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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

NOHEMI TAINA,

Applicant,

vs.

**COUNTY OF SANTA CLARA/VALLEY
MEDICAL CENTER; PERMISSIBLY SELF-
INSURED,**

Defendant.

Case No. ADJ8268219
(San Jose District Office)

**OPINION AND ORDER
DENYING DEFENDANT'S
PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the April 16, 2018 Findings And Award of the workers' compensation administrative law judge (WCJ), who found in pertinent part that applicant sustained industrial injury to her neck, both shoulders and psyche while employed by defendant as a surgical aide on October 4, 2011, causing 87% permanent disability and need for future medical treatment.

Defendant contends that the WCJ erred in determining the level of applicant's overall permanent disability by adding the percentages of permanent disability caused by her orthopedic (48%) and psychiatric (39%) conditions instead of compressing those percentages by using the Combined Values Chart (CVC) in the 2005 Permanent Disability Rating Schedule (2005 PDRS) to combine them. The CVC is based upon the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) formula $A + B(1-A)$, which is used to assure that the result of combining multiple whole person impairment (WPI) values never exceeds 100.¹

¹The AMA Guides require that overall WPI be expressed on a scale of 0-100. (AMA Guides, Definitions, page 600 ["the formula $A + B(1-A)$ combines values of A and B, which ensures that the summary value will not exceed 100% of the whole person".]) This is unlike the scale of permanent disability, where payment of indemnity stops at 100% even if the total value of multiple permanent disability percentages exceeds 100% or the impairment increases. (See, 2005 PDRS pps. 1-2 and 1-3 [permanent disability is "rated" on a "range from 0% to 100%," with 0% signifying "no reduction of earning capacity, while 100% represents permanent total disability... a level of disability at which an employee has sustained a total loss of earning capacity"]; *Greco v. Santa Rosa City Schools* (2005) 70 Cal.Comp.Cases 1512 [2005 Cal. Wrk. Comp. LEXIS 274] (writ den.) [prior award of 100% permanent disability precludes additional compensation for subsequent increased impairment].)

1 An answer was received from applicant.

2 The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report)
3 recommending that reconsideration be denied.

4 Reconsideration is denied for the reasons expressed by the WCJ in his Report, which is
5 incorporated by this reference, and for the reasons below. The agreed medical evaluators (AMEs)
6 determined that the permanent disability caused by applicant's orthopedic injury and the injury to her
7 psyche do not overlap and that adding those separate values provides an accurate overall permanent
8 disability rating.

9 BACKGROUND

10 The WCJ provides the background of the case in his Report, as follows:

11 The Applicant suffered a significant injury to her neck and shoulders on
12 10/4/2011. As a compensable consequence of this injury, she developed
13 psychiatric sequelae. The neck and shoulder injuries were assessed by
14 [Agreed Medical Evaluator (AME)] David Pang, MD, who rated those
15 disabilities at 48%. There is no dispute at present about the accuracy of
16 this assessment. The psychiatric consequences were evaluated by [AME]
17 Joshua Kirz MD, who rated them at 39%, and this assessment is also
18 agreed to have been accurate. The sole disagreement was whether the
19 overall level of [permanent disability (PD)] was best represented by
20 combining the two [values using the CVC] (which would produce 68%
21 PD) or adding the two, (which would produce 87% PD).

22 Applicant's attorney asked Dr. Kirz to comment on whether it was more
23 accurate [to add] these impairments, rather than combine them. Dr. Kirz
24 responded at page 24 of his report dated 9/21/2017 (Joint Exhibit EE),
25 stating;

26 'Mr. Johnson raised the issue of adding versus combining
27 Ms. Taina's physical and psychiatric impairment.

28 'I do not perceive any overlap between the physical and
29 psychiatric impairments in this case. For example, Ms.
30 Taina's orthopedic factors limit her physical capacity to
31 work, whereas her psychiatric factors limit her mental
32 capacity to work.

33 'I have been careful to avoid any overlap. For example, Ms.
34 Taina's sleep does not appear to be disrupted by depression,
35 rumination, or worry, but rather only by pain and
36 positioning. As such, I defer on sleep impairment to the
37 physical evaluator.

38 'Otherwise, the physical and psychiatric impairments appear
39 additive, as opposed to compressive'

1 DISCUSSION

2 For injuries occurring before January 1, 2013, like the October 4, 2011 injury in this case, section
3 4660 provides for use of the 2005 PDRS to determine the overall level of permanent disability. As part
4 of that process, a physician is to use the AMA Guides to determine the WPI caused by the injured
5 worker's several conditions. (Lab. Code, § 4660.)

6 As defined on page two of the AMA Guides, "impairment" means "a loss of use, or derangement
7 of any body part, organ system, or organ function." In contrast to *impairment*, the AMA Guides define
8 *disability* on page eight as follows: "an alteration of an individual's capacity to meet personal, social, or
9 occupational demands or statutory or regulatory requirements because of impairment."² Unlike WPI that
10 measures the psychological and physical effects of an injury, "permanent disability payments are
11 intended to compensate workers for both physical loss and the loss of some or all of their future earning
12 capacity." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases
13 565]; see also, *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48
14 Cal.Comp.Cases 587] (*LeBoeuf*) [a disability rating, "should reflect as accurately as possible an injured
15 employee's diminished ability to compete in the open labor market"].)

16 The distinction between impairment and disability is recognized in section 4660(b)(1), which
17 provides that the "nature of the physical injury or disfigurement" be based upon "the descriptions and
18 measurements of physical *impairments* and the corresponding percentages of *impairments* published" in
19 the AMA Guides. (Italics added.)

20 To assure accuracy in the calculation of WPI, a physician may, with proper explanation, deviate
21 from the percentages contained in the applicable chapter of the AMA Guides in order to better express
22 the injured worker's level of WPI in light of the physician's skill, knowledge, and experience, as well as
23 considerations unique to the injury and information derived from extrinsic resources. (*Almaraz v.*

24
25 ² As further explained on pages eight and nine of the AMA Guides, an impairment evaluation is "only one aspect of disability
26 determination," and an individual with a medical impairment can have "no disability for some occupations, yet be very
27 disabled for others." For that reason, the AMA Guides and WPI are "not intended to be used for direct estimates of work
disability," and "[i]mpairment percentages derived according" to the AMA Guides criteria, "do not measure work disability"
and, "it is inappropriate to use the [AMA Guides'] criteria or ratings to make direct estimates of work disability."

1 *Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases
2 1084 (Appeals Board en banc) (*Almaraz/Guzman*) as affirmed by the Court of Appeal in *Milpitas Unified*
3 *School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases
4 837]; *Nickell v. PKB Investments, Inc.* (June 3, 2013, ADJ7800258, ADJ7800270) [2013 Cal. Wrk.
5 Comp. P.D. LEXIS 274] (panel dec.).)

6 Similarly, in finding permanent disability the WCAB applies its expertise to determine an
7 accurate rating based upon the entirety of the record. (*New Amsterdam Cas. Co. v. Industrial Acc. Com.*
8 (1951) 108 Cal.App.2d 502 [16 Cal.Comp.Cases 312] [determination of percentage of permanent
9 disability sustained by an employee presents a question of fact]; *U.S. Auto Stores v. Workers' Comp.*
10 *Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469, 476 [36 Cal.Comp.Cases 173]; *Dalen v. Workmen's Comp.*
11 *Appeals Bd.* (1972) 26 Cal.App.3d 497, 502 [37 Cal.Comp.Cases 393]; See also, *Blackledge v. Bank of*
12 *America* (2010) 75 Cal.Comp.Cases 613, 619, [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en
13 banc) ["Although determining WPI under the AMA Guides is new to the California workers'
14 compensation system, the procedure for rating permanent disability has not changed and pre-SB 899 case
15 law on rating procedure remains relevant".])

16 In determining overall permanent disability, it has been recognized that the rating schedules
17 provide only a "guide," and that the final rating should reflect "the entire picture of disability and
18 possibility of employability." (*Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720, 728
19 [41 Cal.Comp.Cases 81]; *Morgan v. Workers' Comp. Appeals Bd.* (1983) 48 Cal.Comp.Cases 98 (writ
20 denied) [table for combining permanent disabilities only a guide and the finding of 76% permanent
21 disability is correct even though application of the table would result in 96% rating]; *State of California*
22 *v. Workers' Comp. Appeals Bd. (McDonald)* (1982) 47 Cal.Comp.Cases 1204 [1982 Cal. Wrk. Comp.
23 LEXIS 4410] (writ den.) [finding of total permanent disability proper based upon evidence that applicant
24 unable to work notwithstanding that schedule and table combining disabilities yielded 97½% rating];
25 *County of Los Angeles v. Workers' Comp. Appeals Bd. (LeCornu)* (2009) 74 Cal.Comp.Cases 645 [2009
26 Cal. Wrk. Comp. LEXIS 113] (writ den.) [finding of permanent total disability more accurate than CVC
27 rating of 96% because AME concluded that applicant was unable to return to the open labor market and

1 provided explanation]; *Coca-Cola Enterprises, Inc. v. Workers' Comp. Appeals Bd. (Jaramillo)* 77 Cal.
2 Comp.Cases 445 [2012 Cal. Wrk. Comp. LEXIS 45] (writ den.) [permanent total disability found in
3 accordance with the fact based upon explanations in medical reporting]; *Anaya v. Bay Area Carbide*
4 (2016) 81 Cal.Comp.Cases 1061 [2016 Cal. Wrk. Comp. P.D. LEXIS 314] (panel dec.) [Section 4660
5 applies in cases involving permanent total disability and evidence may establish that level of disability
6 "in accordance with the fact" as provided in section 4662 or by rebutting PDRS rating]; *Montiel v. Cal-*
7 *Tech Precision* (July 8, 2016, ADJ695479) [2016 Cal. Wrk. Comp. P.D. LEXIS 328] [formal rating not
8 required when treating and evaluating physicians conclude that applicant is unable to engage in full-time
9 employment because of physical and mental disabilities]).

10 The disability values of multiple impairments may be added instead of combined using the CVC
11 if that provides an accurate rating, particularly when there is no overlap, and when the synergistic effect
12 of the multiple disabilities support that method of combination. (*Bookout v. Workers' Comp. Appeals*
13 *Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] [previous and subsequent disabilities should be
14 added in absence of overlap to determine Subsequent Injuries Fund liability]; *Athens Administrators v.*
15 *Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 [2013 Cal. Wrk. Comp. LEXIS 34]
16 (writ den.) [appropriate to use additive approach because AMA Guides describe several methods of
17 combining impairments and rigid application of CVC is not mandated]; *Los Angeles County*
18 *Metropolitan Transportation Authority v. Workers' Comp. Appeals Bd. (La Count)* (2015) 80
19 Cal.Comp.Cases 470 [2015 Cal. Wrk. Comp. LEXIS 47] (writ den.) [proper to add impairments rather
20 than use CVC in light of AME opinion that there was synergistic effect to orthopedic injuries so that they
21 should be added rather than combined]; *Diaz v. State* (November 18, 2015, ADJ7682048) [2015 Cal.
22 Wrk. Comp. P.D. LEXIS 683] (panel dec.) [additive approach within the authority of WCJ because there
23 was no clear overlap in impairments]; *Sanchez v. California Dept. of Corrections* (August 4, 2015,
24 ADJ6995506) [2015 Cal. Wrk. Comp. P.D. LEXIS 482] (panel dec.) [additive method provides more
25 accurate rating of overall permanent disability]; *Martinez v. Pack Fresh Processors* (October 23, 2017,
26 ADJ8552281) 83 Cal.Comp.Cases __ [2017 Cal. Wrk. Comp. P.D. LEXIS 492] (writ den.) [same]; but
27 see also, *Leo v. Greenspan Adjusters* (2016) (August 2, 2016, ADJ8994157) [2016 Cal. Wrk. Comp. P.D.

1 LEXIS 431] (panel dec.) [reason for adding not adequately explained]; *Johnson v. Wayman Ranches*
2 (May 12, 2016, ADJ1330130) 2016 Cal. Wrk. Comp. P.D. LEXIS 235 (panel dec.) (*Johnson*) [same];
3 *Borela v. State of California* (May 13, 2014, ADJ7181658) [2014 Cal. Wrk. Comp. P.D. LEXIS 217]
4 (*Borela*) [adding not shown to be more accurate in absence of medical opinion and reasoning]; *Wong v.*
5 *Amdocs, Inc.* (October 26, 2016, ADJ7365140) [2016 Cal. Wrk. Comp. P.D. LEXIS 604] (*Wong*)
6 [same].)³

7 The WCJ's decision to add the permanent disability values of applicant's orthopedic and
8 psychiatric conditions is based upon the reporting of the AMEs and is supported by the AMA Guides, as
9 shown by the discussion of the role of the trier of fact that is provided in Chapters 1.4 and 1.5 on pages
10 9 and 10 of the AMA Guides, as follows:

11 A scientific formula has not been established to indicate the best way to
12 combine multiple impairments. Given the diversity of impairments and
13 great variability in herein in combining multiple impairments, it is difficult
14 to establish a formula that accounts for all situations. A combination of
15 some impairments could decrease overall functioning more than suggested
16 by just adding the impairment ratings for the separate impairments (eg
17 blindness and inability to use both hands). When other multiple
18 impairments are combined, a less than additive approach may be more
19 appropriate...Other options are to combine (add, subtract, or multiply)
20 multiple impairments based upon the extent to which they affect and
21 individual's ability to perform activities of daily living...

22 *[T]here is no validated formula that assigns accurate weights to determine*
23 *how a medical condition can be combined with other factors...to calculate*
24 *the effect of the medical impairment on future employment. Therefore,*
25 *each commissioner or hearing official bases a decision on the assessment*
26 *of the available medical and nonmedical information...* (Italics added.)
27

22 ³ Several citation errors were noted in defendant's petition for reconsideration, including incorrect citations to *Wong* and
23 *Johnson*. In addition, *Borela* is described in defendant's petition as a "Noteworthy Panel Decision." (4:15) However, it
24 appears defendant obtained that description from a publisher of the decision, Matthew Bender & Company, Inc., and the
25 description has no significance for the WCAB. This is unlike the designation of a "significant panel decision" by the Appeals
26 Board. (See, https://www.dir.ca.gov/wcab/wcab_panel.htm, WCAB web site containing significant panel decisions as of June
27 20, 2018.) A panel decision is not deemed "a significant panel decision" unless, among other things, all Appeals Board
members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182
Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098,
1099-1100 (writ den.)) *Borela* has not been deemed by the Appeals Board to be a significant panel decision. Panel decisions
like *Borela* are citeable, but are not binding precedent on WCJs or Appeals Board panels. (See, *Griffith v. Workers' Comp.*
Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal. Comp. Cases 145].)

1 In this case, the initial psychiatric AME, Dr. Lieberman, confirmed during his June 9, 2016
2 deposition that applicant's psychiatric and orthopedic disabilities do not overlap, and that their
3 synergistic disabling effect on applicant's earning capacity supports addition of the disability values in
4 order to obtain an accurate overall rating.⁴ (Applicant's Exhibit 3, 23:22-24:3.)

5 AME Dr. Kirtz was informed of the opinions and conclusions of Dr. Lieberman as noted in his
6 report of September 21, 2017. As he further wrote in that report, Dr. Kirtz agreed with Dr. Lieberman
7 that applicant's physical and psychiatric impairments do not overlap and that her "physical and
8 psychiatric impairments appear additive" in their effect on permanent disability.

9 AMEs are presumed to have the expertise and neutrality to provide substantial medical opinions
10 and their opinions should be followed unless shown to be incorrect. (*Power v. Workers' Comp. Appeals*
11 *Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Defendant did not rebut the substantial
12 opinions of AMEs Dr. Kirtz and Dr. Lieberman that the values of applicant's orthopedic and psychiatric
13 disabilities should be added in order to obtain an accurate overall permanent disability rating, and the
14 April 16, 2018 decision of the WCJ that is based upon those opinions is affirmed.

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27 ⁴ Dr. Lieberman stopped providing reporting following a billing dispute with defendant.

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for reconsideration of the April 16, 2018 Findings
3 And Award of the workers' compensation administrative law judge is **DENIED**.


4
5 **WORKERS' COMPENSATION APPEALS BOARD**

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7  **DEPUTY**
8 **ANNE SCHMITZ**

9
10 **I CONCUR,**

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13 **MARGUERITE SWEENEY**



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16 **DEIDRA E. LOWE**

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

20 **JUL 05 2018**

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

23 **NOHEMI TAINA**
24 **BUTTS & JOHNSON**
25 **SANTA CLARA COUNTY COUNSEL**



26 **JFS/abs**

**Worker's Compensation Appeals Board
State of California**

CASE NUMBERS ADJ8268219

Noheimi Taina vs County of Santa Clara/Valley Medical Center, PSI

JUDGE: DAVID LAUERMAN

DATE: 5/17/2018

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

I

INTRODUCTION

1. Applicant, Nohemi Taina, born [REDACTED], while employed as a surgical aide (Group 311) on 10/4/2011, at Santa Clara County, California, by Santa Clara County Valley Medical Center, permissibly self-insured for worker's compensation liability, sustained a specific injury arising out of and in the course of this employment to her neck, shoulders, and psyche.

2. A Petition for Reconsideration has been filed by Defendant, County of Santa Clara/Valley Medical Center. The Petition was timely filed and verified in accordance with law. Applicant has not yet filed an Answer.

3. Defendant seeks Reconsideration from a Findings and Award which issued 4/16/2018, which awarded 87% permanent partial disability.

4. Defendant contends that the Award improperly applied the Kite doctrine to reach a final PD percentage by adding, rather than combining, orthopedic and psychiatric factors of disability where the medical evidence is insufficient to rebut the Schedule.

II

SUMMARY of FACT

The facts relevant to this dispute are set forth with admirable accuracy and brevity in Defendant's Petition. The Applicant suffered a significant injury to her neck and shoulders on 10/4/2011. As a compensable consequence of this injury, she developed psychiatric sequelae. The neck and shoulder injuries were assessed by David Pang, MD, who rated those disabilities at 48%. There is no dispute at present about the accuracy of this assessment. The psychiatric consequences were evaluated by Joshua Kirz MD, who rated them at 39%, and this assessment is also agreed to have been accurate. The sole disagreement was whether the overall level of PD was best represented by combining the two (which would produce 68% PD) or adding the two, (which would produce 87% PD).

Applicant's attorney asked Dr. Kirz to comment on whether it was more accurate to add these impairments, rather than combine them. Dr. Kirz responded at page 24 of his report dated 9/21/2017 (Joint Exhibit EE), stating;

"Mr. Johnson raised the issue of adding versus combining Ms. Taina's physical and psychiatric impairment.

"I do not perceive any overlap between the physical and psychiatric impairments in this case. For example, Ms. Taina's orthopedic factors limit her physical capacity to work, whereas her psychiatric factors limit her mental capacity to work.

“I have been careful to avoid any overlap. For example, Ms. Taina’s sleep does not appear to be disrupted by depression, rumination, or worry, but rather only by pain and positioning. As such, I defer on sleep impairment to the physical evaluator.

“Otherwise, the physical and psychiatric impairments appear additive, as opposed to compressive”

Defendant believed, and continues to believe, that this language was insufficient to rebut that portion of the PDRS that calls for use of the CvC. Applicant disagreed, and the matter was set before me. After careful review, I concluded that the language used, while scanty, was sufficient to rebut the schedule, particularly since Dr. Kirz was reporting as an AME. From this decision, Defendant seeks Reconsideration.

III

DISCUSSION

The parties agree that the AME physical medicine evaluator, Dr. Pang, produces 48% PD. The psychiatric AME, Dr. Kirz, provided an opinion consistent with 39% PD. Based upon the pre-trial briefs filed by the parties, and upon the arguments made before me at trial, the sole issue for determination is whether it is proper to apply the CvC to these two disabilities, or whether a more accurate rating is produced by addition. The CvC method produces 64% PD, while addition results in 87%. The ‘default’ position of the Guides is to prefer use of the CvC, unless there is medical evidence to show that addition produces a more accurate rating.

Of the three AME’s who have been involved with this, two have expressed opinions on this point, Dr. Kirz and Dr. Lieberman. Both indicated that addition, not the CvC, produce a more accurate rating. Of these, easily the most complete and convincing is that of Dr.

Lieberman, who was deposed on this issue at some length (Applicant's Exhibit 3). Since Dr. Lieberman last saw the Applicant, however, he has been replaced by Dr. Kirz, and more importantly, Applicant's condition and level of psychiatric disability has changed considerably. We simply have no way of knowing whether Dr. Lieberman would continue to advocate addition over combination under present conditions, when by all accounts Applicant has received much needed treatment and has achieved substantial improvement in her psychiatric disability.

I have reviewed the *Kite* decision and its progeny, and a number of conclusions can usefully be drawn. First, it is clear that the current WCAB has held over and over that, under the right conditions, addition may be used instead of the CvC. It is clear that a necessary precondition to such use is a complete lack of overlap in the factors of permanent disability. According to Dr. Kirz, this precondition has been met. At least one WCAB panel has held that nothing more is required, but most panels (and all of the decisions I have been able to find are panel decisions) find that something more is required to indicate that, in the medical expert's opinion, a more accurate rating is produced by addition than by combination. Of what this 'something more' ought to consist to be sufficient is left mostly unclear in the available case law.

In this case, the opinion of Dr. Kirz (Joint Exhibit EE, page 24) does state that no overlap exists and has in fact been studiously avoided. He then simply states "Otherwise, the physical and psychiatric impairments appear additive, as opposed to compressive". Is this statement enough to warrant departure from the CvC? Available case law does not answer this question in any definitive way. It is clear to me that if this language is sufficient, addition will become the norm, and the CvC relegated to those rare cases where the AMA Guides produces ratings which overlap, since the whole system is designed to avoid any overlap. On the other hand, we ought not to reject the opinion of an AME lightly, particularly one as well-regarded as Dr. Kirz. Had

Defendant truly believed this opinion to be speculative, or poorly thought through, or otherwise defective, there was enough at stake to warrant a deposition on this point, or at leads a request for a supplemental report. Under ordinary circumstances, the Board expects the parties to be bound by the opinions of an AME.

I believe this case to be a close one, but given the Board's willingness to rely upon reports which found no overlap, but provided little or no discussion as to why addition was more accurate than the CvC, I have decided to respect the opinion of the AME and use addition. As skillfully set forth in Defendant's Petition, the case law on this point is somewhat conflicting; resolution on this point would be welcome.

IV

RECOMMENDATION

DENY Reconsideration.



David L. Lauerman,
Workers' Compensation Judge

Filed and served by Mail on: *05/18/2018*
All parties on the Official Address Record