicant sustained an admitted injury to his neck, low back and right shoulder on June 27, 2003,
5 and claimed injury to multiple internal systems, as a consequence of his admitted injury. The issues of the
6 contested body parts, permanent disability and apportionment were tried on March 27, 2017. Applicant
7 testified that his injury occurred when he fell through plywood and dropped six to ten feet. He required
8 four surgeries, including the placement, and later removal, of a metal plate in his neck. He further testified
9 that he sustained internal injuries from the medications required to treat his injury, and lives with constant
10 pain and physical limitations. He was unable to complete a vocational rehabilitation program in computer
11 repair due to his physical condition.

12 Applicant was evaluated by AMEs in psychiatry, orthopedics and internal medicine. The WCJ
13 relied upon their impairment ratings to find applicant sustained 93% permanent disability as a result of his
14 industrial injury and the internal medical complications that arose thereafter. In doing so, the WCJ
15 discounted the opinion of Dr. Reynolds, the AME in internal medicine, who advised that in rating
16 applicant's impairments, the impairments should be added together rather than combined using the CVC,
17 because "the combination of his orthopedic, gastrointestinal, sleep and headache impairments causes
18 greater disability/impairment than what would be calculated by using the CVC. Hence, adding these
19 individual impairments is more accurate."

20 Dr. Reynolds stated:

21 This is an unfortunate gentleman whose present medical condition was
22 undoubtedly caused at least in part by the several well-meaning surgical
23 procedures that were accomplished in order to treat the effects of his 6/27/04
24 [sic] injury. However, with the extent of the orthopedic disabilities described
25 by Dr. Roth, his symptoms of RAD, GERD, sleep disorder and tension
26 headache have a much greater overall impact on Mr. De La Cerda's activities
27 of daily living than would be accounted for by using the AME Guides
Combined Value Chart (CVC) in order to determine an overall impairment
rating.

In effect, the combination of his orthopedic, gastrointestinal, sleep and
headache impairments causes greater disability/impairment than what would
be calculated by using the CVC. Hence, adding these individual impairments

1 is more accurate.
2 (Jt. Exh. D, 4/27/15 Report of Dr. Reynolds, p. 3.)

3 In his Opinion on Decision, the WCJ rejected Dr. Reynolds' opinion and used the CVC for rating
4 impairments for all parts of the body, on the basis that following Dr. Reynolds would result in a permanent
5 disability rating that exceeds 100%.

6 The WCJ also rejected the opinion of the vocational expert, Mr. Vega, who concluded that due to
7 his industrial impairments, applicant was not feasible for vocational rehabilitation and is unable to return
8 to the open labor market, having lost all of his earning capacity. Due to disparities in Mr. Vega's reporting
9 and applicant's testimony about his vocational testing, the WCJ concluded that Mr. Vega's report did not
10 constitute substantial evidence to support his opinion.

11 In response to applicant's argument that the opinion of Dr. Reynolds should be followed regarding
12 the rating method that most accurately reflects applicant's impairment, the WCJ stated in his Report and
13 Recommendation on Petition for Reconsideration that the AME's opinion should be rejected because it
14 would lead to a permanent disability rating in excess of 100%.

15 The WCJ further explained that he would not follow the AME's opinion against the use of the CVC
16 because the AME "failed to give an adequate explanation for how there was a synergistic effect between
17 body parts both within and outside his expertise," and that the AME's justification was not sufficient to
18 establish a synergistic effect.

19 While we do not find error in the WCJ's determination that the opinion of the vocational expert
20 does not constitute substantial evidence to support applicant's *LeBoeuf* argument, we do not concur with
21 the WCJ's refusal to follow the AME's opinion on adding applicant's impairments because it would result
22 in a permanent disability rating greater than 100%.

23 The additive method recommended by Dr. Reynolds was approved in *EBMUD v. Workers'*
24 *Compensation Appeals Board (Kite)* (2013) 78 Cal.Comp.Cases 213, where a Qualified Medical Evaluator
25 recommended the addition of separate ratings for the right and left hips, as the best way to combine the
26 impairments, rather than using the CVC, which would reduce the overall permanent disability rating. The
27 QME in *Kite* opined that there was a "synergistic effect of the injury to the same body parts bilaterally

1 versus body parts from different regions of the body. In this case, it is my opinion that the best way to
2 combine the impairments to the right and left hips would be to add them versus using the combined values
3 chart, which would result in a lower whole person impairment.” (2012 Cal. Wkr. Comp. P.D. LEXIS 640.)

4 The PDRS provides that the CVC is “generally” used to combine multiple disabilities, but that
5 other methodology may be used depending upon the relevant circumstances. It is the role of the medical
6 expert to make a medical determination as to how to combine the separate impairments. Here, one of the
7 WCJ’s reasons for not following the AME’s recommendation was that it would impermissibly lead to a
8 rating greater than 100% permanent disability. However, this concern is not justified, since applicant
9 cannot receive a permanent disability award for a single injury greater than 100%. (See *Johns-Manville*
10 *Products Corporation v. Workers’ Comp. Appeals Bd. (Carey)* (1978) 87 Cal.App.3d 740 [43
11 Cal.Comp.Cases 1372]; *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Hurley)* (1977) 70
12 Cal.App.3d 599 [42 Cal.Comp.Cases 481].)

13 That the AME did not use the term “synergistic” to advocate for the use of the additive rating
14 method is not determinative of the validity of using that method. The impairments may be added if
15 substantial medical evidence supports the physician’s opinion that adding them will result in a more
16 accurate rating of the applicant’s level of disability than the rating resulting from the use of the CVC. The
17 AME’s opinion on the most accurate method for rating applicant’s impairment should be followed if he
18 provides a reasonably articulated medical basis, absent good reason to find that opinion unpersuasive.
19 (*Power v. Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d. 775 [51 Cal.Comp.Cases 114, 117.]

20 However, to the extent the WCJ does not find the justification Dr. Reynold’s articulated for adding
21 applicant’s impairments to be adequate, the AME should be provided an opportunity to clarify the basis
22 for his rating recommendation. Accordingly, we will grant reconsideration, rescind the Findings of Fact
23 and Award, and return this matter so the parties may obtain a supplemental report or deposition from Dr.
24 Reynolds.

25 / / /

26 / / /

27 / / /


1 For the foregoing reasons,

2 **IT IS ORDERED** that the October 6, 2017 Petition for Reconsideration be, and hereby is,
3 **GRANTED**, and as our Decision After Reconsideration, the Findings of Fact and Award, issued
4 September 13, 2017, is **RESCINDED**, and the matter shall be **RETURNED** to the trial level for further
5 proceedings consistent with this opinion and for a new final decision.

6
7 **WORKERS' COMPENSATION APPEALS BOARD**

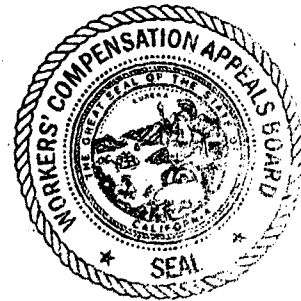
8
9
10
11 
12 _____
13 **MARGUERITE SWEENEY**

11 **I CONCUR,**

12
13 
14 _____

15 **DEIDRA E. LOWE**

16 **CONCURRING, BUT NOT SIGNING**



18 **FRANK M. BRASS**

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

21
22 **NOV 21 2017**

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

25 **JOEL DE LA CERDA**
26 **ROWEN, GURVEY & WIN**
27 **STATE COMPENSATION INSURANCE FUND**

27 **SV/pc**

DE LA CERDA, Joel