

[REDACTED]

October 18, 2021

SENT VIA US MAIL

Dr. [REDACTED]
[REDACTED]

RE: [REDACTED] *Jack In The Box*
WCAB No.: [REDACTED]
Date of Injury: [REDACTED]
Claim No.: [REDACTED]
Our File No.: [REDACTED]

Dear Dr. [REDACTED]

You have been selected from the designated panel of Qualified Medical Evaluators to perform a QME evaluation of the applicant in this case. An appointment has been made on October 12, 2021 at 9:00 a.m.

To assist you in preparing for this examination please read this letter thoroughly to assist you in resolving the medical issues in this case. Pursuant to Labor Code § 4062.3, we are copying defense with this correspondence and the records noted. Please note that this letter and the records referenced herein were previously served on Defendant on September 26, 2021.

Position Statement

This case involves a forty-eight-year old employee of Dhillon Foods Inc DBA Jack In The Box. Applicant has filed the following Application:

Specific injury of 04/13/2020: Applicant slipped and fell.

- Lumbar, cervical spine, thoracic spine, bilateral upper extremities, left lower extremities.

Applicant has prior workers compensation cases for the dates of 07/13/17 and 11/05/17, in which she was carrying a box and in which she fell, respectively. There is a QME report for those dates of injury from [REDACTED] who found an injury to her lumbar spine.

Please talk to the Applicant about her 04/13/2020 injury and evaluate whether she has injured or aggravated her cervical spine, thoracic spine, bilateral upper extremities, and left lower extremities from the 04/13/2020 injury. In addition, please talk to the Applicant and evaluate whether she has exacerbated or aggravated her lower spine as a result of the 04/13/2020 injury.

Body Parts That Need To Be Addressed In Your Report:

Please review and carefully examine all alleged injured body parts and conditions referenced above and address all injuries and conditions.

California Code of Regulations section 35.5, subd. (c)(1) states:

"The evaluator shall address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's appointment with the medical evaluator that are issues within the evaluator's scope of practice and areas of clinical competence. The reporting evaluator shall attempt to address each question raised by each party in the issue cover letter sent to the evaluator as provided in subdivision 35(a)(3)."

California Code of Regulations section 35.5, subd. (d) states:

"At the evaluator's earliest opportunity and no later than the date the report is served, the evaluator shall advise the parties in writing of any disputed medical issues outside of the evaluator's scope of practice and area of clinical competency in order that the parties may initiate the process for obtaining an additional evaluation pursuant to section 4062.1 or 4062.2 of the Labor Code and these regulations in another specialty. In the case of an Agreed Panel QME or a panel QME, the evaluator shall send a copy of the written notification provided to the parties to the Medical Director at the same time..."

Diagnostic Testing

- Labor Code section 4620 and 4622 and Regulation 9793 and 9794 allow the AME to obtain any tests necessary to complete the medical-legal report. Obtain any necessary tests you determine are needed to complete your AME reporting.
- Send a copy of any prescriptions for medical-legal diagnostic tests to the insurance company, the Defense Attorneys, and the Applicant Attorney.
- If you have requested testing and have not received the results of the test by the time you write your report, inform the parties of the diagnostic tests that are still needed.

Diagnosis:

- Labor Code section 4620 and 4622 and Regulation 9793 and 9794 allow the AME to obtain any tests necessary to complete the medical-legal report. Obtain any necessary tests you determine are needed to complete your AME reporting.
- Send a copy of any prescriptions for medical-legal diagnostic tests to the insurance company, the Defense Attorneys, and the Applicant Attorney.
- If you have requested testing and have not received the results of the test by the time you write your report, inform the parties of the diagnostic tests that are still needed.

Temporary Disability:

- Is the ~~employee~~ temporarily disabled at this time?

Impairment Rating & Permanent Disability:

- If you determine that the Applicant has reached maximal medical improvement, what is the whole person impairment? Maximal medical improvement is defined as "a condition or state that is well stabilized and unlikely to change substantially in the next year, *with or without medical treatment.*" (emphasis added) (AMA Guides, p. 601).

- In the event you find multiple impairments, is there a synergistic effect between two or more injured body parts? If so, would adding the multiple impairments be a more accurate measure of the Applicant's overall level of permanent disability as opposed to combining them under the Combined Values Chart. Please be advised that neither the Labor Code, AMA Guides nor the

rating schedule mandate that multiple disabilities be combined using the formula utilized in the combined values chart. See *East Bay Municipal Utility District v. WCAB (Kite)* (2013) 78 CCC 213 (writ denied). See also *Los Angeles County Metropolitan Transportation Authority v. WCAB (La Count)* (2015) 80 CCC 470 (writ denied).

Rating by Analogy for an Injury Not Listed in the AMA Guides

- Under AMA Guides (See Chapter 1, Page 11), you may use an analogy to rate an impairment or disability. Where impairment ratings are not provided, you may use your clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar condition with similar impairment of function in performing activities of daily living. You may by analogy determine the actual impairments of ADL and the actual disability of the applicant to function in his or he personal, social, and/or occupational life as a result of the impairment, pain or both.

Almaraz/Guzman

- Pursuant to the case of *Almaraz/Guzman* (2009) 74 CCC 1084, please state whether you believe the overall level of Whole Person Impairment based on a strict reading of the AMA Guides is adequate for this individual based upon his/her injuries and your evaluation of the Applicant, or alternatively, if you believe the injury should be analogized to a different chart/injury in the AMA Guides. If the whole person impairment increases based on an analogy, please explain how much and by what reasoning.

- You should utilize your experience and clinical judgment in order to determine if the AMA guides adequately assesses the individual's impairments and disabilities to function and to work. Under the AMA guides you may evaluate the applicant using any validated scale to determine the applicant's impairment of ADLs and the injury's effect on the applicant's ability to function in his or her personal, social and/or occupational life as a result of the impairment(s), pain or both. Should you decide to rate by analogy please provide an explanation for why you have chosen to rate by analogy.

- Per *Almaraz/Guzman*, an AMA impairment is rebuttable. This decision is currently binding throughout the state on all WCAB panels and judges. I would respectfully request that you address whether the application of the guides for Applicant's permanent disability would be inequitable, disproportionate, or unfair to him in light of the above--referenced decision.

Work Tolerance Evaluation

- Please let the parties know if you are of the opinion that a work tolerance evaluation is necessary to determine the applicant's work related disabilities, and/or the effect of pain and/or other impediments to applicant's ability to meet personal, social, or occupational demands

Pain Affecting Functionality

- Please determine how pain impacts both the applicant's functionality in performing ADL's and how the pain affects the applicant's ability to function in her or her personal, social, or occupational life.
- If you determine that he applicant is suffering from pain, please determine if the applicant's pain is acute, nociceptive, eudynia pain or chronic neuropathic maldynia pain. This is important so that you can be guided to use Chapter 13 and/or Chapter 18 to rate the applicant's impairment and

disabilities.

Medications

- If the applicant is at MMI and the applicant is taking any medication, you must determine if the applicant is suffering from impairment to any body system, and/or psychologically, and/or cognitively, from any side effect from a medication and if so, the side effect(s) must be rated and appropriately described within the parameters of the AMA Guides. *AMA Guides 5th Edition Pg 20*
- If after you examine the applicant you are of the opinion that because of the medication taken by the applicant, or the side effects of the same, that the applicant needs to be seen by a specialist, including but not limited to an internist, psychiatrist, or neuro-psychologist, please let the parties know.
- Please determine if the side effects of the medication impacts both the applicant's functionality in performing ADL's and the applicant's ability to function in his or her personal, social, or occupational life.
- **Advanced Chronic Pain Syndrome** -- Please diagnose whether Applicant suffers from causalgia, posttraumatic neuralgia, or reflex sympathetic dystrophy (RSD). (AMA Guides 5th, Chapter 13, Page 343). Should you determine a diagnosis of Advanced Chronic Pain Syndrome please provide a Whole Person Impairment using Table 13-22 or any other corresponding table in conjunction with your clinical judgment.
- If this is not within your specialty, would you defer this issue to a medical-legal evaluator in pain management?

Future Medical Treatment:

- Please provide a **Detailed Outline** of all future medical treatment required by these injuries, including the specific treatment you would recommend. Please include modalities of treatment with frequency and duration and any problems that you are able to foresee in the future
- Please indicate if you believe there will be any possible additional compensable consequences to the existing industrial injuries and condition.

Home Health Care

- Please comment on the need for homecare both retroactive and in the future. Please take into account the nature, extent, and duration of the homecare immediately after injury, immediately after any debilitating medical procedures and once the Applicant has obtained maximum medical improvement.
- If you are unable to make a determination as to Applicant's home care needs into the future, please state whether a comprehensive home nursing assessment would be helpful.
- If warranted, please quantify, with reasonable medical probability, the amount of hours per day, the number of days per week and the duration the Applicant will need homecare.

Apportionment:

In 2017, there was a new change in the law. Per the *Hikida* case, disability resulting from medical

treatment for which the employment is responsible is not subject to apportionment." (*Hikida v. Workers' Comp. Appeals Bd.*, 12 Cal. App. 5th 1249, 1252.) In *Hikida*, the California Appellate Court opined that the employer is 100% responsible for both the medical treatment and for any disability arising directly from unsuccessful medical intervention, without apportionment. (*Id.* at 1260.)

Please remember that apportionment is based on causation of permanent disability, not the source of injury. In the *Escobedo case*, the court noted that "Section 4663(a)'s statement that the apportionment of permanent disability shall be based on 'causation' refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment *may be different* from the analysis of the causal factors of the injury itself." *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 605, 607. (emphasis added)

Permanent disability is: an "irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market. Payments for permanent disability are designed to compensate an injured employee both for physical loss and reduction in earning capacity." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262, 1270. Permanent disability is therefore different from whole person impairment because it takes into account an injured worker's ability to work.

Please include an apportionment determination, pursuant to Labor Code 4663 and 4664, indicating the percentage of permanent disability that was caused by other factors besides this industrial injury. If you are apportioning between multiple dates of injury but are unable to separate the permanent disability between them, you are allowed to determine the different dates of injury are inextricably intertwined.

Regarding Non-Industrial Factors :

If you choose to "parcel out" non-industrial source(s) that directly caused the current permanent disability, you must explain how and why you arrived at your opinion based on the standard of reasonable medical probability.

Please note that some doctors feel compelled to find apportionment between injuries or they feel compelled to parcel out disabilities between injuries. However, we believe you are not required to find apportionment to other sources or separate disabilities. In fact, the following are potential reasons for not finding apportionment or for parceling out disability between different injuries:

- A. the initial and/or the subsequent injury(ies) prevented the other injury(ies) from healing properly.
- B. The first injury has rendered the injured body part sufficiently weak or sensitive so that it contributed to the damage caused by the second injury.
- C. It would be speculative to separate the two injuries due to the proximity in time when the injuries occurred.
- D. There is no medical basis to separate e effect of the two injuries causing the overall disability.
- E. The disability or impairment caused by one injury is so significant that all residual disability is attributable to the other injury.
- F. There is a synergistic effect between the multiple injuries which does not allow the permanent disability from one to be separated from the others. (The later injury is a compensable

