

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

ANTONIO ORTEGA MELGOZA, *Applicant*

vs.

CYMA ORCHIDS; ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ11097620
Van Nuys District Office**

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

Defendant seeks reconsideration of the Findings and Order issued by the workers' compensation administrative law judge (WCJ) on May 28, 2024. Defendant contends that applicant has reached maximum medical improvement and so it is not entitled to temporary disability benefits; that applicant is not entitled to increased benefits under Labor Code section 4650; and that clerical errors exist in the decision because Finding of Fact #1 does not contain applicant's full date of birth and Finding of Fact #2 states that applicant's "employer" is Zenith Insurance Company.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report, which we adopt and incorporate, and as discussed below, we will amend the Findings and Order to clarify that defendant's workers' compensation insurance carrier is Zenith Insurance Company (Finding of Fact #2). Otherwise, we will affirm the WCJ's Findings and Order.

"The Appeals Board or a Workers' Compensation Judge may correct a clerical error at any time and without necessity for further hearings, notwithstanding the lapse of the statutory period for filing a petition for reconsideration." (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128

Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145], internal citation omitted.) Here, the parties stipulated at trial on February 6, 2024 that defendant's workers' compensation insurance carrier was Zenith Insurance Company. Thus, as alleged by defendant in its Petition, the finding that Zenith Insurance Company was applicant's employer is clearly a clerical error, and we will amend Finding of Fact # 2 accordingly.

With respect to defendant's contention that the WCJ failed to provide a complete date of birth for applicant, under Labor Code section 138.7, individually identifiable information shall be kept confidential and protected from public disclosure, except under the enumerated exceptions. A date of birth is considered to be individually identifiable information and is subject to privacy restrictions, and we will make no changes to Finding of Fact #1. ***We note that the best practice is to identify an injured worker's age only, and not their birthdate, on any document that is publicly available.***

Turning to defendant's contentions as to applicant's entitlement to temporary disability indemnity, we first observe that Labor Code section 4600 provides:

(a) Medical, surgical, chiropractic, acupuncture, licensed clinical social worker, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, *that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury shall be provided by the employer.*

(Lab. Code, § 4600, emphasis added.)

Here, applicant's treating psychiatrist Mohammed A. Shamie, M.D.,'s requests for treatment in the form of cognitive behavior therapy, individual psychotherapy, and/or psychopharmacology management were denied. (Ex. 9, Deposition Transcript of Mohammed A. Shamie, May 17, 2023, p. 12:18-24; Ex. 19, Report of Mohammed A. Shamie, February 4, 2022, p. 5.) Yet, applicant's treating psychiatrist Dr. Shamie and the qualified medical evaluator (QME) in psychiatry David M. Reiss, M.D., both testified that absent treatment, applicant has not reached maximum medical improvement. (Ex. 9, p. 12:2-8; Ex. 1, Deposition Transcript of David M. Reiss, M.D., March 17, 2023, p. 39:3-4, 19-22.)

While defendant's contentions are not a model of clarity, the limitation on the use of vibratory tools seems central to defendant's arguments:

Even if the court were to determine that the applicant is not at MMI status psychiatrically, it is clear based on the medical report of Dr. Reiss and the deposition of Dr. Reiss that he has never been temporarily totally disabled separate

from any time that he was orthopedically temporarily totally disabled. The only psychiatric work restriction concerns the use of the vibratory tools which has been a permanent restriction orthopedically since Dr. Harris declared applicant MMI. There is no justification for finding any periods of temporary total or temporary partial disability beyond the period which Zenith Insurance Company paid temporary disability indemnity benefits.

(Petition, p. 12.)

Generally speaking, in cases of an injury involving multiple body parts, “[t]here is only one permanent and stationary date for an injury, even if some body parts stabilize before others. The permanent and stationary date would be the date on which the last body part became permanent and stationary.” (*American Ins. Co. v. Workers’ Comp. Appeals Bd. (Mathat)* (2003) 68 Cal.Comp.Cases 926, 931 [writ den.])

Temporary disability indemnity “is payable during the injured worker’s healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status.” (*Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) Although a partially temporarily disabled worker is expected to work during a period of partial disability if suitable work is available, as the Supreme Court explained in *General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)*:

Under the “odd lot” doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages. [Citation.] This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. [Citations]

(*General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375].)

Accordingly, we grant defendant’s Petition, amend the May 28, 2024 Findings and Order to clarify that defendant’s workers’ compensation insurance carrier is Zenith Insurance Company (Finding of Fact #2), and otherwise affirm the decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on May 28, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on May 28, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

2. At the time of injury, the employer's workers' compensation insurance carrier was Zenith Insurance Company.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 19, 2024

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

**ANTONIO ORTEGA MELGOZA
MICHAEL BURGIS & ASSOCIATES, P.C.
ROSENBERG YUDIN LLP**

JB/pm

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

- | | | |
|----|------------------------------|------------------------|
| 1. | Minutes of Hearing | February 6, 2024 |
| 2. | Findings and Order | May 28, 2024 |
| 3. | Identity of Petitioner | Defendant |
| 4. | Verification | Yes |
| 5. | Timeliness | The Petition is timely |
| 6. | Petition for Reconsideration | June 19, 2024 |
| 7. | Proof of Service | Yes |

II
FACTS AND PROCEDURAL HISTORY

The applicant, Antonio Ortega Melgoza, born February 11, 19xx, while employed on August 23, 2016, at Oxnard, California by Cyma Orchids insured by Zenith Insurance Company sustained an[] admitted injury to his left thumb and psyche. The injury to the left thumb was described as a complete traumatic metacarpophalangeal amputation of the left thumb.

This matter proceeded to Trial on February 6, 2024, on the following issues:

1. Whether the applicant has reached maximum medical improvement status on a psychiatric basis.
2. Whether the applicant is entitled to retroactive temporary disability benefits and the amount thereof.
3. Whether defendants have complied with the IMR determination, dated September 29, 2021.

All other issues were deferred and bifurcated. (MOH, 2:17-24).

The undersigned issued Findings and Orders and an Opinion on Decision on May 28, 2024, in favor of the Applicant, namely, that (1) The applicant has not reached maximum medical

improvement status on a psychiatric basis, (2) The applicant is entitled to retroactive temporary total disability benefits from the last date temporary disability benefits were paid, less credits for any sums paid, less 15% attorney's fees for any retroactive amounts and continuing up to the statutory maximum of 240 weeks per Labor Code Section 4656(c)(3), and (3) Defendants have not complied with the IMR determination, dated September 29, 2021. Thereafter, Defendant filed the instant Petition for Reconsideration on June 19, 2024.

Defendant's Petition for Reconsideration is based on the following grounds:

1. That by the order, decision or award made and filed by the workers' compensation judge, the Workers Compensation Judge acted without or in excess of his powers.
2. That the evidence does not justify the findings of fact.
3. That the findings of fact do not support the Order, Decision or Award.

Defendant, petitioner, essentially argues that (1) the Applicant has reached Maximum Medical Improvement (MMI) on a psychiatric and orthopedic basis, (2) the Applicant is not entitled to temporary disability beyond that which Zenith Insurance Company has already paid in this case and (3) that the statutory increase in benefits under Labor Code §4650(d) should not have been imposed. Petitioner correctly points out that the Findings of Fact on Page 1 indicates that at the time of the injury, the employer was Zenith Insurance Company. This appears to be a scrivener's error as the employer is Cyma Orchids insured by Zenith Insurance Company.

III **DISCUSSION**

The petition should be denied. Despite Defendant's claims to the contrary, the Applicant has not reached MMI. Treating physician, Dr. Shamie evaluated Applicant on September 20, 2019 and found Applicant "to be in extreme need of emotional treatment." (Applicant's Exhibit 18, pg. 25). In his September 17, 2022 report, psychiatrist PQME Dr. David Reiss, did opine that the Applicant "...can be considered psychiatrically Permanent and Stationary for rating purposes." (Joint Exhibit 2, pg. 17). However, at a deposition on March 17, 2023, when asked whether his opinion was accurate as to Applicant being at MMI, Dr. Reiss clarified that "[w]ithout treatment, he was not at the point of maximum medical improvement psychiatrically." (Id. pgs. 38-39). "Clinically, he's not really MMI until he receives treatment." (Id. pg. 39). When Dr. Reiss

conceded that Applicant was not at MMI, Applicant Attorney questioned whether he would have any temporary work restrictions while receiving medical treatment and Dr. Reiss opined in the affirmative that he would have the following temporary work restriction, “he should avoid any environment which is inherently seriously stressful or potentially traumatic.”

In his May 17, 2023 deposition, Dr. Shamie opined that Applicant is still “currently totally temporary disabled” (Joint Exhibit 9, pg. 14) and “has a temporary work restriction of avoiding power tools because utilizing power tools can trigger anxiety and his PTSD.” (Id. pg. 16). When Defendant asked if the doctor had been treating Applicant extensively, Dr. Shamie answered, “For the follow-up and also the psychopharmacology sessions on a monthly basis as much as he was available.” (pg. 28) “But even though I continued to see the patient on a monthly basis as a requirement and as an obligation of me as a psychiatrist... at the end, psychotherapy could not be provided because of continuous denial.” (Id. pg. 13).

Defendant does not contest in its petition that the applicant is eligible for 240 weeks per Labor Code Section 4656(c)(3) but for his MMI status based on the admitted amputation injury. Based on the unrebutted findings of the psychiatric treating physician and psychiatric QME, the applicant has not reached MMI and is therefore entitled to retroactive and ongoing temporary total disability benefits from the last date temporary disability benefits were paid, less credits for any sums paid and wages earned by the applicant.

Lastly, Defendant contends that it is not liable for the statutory increase in benefits under Labor Code section 4650. Labor Code section 4650 benefits are the most common seen in workers’ compensation. Labor Code section 4650(d) states, “If any indemnity payment is not made timely ... the amount of the late payment shall be increased by 10 percent and shall be paid, without application, to the employee.” The Labor Code §4650(d) penalty is a self-executing, strict liability provision that applies to delays in payments of temporary or permanent disability payments. *Rhiner v. WCAB* (1993) 58 CCC 172, 183; *State of California v. WCAB (Ellison)* (1996) 61 CCC 325, 333; *Christian v. WCAB* (1997) 62 CCC 576, 586; *Mote v. WCAB* (1997) 62 CCC 891, 895. Under Labor Code §4650(d), if a payment is late, that individual payment is automatically increased by 10 percent, and the penalty applies irrespective of the reason for delay. *SCIF v. WCAB (Stuart)* (1998) 63 CCC 916, 918. Clearly, if the applicant is entitled to retroactive and continuing Temporary Disability benefits, the applicant is also entitled to an increase in temporary disability indemnity payments pursuant to Labor Code §4650(d).

RECOMMENDATION

For the reasons stated above, it is respectfully requested that Defendant's Petition for Reconsideration be denied.

Date: May 28, 2024

HON. TROY SLATEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE