

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

CHRIS GASPAR, *Applicant*

vs.

**SAN MATEO COUNTY TRANSIT DISTRICT dba SAMTRANS,
permissibly self-insured, administered by THE CITIES GROUP, *Defendants***

Adjudication Number: ADJ11489504

Oakland District Office

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 20, 2024, wherein the WCJ found in pertinent part that applicant sustained injury to his neck, low back, left shoulder, and psyche while employed by defendant as a bus operator during the period up through April 4, 2018; that applicant was permanent and stationary on July 23, 2020; that applicant is entitled to temporary disability for the period of July 29, 2019, to July 23, 2020; and that:

Defendant paid temporary disability from 04-14-2018 to 04-20-2018 and for the period of 09-19-2018 to 12-14-2019. Because the applicant was forced to retire due to this injury, Defendant is entitled to credit for the period of 04-14-2018 to 04-20-2018 and from 09-18-2018 to 07-28-2019. Amounts due are to be adjusted by the parties. (Finding of Fact #16, May 20, 2024.)

The WCJ awarded additional temporary disability indemnity at the rate of \$865.88 per week for the period from July 29, 2019, to July 23, 2020, and permanent disability of 22%, less credit for permanent disability advances.

Defendant contends that the temporary disability indemnity paid to applicant during the period from June 29, 2019, to December 14, 2019, in the amount of \$29,122.57 was an overpayment and that it is entitled to credit for the full amount, against the permanent disability indemnity awarded to applicant; and that it should not be liable for further payments from December 15, 2019 to July 23, 2020, in the amount of \$22,459.18.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed in the Report, which we adopt and incorporate, and as discussed below, we will grant reconsideration and we will affirm the F&A except that we will amend the F&A to clarify Finding of Fact #16, by removing this sentence: “Because the applicant was forced to retire due to this injury, Defendant is entitled to credit for the period of 04-14- 2018 to 04-20-2018 and from 09-18-2018 to 07-28-2019.”

I.

Applicant claimed injury to his neck, low back, left shoulder, and psyche, while employed by defendant as a bus operator during a period of approximately 25 years, ending on April 4, 2018.

The parties proceeded to trial on May 2, 2023. They stipulated that defendant paid applicant temporary disability indemnity for the periods from April 14, 2018, to April 20, 2018, and from September 19, 2018, to December 14, 2019. (Stipulation Four, Minutes of Hearing and Summary of Evidence (MOH/SOE), May 2, 2023, p. 2.) As relevant herein, defendant raised the issue of a temporary disability indemnity overpayment in the amount of \$29,122.57 credited against the award of permanent disability indemnity, “as set forth in Exhibit C.” (MOH/SOE, May 2, 2023, p. 3.) According to Exhibit C, defendant requested reimbursement from applicant for the period from June 29, 2019, through December 14, 2019 in the amount of \$29,122.57. (Exhibit C, Notice Regarding Temporary Disability Benefits Payment Termination, December 27, 2019.) (MOH/SOE, May 2, 2023, p. 3.)

On May 8, 2023, the WCJ issued a findings and award. As relevant herein, the WCJ found that “applicant’s injury caused temporary disability for which he has been adequately compensated” (Finding of Fact #3); and that defendant “was entitled to a credit for temporary disability overpayment for the period of November 7, 2019, through December 14, 2019 at \$865.88 per week” (Finding of Fact #6). The WCJ awarded permanent disability, “less credit for the temporary disability overpayment in Finding number 6 above.”

On August 4, 2023, we issued our “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.” In that decision, we affirmed the findings and award except that we amended the findings and award to defer the issues of the permanent and

stationary date, and whether applicant has been adequately compensated for the temporary disability caused by his injury (Finding of Fact #3); to find that applicant's orthopedic injury caused permanent disability of 22%, for a total sum of \$24,795.00 payable at \$290.00 per week (Finding of Fact #4); and to defer the issue of whether defendant is entitled to a credit for the claimed temporary disability indemnity overpayment, against the award of permanent disability indemnity (Finding of Fact #6); and we returned the matter to the WCJ for further proceedings consistent with this opinion.

On April 30, 2024, the parties returned to trial. As relevant herein, applicant raised the issue of temporary disability from July 29, 2019, to July 23, 2020, and defendant raised the issue of the temporary disability overpayment of \$29,122.57. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 30, 2024, p. 2.) Applicant also raised the issue of: "Whether Applicant Attorney's fee is owed outside of permanent disability indemnity, if the temporary disability overpayment exceeds permanent disability owed. The Applicant asserts that TTD has been underpaid and TTD is owing, that Defendants do not get credit as against retirement benefits paid, and that Defendant's conversion of PD to credit of TTD was improper." (MOH/SOE, April 30, 2024, p. 3.)

On May 20, 2024, the WCJ issued the F&A.

II.

In our review of this matter, we note that the only issues raised with respect to temporary disability at both trials were applicant's claim that he was entitled to temporary disability for the period from July 29, 2019, to July 23, 2020; and defendant's claim of an overpayment of \$29,122.57 from June 29, 2019, to December 14, 2019.

In her decision of May 20, 2024, the WCJ found that applicant was entitled to temporary disability for the period from July 29, 2019, to July 23, 2020 (Finding of Fact #15). She awarded "[a]dditional temporary disability indemnity at the rate of \$865.88 per week for the period of 07-29-2019 to 07-23-2020," and awarded permanent disability of 22% without a credit for temporary disability overpayment. (Award, a, b.) In Finding of Fact #16, she further found that: "[d]efendant paid temporary disability from 04-14-2018 to 04-20-2018 and for the period of 09-19-2018 to 12-14-2019. *Because the applicant was forced to retire due to this injury, Defendant is entitled to credit for the period of 04-14-2018 to 04-20-2018 and from 09-18-2018 to 07-28-2019. Amounts due are to be adjusted by the parties.*" (Italics added.)

However, defendant never raised the issue of a credit for the period of April 14, 2018, to April 20, 2018 and from September 18, 2018, to July 28, 2019 at either trial. Moreover, the WCJ did not award such a credit. Thus, we will amend Finding of Fact #16 to remove this sentence: “Because the applicant was forced to retire due to this injury, Defendant is entitled to credit for the period of 04-14- 2018 to 04-20-2018 and from 09-18-2018 to 07-28-2019.”

We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on May 20, 2024, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 20, 2024 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

16. Based on Stipulation number 4 of Minutes of Hearing/Summary of Evidence from Trial on 05-02-2023, defendant paid temporary disability from 04-14-2018 to 04-20-2018 and for the period of 09-19-2018 to 12-14-2019. Amounts due are to be adjusted by the parties.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2024

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

**CHRIS GASPAR
GEORGE P. SURMAITIS, ESQ.
LAUGHLIN, FALBO, LEVY & MORESI**

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Date of Injuries/Body Parts: and psych Occupation: Petitioner:	CT to 04-04-2018/neck, low back, left shoulder bus driver Defendant Sam Mateo Transit District DBA Sam Trans Adjusted by the Cities Group
Timeliness: Verification:	The petition, filed on 06-05-2024, is timely The petition is not verified.
Petitioner's Contention:	Defendant contests the finding applicant is entitled to temporary disability for the period of 07-29-2019 to 07-23-2020 (Finding number 15 of the Findings and Award and Opinion on Decision dated 05-20-[0]24.

II. PROCEDURAL HISTORY

Applicant Chris Gaspar while employed during the period through 04-04-2024, as a bus operator, occupational group number 250, by defendant SAN MATEO TRANSIT DISTRICT DBA Sam Trans, permissibly self-insured and adjusted by THE CITIES GROUP, sustained injury arising out of and occurring in the course of employment to his neck, low back, and left shoulder. The parties proceeded to the first trial on 05-02-2023 on the case in chief and it was found that permanent disability rating for the orthopedic rating is 22% or \$24,795.00. The record shows no permanent disability advances. At the first trial, the finding on psychiatric injury was deferred.

A second trial took place on 04-30-2024 and the psychiatric injury was found to be compensable. There is no additional permanent disability or temporary disability associated with psychiatric injury. Neither injury nor permanent disability rating are the subject of the instant Petition for Reconsideration.

Defendant contends that it is entitled to credit for temporary disability overpayment because of applicant's service retirement. At the first trial, it was found that applicant was compelled to take his service retirement as the result of his industrial injury. Specifically,

Finding of Fact number 5 of Findings and Award and Opinion on Decision dated 05-18-2023 is as follows:

5. Due to the effects of the industrial injury, applicant was compelled to retire from his position with the employer. The retirement was unplanned as applicant intended to return to work upon recovery from the accepted industrial injury.

(Findings and Award and Opinion on Decision dated 05-18-2023, Finding number 5 at p. 2.)

Defendant file[d] a Petition for Reconsideration on 06-05-2023. On 08-04-2023, the Workers' Compensation Appeals Board issued an Opinion and Order Granting Petition for Reconsideration with Decision After Reconsideration dated 08-04-2023. The Board affirmed Finding number 5 as follows:

The Second District Court of Appeals has explained that:

... [T]emporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. (Citation.) In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. (Citation.) Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. (Citation.) Thus, in many instances the allowance of credit for a temporary disability overpayment against permanent disability indemnity can be disruptive and, in some instances totally destructive of the purpose of permanent disability indemnity. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App. 3d 827, 836-837 [45 Cal.Comp.Cases 1106] (citations omitted).)

Also, the payment of retirement benefits does not in and of itself, satisfy an employers' obligation to provide workers' compensation benefits. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 775 [1973 Cal.App. LEXIS 120].) For example, as in this matter, if the injured worker plans to continue working but retires due to the industrial injury, then the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish that he or she intended to continue working but instead had to retire because of the job-related injury. Under those circumstances the worker would be entitled to temporary disability benefits. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *Pham v. Workers' Comp. Appeals Bd.*, (2000) 78 Cal.App.4th 626 [65 Cal.Comp.Cases 139].) We agree with

the WCJ's Finding that: "Due to the effects of the industrial injury, applicant was compelled to retire from his position with the employer. The retirement was unplanned as applicant intended to return to work upon recovery from the accepted industrial injury." (F&A, p. 2, Finding #5.)

Workmen's compensation and retirement programs are based upon entirely different considerations. (Citation) The former is compulsory under state law and may not be subsidized by any contributions or exactions from employees while the latter is voluntary and subject to employee-employer contractual arrangements. (Citation.) Where a retirement system grants a definite allowance, unless provision is expressly made for a *pro tanto* deduction for workmen's compensation benefits, such reduction cannot be made. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 775 [1973 Cal. App. LEXIS 120] (citations omitted).)

The trial record contains no evidence that applicant's CalPERS retirement includes language warranting a reduction of the applicable workers' compensation benefits.

(Opinion and Order Granting Petition for Reconsideration with Decision After Reconsideration dated 08-04-2023 at p. 4-5.)

However, the Appeals Board stated absent a Finding regarding applicant's permanent and stationary date and uncertainty as to the status of the psychiatric injury claim, the Board was unable to fully address the issue of defendant's entitlement to credit for the alleged temporary disability indemnity overpayment. (*Id.*, at p. 6.) The case was remanded to the trial level as follows:

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of the permanent and stationary date, and whether applicant has been adequately compensated for the temporary disability caused by his injury; to find that applicant's orthopedic injury caused permanent disability of 22%, for a total sum of \$24,795.00 payable at \$290.00 per week; and to defer the issue of whether defendant is entitled to a credit for the claimed temporary disability indemnity overpayment, against the award of permanent disability indemnity; and we return the matter to the WCJ for further proceedings consistent with this opinion.

(*Id.*)

A second trial took place on 04-30-2024. Findings and Award and Opinion on Decision issued on 05-20-2024 addressing all the issues on remand.

III. FACTS REGARDING TEMPORARY DISABILITY

At the second trial, the parties stipulated that applicant's service retirement became effective on 07-29-2019. Despite the retirement, defendant kept paying temporary disability for until 12-14-2019. The official Notice Regarding Temporary Disability Benefits Payment Termination dated 12-27-2019 claims a temporary disability overpayment in the amount of \$29,122.68 for the period of 06-19-2019 through 12-14-2019. (Ex. C.) The applicant's temporary disability rate is \$868.88 per week and the amount claimed in the overpayment notice includes payment for child support in the amount of \$8,217.75. (Id.)

Exhibit D is a "Resignation of Position" form for the employer which was completed by Applicant and signed on 06-25-2019. On this form, Applicant checks the box for "Retirement" and writes: "CAN'T PERFORM THE JOB WELL DUE TO MY LEFT ROTATOR CUFF SURGERY." (Ex. D.) His last day on payroll and his last day at work will be 06-28-2019. (Id.) The bottom of the form was signed by the Director of Human Resources and dated 06-26-2019 or 06-27-2019. (Id.)

At the first trial on 05-02-2023, the director of human resources at SamTrans Juliet Nogales-Deguzman testified as an adverse witness. Ms. Nogales-Deguzman manages both workers' compensation and retirement programs. (MOH/SOE dated 05-02-2023 at p. 4/lines 12-20.) At the end of her testimony, I questioned the witness about Exhibit D and she verified that Applicant submitted his resignation to retire on 06-27-2019 and his resignation was effective on 06-28-2019. (Id., at p. 6/lines 25-29.)

Defendant filed a Petition for Credit dated 04-28-2021 which affirms that the overpayment claim was based on the premise that Applicant voluntarily took himself out of the labor market on account of his service retirement. The Petition for Credit outlines defendant's delay in adjusting temporary disability. The petition states that the information from the employer Sam Trans was not transmitted the adjusting entity The Cities Group until 11-18-2019, almost four months after the effective retirement date and almost five months after the resignation, Exhibit D, was received. The Petition for Credit, filed 16 months after the last payment was made and after the overpayment notice was issued, is inaccurate in stating that the overpayment was from 06-29-2019 to 11-18-2019.

Despite receiving notice about applicant's retirement on 11-18-2019, defendant kept paying temporary disability another month, until 12-14-2019. For completeness of the

petition, notices to applicant, namely, exhibit C, which is dated 12-27-2029 should have been filed with the petition but it was not.

At the first trial, the period of temporary disability overpayment alleged was for the period of 06-29-2019 to 12-14-2019. At the first trial on 05-02-2023, the director of human resources testified that she manages *both* workers' compensation and retirement programs and is the direct liaison to the Cities Group and she speaks with them at least once every month, depending on the caseload. (MOH/SOE dated 05-02-2023 at p. 4/lines 12-20.) The witness testified that she is in "regular communications with Cities Group" and if an employee retires, this is conveyed to Cities Group, usually or typically right away or within a couple of weeks.

(Id., at p. 4/line 41 to p.5/line 1.) There is no explanation in the record as to the delay in notice between the employer and its adjusting entity. The witness for the defendant offered no explanation as to why the overpayments occurred and there is no explanation in the record.

In addition, at the first trial, the evidence established that applicant resigned on 06-27-2019, but no one was able to establish the effective date of the service retirement. It was not until the second trial, one year later, that the parties stipulated that the **service retirement was effective on 07-29-2019.**

At the second trial, the parties stipulated that the **permanent and stationary date** for the orthopedic injury is **07-23-2020** based on QME Dr. Sabsovich. (Additional Finding of Fact number 9.) Therefore, at the second trial, defendant claims a temporary disability overpayment for the period of 07-29-2019 through the termination of temporary disability on 12-19-2019. This is 20 weeks plus four days at \$868.88 per week, the total overpayment claimed is \$17,874.12.

Conversely, based on the stipulations, applicant claims retroactive temporary disability for the period until he was permanent and stationary, from 12-20-2019 to 07-23-2020, or 30 weeks plus 6 days for an underpayment of 744.78 of \$26,811.18.

With the psychiatric injury resolved and the permanent and stationary date established, I found that applicant is entitled to temporary disability for the period of 07-29-2019 to 07-23-2020 because he was forced to take retirement due to the effects of his industrial injury. (Findings and Award and Opinion on Decision dated 05-20-2024, Finding number 15 at p. 3.) In addition, applicant was awarded 22% permanent disability in the amount of \$24,795.00.

Defendant was awarded credit only until retirement which, as far as the record shows, is for the period of 04-14-2018 to 04-20-2018 and from 09-18-2018 to 07-28-2019. (Findings and Award and Opinion on Decision dated 05-20-2024, Finding number 16 at p. 3.) Amounts due were to be adjusted by the parties, for several reasons. The temporary disability payments appear subject to a child support lien, as DCSS San Francisco has a lien of record and prior payment were made to DCSS according to the benefits statement. In addition, the status of permanent disability advances was unclear due to "Defendant's conversion of PD to credit of TTD." (MOH/SOE of 04-30-2024, Issue number 5 at p. 3.) Further, though applicant's attorney George Surmaitis was awarded 15% of amounts awarded to applicant, there is a lien on file by Ryan Sutherland, Esq. who is applicant's former attorney.

As of the filing of this report, no answer has been received.

IV. DISCUSSION

Labor Code section 5902 requires that a petitioner "set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision, or award ... to be unjust or unlawful." Rule 10945(a) requires a petition for reconsideration to "fairly state all of the material evidence relative to the point or points at issue," and that "Each contention shall be separately stated and clearly set forth." (8 Cal. Code Reg. § Rule 10945(a).) In the Petition for Reconsideration, Defendant materially misrepresents the issue by stating that "Applicant voluntarily retired under a service retirement." (Petition for Reconsideration dated 06-05-2024 at p.1/line 26 to p.2/line 2; at p. 2/lines 20-23; at p. 6/lines 10-12; p. 7/ line 19 to p. 8/line 10; p.8/lines 8-10.)

In the Petition for Reconsideration, the section entitled “Procedural History” at page 2 omits the prior finding that applicant’s retirement was not voluntary and that upon Defendant’s first Petition for Reconsideration, the Appeals Board agreed:

Due to the effects of the industrial injury, applicant was compelled to retire from his position with the employer. The retirement was unplanned as applicant intended to return to work upon recovery from the accepted industrial injury.

(Opinion and Order Granting Petition for Reconsideration with Decision After Reconsideration dated 08-04-2023 at p. 4-5.)

The entirety of petitioner’s argument is premised on the false representation that applicant’s service retirement was completely voluntarily with intent to take himself out of the labor market. Applicant did *not* take his retirement voluntarily. This issue was previously litigated and appealed to the Appeals Board. The procedural history in the petition implies that the matter was remanded to trial on all issues, but this is not true. The issue on remand pertains to the permanent and stationary date, particularly, whether applicant sustained a psychiatric injury and if this impacts indemnity in this case, it does not.

Defendant and its representatives may be admonished and could be sanctioned for the misrepresentations and omissions replete throughout the Petition for Reconsideration dated 06-05-2024.

As stated by the Appeals Board in its Opinion, temporary disability indemnity and permanent disability indemnity serve entirely different functions. Temporary disability serves as wage replacement for the healing period. Payment of retirement benefits does not in and of itself satisfy an employers’ objection to provide workers’ compensation benefits. If the injured worker plans to continue working but retires due to the industrial injury, the worker cannot be said to be unwilling to work and would have an earnings capacity diminished by the injury. At the first trial, applicant proved that his service retirement was involuntary due to the industrial injury. Accordingly, applicant is entitled to temporary disability for diminished earnings until the permanent and stationary date of 07-23-2020. Retroactive temporary disability must be paid in accord with Labor Code section 4661.5, if applicable. Given the record, attorney fees should be awarded from any retroactive temporary disability payments. In addition, he should be awarded permanent disability of 22% or \$24,795.00. A 15% attorney fee is appropriate for the valuable services of applicant’s attorney during this prolonged litigation.

In sum, the inaccuracies and omissions above compound the prior issues regarding the factually inaccurate and incomplete Petition for Credit dated 04-28-2021, the inexplicable circumstances where the human resources director failed to communicate the retirement to the Cities Group, the additional delay by the Cities Group in stopping temporary disability, the failure of defendant to provide accurate information of the effective date of the retirement at the first trial, defendant's failure to provide accurate information on its unilateral recharacterization of temporary disability paid, plus the fact that Applicant was compelled to retire early after a long career, all of this has taken a toll on Applicant. The case may be referable to the Audit Unit. Without further delay, the Appeals Board should affirm the Award of 05-20-2024.

V. CONCLUSION

It is recommended that the Petition for Reconsideration dated 06-05-2024 be DENIED.

DATE: 06-14-2024

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE