

## Martinez, Rafaela

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### EVIDENCE

#### **Judicial notice**

The Board must rely on the opinions of medical witnesses in the record as the basis for findings addressing mental health diagnoses and may not rely on taking judicial notice of the DSM. ....*In re Rafaela Martinez*, BIIA Dec., 07 25143 (2009) [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 09-2-32099-3KNT.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE: RAFAELA MARTINEZ** ) **DOCKET NO. 07 25143**  
2 )  
3 **CLAIM NO. AD-61768** ) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Rafaela Martinez, by  
6 Robinson & Kole, P.S., Inc., per  
7 Nathan T. Dwyer

8 Employer, Shari's Management Corp., by  
9 Reinisch Mackenzie, P.C., per  
10 Christy A. Doornink

11 Department of Labor and Industries, by  
12 The Office of the Attorney General, per  
13 Marta Lowy, Assistant

14 The claimant, Rafaela Martinez, filed an appeal with the Board of Industrial Insurance  
15 Appeals on November 26, 2007, from an order of the Department of Labor and Industries dated  
16 November 16, 2007. In this order, the Department affirmed a prior order dated August 3, 2007, in  
17 which it awarded the claimant a permanent partial disability award equal to Category 2 for  
18 permanent dorso-lumbar and/or lumbosacral impairments; and closed the claim. The Department  
19 order is **AFFIRMED**.

**DECISION**

20 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
21 and decision on timely Petitions for Review filed by the claimant and the employer to a Proposed  
22 Decision and Order issued on March 5, 2009, in which the industrial appeals judge reversed and  
23 remanded the order of the Department dated November 16, 2007. All contested issues are  
24 addressed in this order.

25 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
26 no prejudicial error was committed. The rulings are affirmed.

27 In this appeal, the claimant, Rafaela Martinez, contends that she sustained a mental health  
28 condition diagnosed as a pain disorder with both psychological factors and a general medical  
29 condition, proximately caused by her industrial injury. She also seeks treatment for her accepted  
30 lumbar strain. In the Petition for Review, she assigns error to the industrial appeals judge's finding  
31 that she sustained a mental health condition identified in the Proposed Decision and Order as a  
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1 pain disorder with a general medical condition. Ms. Martinez correctly points out that pain disorder  
2 with a general medical condition is not classified as a mental health condition in the American  
3 Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000)  
4 (DSM-IV). "This subtype of Pain Disorder *is not considered a mental disorder and is coded on*  
5 *Axis III.*" DSM-IV, at 499.

6 The employer contends that Ms. Martinez did not sustain an industrially related mental  
7 health condition. In the employer's Petition for Review, error is assigned to the determination by  
8 the industrial appeals judge that Ms. Martinez sustained a pain disorder with a general medical  
9 condition that was caused by the industrial injury. The employer notes that there is no expert  
10 testimony or other medical evidence supporting this diagnosis.

11 We agree with our industrial appeals judge's determination that there is no curative  
12 treatment available for Ms. Martinez's accepted lumbar condition. We also agree that Ms. Martinez  
13 has not proven that she suffers from depression. We have granted review primarily to address our  
14 industrial appeals judge's extensive reliance on a section of the DSM that was not offered or  
15 admitted into the record and was not addressed in medical testimony or other evidence. Further,  
16 we conclude that Ms. Martinez has not proven that she sustained a mental health condition,  
17 proximately caused by her industrial injury. The following is a summary of the evidence necessary  
18 to explain our decision.

19 Rafaela Martinez is 58 years old and was born in Michocan, Mexico. Ms. Martinez attended  
20 nine years of school in Mexico and moved to the United States in January 2005. She understands  
21 very little English. Ms. Martinez is divorced and has a 36-year-old son.

22 In Mexico, Ms. Martinez worked at a bakery for 18 years, and at a kitchen, and a clinic. In  
23 the United States, she has worked as a babysitter and for the employer at injury, Shari's  
24 Management Group (Shari's). Since May 10, 2007, Ms. Martinez has worked at Shari's Lynnwood,  
25 Washington location, baking pies.

26 On November 21, 2005, Ms. Martinez sustained an industrial injury to her low back while  
27 working at the Mill Creek, Washington Shari's Restaurant as a dishwasher, when she lifted a basin  
28 full of dirty dishes. Ms. Martinez testified that she worked part-time before the injury and continues  
29 in part-time employment with Shari's, working fewer hours in a light duty job.

30 Ms. Martinez testified that she does not have the motivation to go out because nothing is  
31 really fun. She sleeps only four to six hours a night. Ms. Martinez thinks about her pain all the time  
32 and first noticed her emotional problems right after the injury. She was asked about her son, with

1 whom she became pregnant following a rape. The assailant was never caught and she did not  
2 raise her son. She testified that overcoming that trauma took about eight years. Ms. Martinez is  
3 divorced from an abusive husband. According to Ms. Martinez, it took less than a year to overcome  
4 the trauma of the divorce.

5 Melina Oei, M.D., a certified physical medicine and rehabilitation physician, first saw  
6 Ms. Martinez on January 3, 2006, and became her attending physician. She examined  
7 Ms. Martinez monthly until September 25, 2007, usually with the aid of an interpreter who came  
8 with Ms. Martinez. Dr. Oei's diagnosis of lumbar strain, which she felt was related to the industrial  
9 injury, had not changed throughout the course of her treatment of Ms. Martinez. On September 25,  
10 2007, Dr. Oei noted that Ms. Martinez appeared uncomfortable and preferred to remain standing  
11 during the last half of the visit. She was able to walk without limping. Dr. Oei gave Ms. Martinez a  
12 prescription for physical therapy in case her claim was reopened, but was not sure it would be  
13 curative. The doctor also recommended a trial of Neurontin for nerve pain. Toward the end of her  
14 treatment of Ms. Martinez, Dr. Oei noted increased pain behaviors.

15 Christopher Noell, M.D., certified psychiatrist, first met with Ms. Martinez on April 25, 2008.  
16 A Spanish language interpreter was present. The prominent features in the records reviewed by  
17 Dr. Noell were the consistency of the complaints and the assessment of the examiners regarding  
18 pain behavior, which included chronic pain, dizziness, numbness of her legs, and radiating pain.

19 During the April 2008 examination, Ms. Martinez primarily complained of pain and difficulty  
20 walking. According to Dr. Noell, she endorsed feeling depressed. "She used the Spanish word for  
21 desperate," and indicated that she had crying spells, felt hopeless and helpless, was less socially  
22 active, less involved, was fearful of the future, and had low self esteem. Noell Dep. at 15. She  
23 denied that the deaths of her father and mother, 25 and 12 years prior, respectively, had affected  
24 her functioning beyond a brief period of sadness. Ms. Martinez's pain was focused on her low back  
25 with radiation down both legs to both feet. Pain interfered with her ability to take a bath and she  
26 walked slowly. Ms. Martinez reported that her pain and emotional difficulties had developed since  
27 her 2005 injury.

28 Ms. Martinez walked with obvious discomfort. She burst into tears when Dr. Noell said she  
29 looked as if she were about to cry. After she started to cry, Ms. Martinez spoke of being sad,  
30 depressed, helpless, hopeless, worthless, and fearful of the future. Her cognition appeared intact,  
31 although Dr. Noell did no formal cognitive testing. He determined in April 2008 that she was unable  
32 to work due to her psychiatric diagnosis.

1 A second meeting took place on September 24, 2008, to clarify inconsistencies between  
2 what Ms. Martinez had told Dr. Noell on April 25, 2008, and information contained in a July 30,  
3 2008 report of psychiatrist Roy D. Clark, Jr., M.D. Dr. Noell learned from Dr. Clark's evaluation that  
4 Ms. Martinez was working, which surprised him. Dr. Noell also learned, for the first time, of  
5 Ms. Martinez's childhood abuse and her abusive marriage. During the September 24, 2008 visit,  
6 Ms. Martinez did not explain why she had failed to share this information with him initially.

7 Dr. Noell diagnosed on Axis I, pain disorder associated with both psychological factors and  
8 a general medical condition, and major depression single episode, severe; Axis II, no diagnosis;  
9 Axis III, lumbar sprain; Axis IV, severe psychosocial stressors related to physical and psychiatric  
10 disabilities, social isolation, and financial difficulties; and on Axis V (Global Assessment of  
11 Functioning), 45-50, upgraded to 50-55 because Ms. Martinez was working. He believed that the  
12 pain disorder and the major depression were related to the industrial injury, based on her history as  
13 supported by the medical records. The diagnosis of depression was based on her endorsement of  
14 feeling depressed, her crying, hopelessness, helplessness, low self esteem, social withdrawal, and  
15 a feeling of burdening her extended family. He also noted her depressed affect and tearfulness. In  
16 Dr. Noell's opinion, Ms. Martinez's life experiences, including her abusive relationship, sexual  
17 abuse, and assault, were risk factors, but did not cause her diagnoses.

18 The accepted lumbar sprain was the general medical condition supporting Dr. Noell's  
19 diagnosis of pain disorder associated with both psychological factors and a general medical  
20 condition. The prominence of the pain, either in the initiation of the pain disorder or in the  
21 maintenance of it, supported the diagnosis, with her pain and fearfulness about the future  
22 constituting the psychological factors. Dr. Noell distinguished the diagnosis of pain disorder from  
23 somatoform disorder, which involves somatic complaints such as fatigue, loss of appetite, and  
24 gastrointestinal and urinary complaints. He acknowledged, however, that Ms. Martinez did have  
25 features of a somatoform disorder.

26 Mark Fishel, M.D., certified neurologist, examined Ms. Martinez on December 21, 2006  
27 along with Dean S. Ricketts, M.D. He reviewed records, including those of Dr. Oei. Dr. Fishel  
28 learned that Ms. Martinez was diagnosed with lumbar strain and discogenic pain, had received  
29 some physical therapy, but had not significantly improved. Ms. Martinez reported that her low back  
30 pain was 9 out of 10, and described limitations on lifting, sitting, walking, standing, and performing  
31 household chores. She was unable to do a complete deep knee bend. Forward flexion was limited  
32 to 40 degrees and extension to only 5 degrees, with some pain. There were some signs of

1 decreased effort and non-physiologic pain complaints, confirming possible symptom magnification.  
2 Dr. Fishel diagnosed lumbar strain, related to the injury; pre-existing lumbar degenerative spine and  
3 disc disease; a central L4-5 protrusion, not likely related to the industrial injury based on the  
4 mechanism of the injury, which was likely pre-existing and possibly aggravated by the industrial  
5 injury; pain behavior with some non-anatomic findings; and lack of effort on motor strength testing.  
6 The MRI was unremarkable. He felt that no curative treatment was available for the back condition.  
7 Ms. Martinez's low back impairment was a Category 2. Dr. Fishel noted that the findings of Dr. Oei  
8 at her last examination of Ms. Martinez were consistent with his own.

9 Charles J. Larson, M.D., certified orthopedic surgeon, examined Ms. Martinez on  
10 November 1, 2007, at the request of the Department. The purpose of his examination was to  
11 determine whether surgical treatment was recommended. Dr. Larson diagnosed lumbar strain,  
12 resolved, based on the lack of objective findings to suggest ongoing pathology. The condition had  
13 reached maximum medical improvement and Ms. Martinez's lumbosacral impairment was equal to  
14 a Category 2. He agreed that someone with non-anatomic findings and pain behaviors could have  
15 some psychological issues. Ms. Martinez's pain was the predominant focus of her presentation.

16 Roy D. Clark, Jr., M.D., certified psychiatrist, evaluated Ms. Martinez at the request of the  
17 Department on July 3, 2008, with the aid of a Spanish interpreter. During his examination of  
18 Ms. Martinez, Dr. Clark asked if she had any emotional or psychological symptoms of the injury and  
19 its residuals. She replied that she could not work like she used to and could not move as she did  
20 before. According to Ms. Martinez, the most difficult thing she faced prior to the work injury was the  
21 death of her parents. Not being able to work and move as before "meant sadness, as she had  
22 always been able to do so before." Clark Dep. at 41. While reporting this, Ms. Martinez smiled and  
23 stated, "she tells herself that she just needs to move on, there is no other way." Clark Dep. at 41.

24 Dr. Clark felt that Ms. Martinez was forthcoming and that it was not difficult to obtain  
25 information from her. Ms. Martinez told Dr. Clark that she had not been physically, emotionally, or  
26 sexually abused as a child. She reported a sexual assault that occurred when she was in her early  
27 twenties. The perpetrator was never apprehended. She became pregnant and gave birth to a son,  
28 now 36, who was raised primarily by Ms. Martinez's mother at their ranch while Ms. Martinez  
29 worked in Mexico City. She experienced a spontaneous loss of a birth five months into her second  
30 pregnancy. The father had been killed when Ms. Martinez was three months pregnant. She also  
31 had been married for about a year to someone who drank and was physically abusive.

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1 Ms. Martinez had come to the United States in January 2005, at the invitation of her niece.  
2 Her current status was that she was working at Shari's Restaurant in a modified job for about  
3 26 hours a week. She was living with her sister and her sister's family. A typical day for  
4 Ms. Martinez was awakening at 6:30 a.m., starting work at 10:00 a.m., working until 2:00 or  
5 2:30 p.m., and going to bed no later than 9:00 p.m. She could maintain her own self-care, although  
6 sometimes the pain is worse and her sister has to help. She reported that she relaxes by listening  
7 to music and reading and she takes pride in continuing to work despite the pain. Based on the  
8 mini-mental status examination, Dr. Clark did not detect any significant cognitive impairment. He  
9 noted that Ms. Martinez had described a number of psychosocial stressors that were independent  
10 of the injury, including the loss of a child and being a victim of a violent crime.

11 Ms. Martinez completed the Beck Depression Inventory, Spanish language version; and the  
12 Spanish-language MMPI-II. In her responses to the Beck Depression inventory, she indicated that  
13 she did not feel sad and had not lost interest in other people or activities. Based on her responses  
14 to the Beck test, she would not meet the DSM criteria for diagnosis of major depressive episode.  
15 Her test score, in the mid-20s, suggested a moderate level of symptoms of depression, which was  
16 a bit more than he would expect on the basis of her clinical presentation: she was neatly groomed  
17 and dressed, was polite, cooperative, and pleasant throughout the evaluation. Ms. Martinez had  
18 continued working after the industrial injury and had some relationships and activities away from  
19 work. Dr. Clark would anticipate that a person with a moderate level of depression would have  
20 some difficulty with the mini-mental status examination, but Ms. Martinez's performance was intact.  
21 She exhibited much somatic distress.

22 Dr. Clark felt that Ms. Martinez's physical complaints were probably extreme, perhaps  
23 reflecting a general lack of effectiveness in life. These are likely long-standing personality problems  
24 predisposing her to develop physical symptoms under stress. He noted that she had experienced a  
25 number of robust psychosocial stressors prior to, and independent of, her industrial injury. These  
26 would be associated with a high risk of development of a mood disorder. In addition to those  
27 stressors previously stated, Dr. Clark noted that her father had died suddenly in a work-related  
28 accident and that Ms. Martinez had experienced the stress of emigrating from her country of origin  
29 less than a year prior to the industrial injury.

30 Dr. Clark disagreed with Dr. Noell's diagnoses of major depression and a pain disorder  
31 caused by the industrial injury. Ms. Martinez did not meet the criteria for major depressive disorder.  
32 In particular, she failed to indicate to Dr. Clark, or spontaneously during Dr. Noell's examination,

1 that she feels sad or has a loss of interest in activities. Similarly, on the Beck Inventory,  
2 Ms. Martinez did not indicate that she felt sad or had lost interest in other people or activities.  
3 These were primary criteria for the diagnosis of major depressive disorder that were not met.  
4 Dr. Clark testified that Ms. Martinez did have a pain disorder that was properly characterized as a  
5 somatoform disorder. The diagnostic criteria for undifferentiated somatoform disorder can be  
6 distinguished from those of a pain disorder associated with both psychological factors and a  
7 general medical condition. With the diagnosis of a pain disorder, the pain complaints are prominent  
8 or an important part of the presentation. In Ms. Martinez's case, her physical symptoms are not  
9 limited to pain, such as difficulties with movement and agility, and pain is not the predominant  
10 symptom she relates to the injury. Further, Dr. Clark believed that Dr. Noell had underappreciated  
11 the totality of Ms. Martinez's experiences, which were tragic and significant and beyond "mere risk  
12 factors." Clark Dep. at 77. Dr. Clark concluded that the somatoform disorder was not proximately  
13 caused by the November 21, 2005 industrial injury.

14 We find Dr. Clark's opinion more persuasive than Dr. Noell's for several reasons. Dr. Clark  
15 conducted a much more thorough interview of Ms. Martinez, learning important details of her life  
16 and symptoms (and the absence thereof) that were overlooked by Dr. Noell. Dr. Clark also drew  
17 from information gleaned from psychiatric tests, which Dr. Noell did not. It is significant that, even  
18 after learning the additional facts that led to Dr. Noell's re-examination of Ms. Martinez following  
19 Dr. Clark's evaluation, Dr. Noell's opinion remained largely unchanged. Dr. Noell did acknowledge  
20 that Ms. Martinez had some of the features of a somatoform disorder, the non-industrial mental  
21 health condition diagnosed by Dr. Clark. Dr. Oei, the long-standing treating physician, determined  
22 that Ms. Martinez's industrial injury solely caused a lumbar strain and that the claimant appeared  
23 somatically focused. We conclude that the evidence is insufficient to support Ms. Martinez's  
24 contention that she suffered from a mental health condition proximately caused by the industrial  
25 injury.

26 Both Petitions for Review question the industrial appeals judge's diagnosis of Ms. Martinez's  
27 mental health condition with liberal reference to the DSM, a guide that was not offered or admitted  
28 as an exhibit, in whole or in part. WAC 263-12-135 provides, in relevant part:

29 The record in any contested case shall consist of the order of the  
30 department, the notice of appeal therefrom, all orders issued by the board  
31 (including litigation orders and judge's report of proceeding), responsive  
32 pleadings, if any, and notices of appearances, and any other written  
applications, motions, stipulations or requests duly filed by any party.



1 Such record shall also include all depositions, the transcript of testimony  
2 and other proceedings at the hearing, together with all exhibits offered.  
3 *No part of the department's record or other documents shall be made part  
4 of the record of the board unless offered in evidence.* (Emphasis ours.)

4 In *In re Doug White*, Dckt. No. 92 4722 (February 10, 1994), the industrial appeals judge  
5 evaluated the psychiatric evidence according to his own reading of the DSM. The DSM was  
6 extensively discussed in the Proposed Decision and Order. The Board determined that this was  
7 improper, per WAC 263-12-135, as no portion of the manual had been admitted as evidence.

8 *White* did not reference a prior decision, *In re Deborah Lee*, BIIA Dec., 71,058 (1987). In  
9 *Lee*, the claimant's expert failed to establish whether chronic pain syndrome was a psychiatric,  
10 versus a physical, condition. The Board referred to the DSM, which had not been admitted as  
11 evidence or referenced by a medical witness, and found that the expert testimony did not establish  
12 a psychogenic pain disorder or any other recognized psychiatric condition, proximately caused by  
13 the industrial injury. We note that the *White* analysis was limited and focused solely on determining  
14 whether the condition alleged was psychiatric, versus physical; the Board did not diagnose a mental  
15 health condition.

16 We are cognizant that this Board, in several Decisions and Orders, has endorsed taking  
17 judicial notice of another medical manual, the AMA, *Guides to the Evaluation of Permanent*  
18 *Impairment (Guides)*. In *In re Bertha Ramirez*, BIIA Dec., 03 14933 (2004), we relied on findings of  
19 a non-physician expert to determine the impairment of Ms. Ramirez's left knee, with reference to  
20 the *Guides*. In *Ramirez*, we noted that the *Guides* are regularly used and referenced in Department  
21 policies, rules, and applicable law and that it was appropriate for the industrial appeals judge to take  
22 judicial notice of the publication.

23 Similar to the *Guides*, the DSM is referenced in several Department rules. See, for  
24 example, WAC 296-20-330(e) ("Impairments of mental health"); WAC 296-21-270 ("Psychiatric  
25 services"); WAC 296-30-010 ("Definitions"). However, we find good reason to distinguish our use  
26 of the *Guides* in *Ramirez* from our industrial appeals judge's use of the DSM-IV in Ms. Martinez's  
27 appeal. The *Guides* establish "straightforward" rules for rating impairments. *Ramirez*, at 6. In  
28 contrast, the DSM is a reference used by mental health professionals to diagnose mental health  
29 conditions.

30 The DSM-IV's "Cautionary Statement" emphasizes that the criteria contained therein are  
31 intended for use by those with specialized clinical training:

1 The specified diagnostic criteria for each mental disorder are offered as  
2 guidelines for making diagnoses, because it has been demonstrated that  
3 the use of such criteria enhances agreement among clinicians and  
4 investigators. *The proper use of these criteria requires specialized clinical  
training that provides both a body of knowledge and clinical skills.*

5 DSM-IV at xxvii. (Emphasis ours.) We therefore conclude that our industrial appeals judges and  
6 this Board must rely on the opinions of medical witnesses contained in the record as the basis for  
7 findings addressing mental health diagnoses.

8 After consideration of the Proposed Decision and Order and the Petitions for Review, and a  
9 careful review of the entire record before us, we enter the following:

### 10 **FINDINGS OF FACT**

- 11 1. On December 9, 2005, the claimant, Rafaela Martinez, filed an  
12 Application for Benefits with the Department of Labor and Industries, in  
13 which she alleged an injury to her back on November 21, 2005, while in  
14 the course of her employment with Shari's Management Corporation  
15 (Shari's). On December 14, 2005, the Department issued an order in  
16 which it allowed the claim. On August 3, 2007, the Department issued  
17 an order in which it awarded a permanent partial disability award equal  
18 to Category 2 for permanent dorso-lumbar and/or lumbosacral  
19 impairments and closed the claim. On September 18, 2007,  
20 Ms. Martinez filed a Protest and Request for Reconsideration with the  
21 Department, from an order dated August 3, 2007. On November 16,  
22 2007, the Department issued an order in which it affirmed the August 3,  
23 2007 Department order.

24 On November 26, 2007, Rafaela Martinez filed a Notice of Appeal with  
25 the Board of Industrial Insurance Appeals, from the Department order  
26 dated November 16, 2007. On January 3, 2008, the Board granted the  
27 claimant's appeal under Docket No. 07 25143, and agreed to hear the  
28 appeal.

- 29 2. On November 21, 2005, Rafaela Martinez sustained an injury to her low  
30 back while in the course of her employment with Shari's. The injury  
31 occurred as she attempted to lift and carry a tub full of dirty dishes. She  
32 immediately felt pain in her back.
3. Ms. Martinez sustained a low back strain, proximately caused by the  
November 21, 2005 industrial injury.
4. As of August 3, 2007, Ms. Martinez's condition, diagnosed as a low back  
strain, had reached maximum medical improvement and she was not in  
need of further proper and necessary medical treatment.
5. Ms. Martinez did not sustain a mental health condition, proximately  
caused by the November 21, 2005 industrial injury.

1 **CONCLUSIONS OF LAW**

- 2 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
3 parties to and the subject matter of this appeal.
- 4 2. Pursuant to RCW 51.36.010, Ms. Martinez's condition, diagnosed as low  
5 back strain, proximately caused by the November 21, 2005 industrial  
6 injury, had reached maximum medical improvement as of August 3,  
7 2007, and she is not entitled to further proper and necessary medical  
8 treatment.
- 9 3. The order of the Department of Labor and Industries dated  
10 November 16, 2007, is correct and is affirmed.

11 DATED: July 29, 2009.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13 /s/ \_\_\_\_\_  
14 THOMAS E. EGAN Chairperson

15  
16  
17 /s/ \_\_\_\_\_  
18 LARRY DITTMAN Member