WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CORLISS ANDERSON, *Applicant*

vs.

WALMART, INC.; ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT, *Defendants*

Adjudication Number: ADJ10447246
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendants Walmart, Inc. and ACE American Insurance Company, administered by Sedgwick Claims Management, seeks reconsideration of the July 30, 2024 Second Amended Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that (1) applicant's average weekly earnings are $2,060.35 per week, with a temporary disability rate of $1,373.57 per week; (2) the injury caused temporary disability in excess of the maximum allowable period of 104 weeks, for which indemnity is payable for 104 weeks at the rate of $1,373.57 per week, in the total sum of $142,851.28, less credit for all sums previously paid toward temporary disability, but not reduced for sums paid by EDD; and (3) applicant is entitled to medical mileage reimbursement in the amount of $73,110.53, less credit for all sums paid for medical mileage.

Defendants contend that (1) the trial court erred in setting aside the parties' stipulation that applicant's average weekly earnings were $432.80 per week, with a temporary disability rate of $288.53 per week; (2) the evidence does not support dual employment with Walmart and SMX, LLC; (3) evidence of applicant's self-employment should not have been admitted, and self-employment income must reflect net, not gross, income; (4) the trial court should have applied a credit for partial reimbursement to EDD; and (5) the trial court awarded excessive medical mileage.

We received and reviewed an answer from applicant Corliss Anderson. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration and defer the issues of earnings, temporary disability indemnity, and mileage reimbursement.

FACTS

As the WCJ stated in his Report:

> Seven days of formal trial proceedings were conducted on the issues of earnings, temporary disability, and mileage reimbursement (See Minutes of Hearing and Summary of Evidence dated 10/18/2021, 12/14/2021, 3/21/2022, 5/26/2022, 10/26/2023, 4/22/2024, and 5/7/2024). Penalties, and all other issues besides earnings, temporary disability, and mileage reimbursement, were deferred and were not part of the decision. A previous decision on these four issues, and an amended decision, were each rescinded after petitions for reconsideration, following each of which additional hearings were conducted and numerous additional documents filed, with the issues being re-submitted for decision based on all of the previous evidence plus all additional information that was subsequently filed herein. Judicial notice was taken of the contents of FileNet for the sake of ensuring a complete record of all proceedings and available evidence.
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> Unfortunately, after many hours of further discussion and pages of additional evidence and analysis, the parties remain in dispute regarding the issues of earnings, temporary disability, and mileage reimbursement. Post-trial briefs were provided by the parties. Defendant's post-trial brief asserted that nothing more is owed, because it had paid $36,331.12 in medical mileage, which was the amount awarded in the now-rescinded First Amended Findings and Award, and it had also paid 104 weeks of temporary disability (TD) benefits at the rate of $288.53 per week (a rate to which the parties stipulated on September 4, 2018), with reimbursement for unemployment insurance benefits paid by the Employment Development Department (EDD) counted toward the 104 weeks. Applicant's post-trial brief disputed the total amount of allowable mileage, the average weekly earnings rate, and the right to credit for EDD, and requested mileage reimbursement $86,890.77 less paid credit of $36,302.46 with an outstanding balance of $50,588.31.
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> After reviewing all of the evidence and arguments, the Second Amended Findings and Award concluded that (1) applicant's earnings should be increased from the rate stipulated in 2018 to $2,060.35 per week, based on her apparent capacity for dual employment at the time of injury, (2) the legal maximum 104 weeks of TD

should be paid at this earnings rate, less credit for sums paid, but not for EDD which was apparently paid after the maximum compensable TD period of 104 weeks within five years, and (3) the previous finding of reimbursable mileage of $36,311.12 should be increased to $73,110.53, based on additional evidence of what appears to be travel in good faith by applicant for the purpose of obtaining treatment, taking into account defendants' willingness to pay some of this mileage and unwillingness to formally petition to change the California-based Primary Treating Physician (PTP) or otherwise regain medical control. Although these further amended findings did not resolve all issues in Ms. Anderson's case, it was hoped that perhaps the second amended decision would finally bring the parties sufficient closure on the long-contested issues of earnings, TD, and mileage to lead to a global settlement based on Agreed Medical Evaluator Dr. Peter Newton instead of further litigation.

On October 18, 2021, the first trial date on the issues decided herein, the parties stipulated that Corliss Anderson, while employed on March 29, 2016 (at 42 years of age), as a modular team worker, at Lancaster, California, by Wal-Mart, sustained injury arising out of and in the course of employment to her right wrist, and at the time of injury, the employer's workers' compensation carrier was ACE American Insurance Company. The parties further stipulated that the employer has furnished some medical treatment, and that the primary treating physician is Dr. Ron Goldstein (Minutes of Hearing and Summary of Evidence 10/18/2021, p. 2, numbered lines 5-10). Those stipulations are included in this decision as Findings of Fact 1, 2, and 3.

At the first session of trial, applicant Corliss Anderson provided 963 pages of evidence in the form of electronic files that were divided into a bulk file of 874 pages identified as Applicant's 1, 63 pages identified as Applicant's 2, a 2017 tax return transcript identified as Applicant's 4, a 2018 tax return transcript identified as Applicant's 4, and transportation documents (including mileage forms) identified as Applicant's 5. These were all admitted into evidence, with defendant objecting to handwritten portions of these documents. Defendants provided 40 exhibits that were identified and admitted into evidence as Defendant's A through QQ, skipping letters X through Z as these were reserved for Agreed Medical Evaluator (AME) reports. Eight AME reports and one deposition transcript of Peter Newton, M.D. were identified and admitted into evidence as Court's X1 through X9.

On the first day of trial, Marisel Fitting was called as a witness by Ms. Anderson and Ebony Storey was called as a witness by the defendant. Their testimony has been summarized in the Minutes of Hearing and Summary of Evidence for October 18, 2021, and a transcript was later prepared at the request of the defendants.

On December 14, 2021, a second full day of trial proceedings was conducted, with defense witness Ebony Storey completing her testimony, and Elizabeth Diana Winn also testifying on behalf of the defendants. A transcript of the second day of trial

was also prepared at defendants' request. A picture of a Telxon scanner was marked for identification as Applicant's 6, but was not admitted into evidence, and is not admitted into evidence, based on defendant's objection that it was unlisted in the pretrial conference statement and not authenticated. Judicial notice of web links to two YouTube videos and a Google image of a scanner was similarly not taken, and is not taken, based on defendant's objection that the videos were not properly authenticated. Defendant's UU, records of the California Employment Development Department (EDD) was admitted into evidence without objection (Minutes of Hearing and Summary of Evidence 12/14/2021, p. 2, numbered lines 10-12; Transcript 12/14/2021, p. 3, lines 13-23).

On March 21, 2022, trial resumed for a third day, with the testimony of Ms. Anderson. Other witnesses had been summoned by subpoena by Ms. Anderson, but they did not appear in person or on the telephone conference line to testify. Defendants filed 12 petitions to quash those witness subpoenas, which were denied, and remain denied, but the parties agreed to proceed with Ms. Anderson's testimony that day. Trial was continued to a fourth day to seek the participation of additional witnesses (Minutes of Hearing and Summary of Evidence 3/21/2022, p. 13, lines 13-14).

On May 26, 2022, trial concluded with the testimony of claims examiner Kathy Hoskins, called as a witness by Ms. Anderson. On this day, the parties rested and the matter was submitted for a decision without any further testimony (Minutes of Hearing and Summary of Evidence 5/26/2022, p. 1, lines 19-21).

After an initial findings and award was rescinded and further proceedings conducted, the matter returned to formal trial proceedings for a submission on the record without additional witnesses or exhibits on October 26, 2023 (Minutes of Hearing and Summary of Evidence 10/26/2023, p. 1, lines 18-21).

After an amended findings and award was rescinded and further proceedings conducted, the matter returned to formal trial proceedings for additional exhibits on April 22, 2024, followed by further additional exhibits through Applicant's Exhibit 21 and Defendant's Exhibit VVV, as well as additional testimony of the applicant, Corliss Anderson, on May 7, 2024, which is summarized in the May 7, 2024 Minutes of Hearing and Summary of Evidence (Minutes of Hearing and Summary of Evidence 4/22/2024, pp. 1-3; Minutes of Hearing and Summary of Evidence 5/7/2024, pp. 1-12). The matter was once again submitted for decision on the issues of earnings, TD, and medical mileage, after both parties have had ample opportunity (indeed, multiple opportunities) to fully develop the record with additional exhibits, testimony, and argument.

A Second Amended Findings and Award dated July 30, 2024 increased the earnings rate to $2,060.35 per week based on additional evidence of self-employment income, and disallowed credit against the 104-week cap for EDD because EDD benefits were apparently paid after the maximum compensable temporary disability

period of 104 weeks within five years. As a result of these two findings, additional temporary disability indemnity was awarded, up to 104 weeks at the newly found earnings rate, less credit for sums paid. The Second Amended Findings and Award also increased the previous finding of reimbursable mileage of $36,311.12 to $73,110.53, based on additional evidence of what appears to be travel in good faith by applicant for the purpose of obtaining treatment. The decision to allow reimbursement for such a large amount of medical mileage took into account applicant's reliance upon defendants' willingness to pay some of this mileage, and also pointed out that defendants did not have medical control to unilaterally change the primary treating physician, and they should have formally petitioned to change the California-based Primary Treating Physician (PTP) or otherwise regain medical control with the Board's assistance. Defendants have filed a timely, verified petition for reconsideration of the Second Amended Findings and Award, challenging its application of Labor Code sections 4453, 4600, 4656, 4903-4904, and 5502 on the issues of earnings, medical mileage, temporary disability, EDD lien enforcement, and the admissibility of evidence.

(Report, pp. 1-5.)

DISCUSSION
I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
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> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
> >
> > (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under

[1] All statutory references are to the Labor Code unless otherwise indicated.

Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 9, 2024, and 60 days from the date of transmission is November 8, 2024. This decision is issued by or on November 8, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 9, 2024, and the case was transmitted to the Appeals Board on September 9, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 9, 2024.

II.

A. Earnings

Section 4453, subdivision (c), governs the calculation of average weekly earnings for the purposes of calculating permanent disability. Section 4453, subdivision (c), provides,

> (c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows:
>
> (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.
>
> (2) Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings

from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.

(3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the average weekly earnings mentioned in subdivision (a) shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(4) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

(§ 4453, subd. (c).)

In *Argonaut Ins. Co. v. Industrial Acc. Comm.* (*Montana*) (1962) 57 Cal.2d 589, 594-595 [27 Cal.Comp.Cases 130], the California Supreme Court held,

When an employee is steadily employed at a full-time job his earning capacity is determined by an appropriate formula (see *West v. Industrial Acc. Com*., 79 Cal.App.2d 711, 722 [180 P.2d 972]). When the employment is for less than 30 hours a week or when a formula "cannot reasonably and fairly be applied" the commission must make its own estimate of weekly earning capacity at the time of the injury. (Lab. Code, § 4453, subd. (d).) The purpose of this provision is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of injury may be aberrant or otherwise a distorted basis for estimating true earning power. It would hardly be consistent with that purpose to foreclose a worker from a maximum temporary or permanent award simply because a brief recession had forced him to work sporadically or at a low wage. Nor in making a permanent disability award would it be consistent with the purpose of the statute to base a finding of maximum earning capacity solely on a high wage, ignoring irregular employment and low income over a long period of time. An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse. Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability,

> the commission will ordinarily be concerned with whether an applicant would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. With regard to both awards all facts relevant and helpful to making the estimate must be considered. (*Colonial Mut. Comp. Ins. Co. v. Industrial Acc. Com*., 47 Cal.App.2d 487, 490–492 [118 P.2d 361]; *Aetna Life Ins. Co. v. Industrial Acc. Com*., 130 Cal.App. 488, 491–492 [20 P.2d 372]; see *Southern Bell Tel. & Tel. Co. v. Bell* (Fla.) 116 So.2d 617, 620–621; *Vanney v. Alaska Packers Assn*., 12 Alaska 284, 290–291; Larson, The Law of Workmen's Compensation, § 57.21 at pp. 4–7.) The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant. (See *West v. Industrial Acc. Com., supra* at p. 722; *Aetna Life Ins. Co. v. Industrial Acc. Com., supra* at pp. 491–492.) In weighing such facts, the commission may make use of "'its general knowledge as a basis of reasonable forecast.'" (*Latour v. Producers Dairy, Inc*., 102 N.H. 5 [148 A.2d 655, 657]; compare *Russell v. Southeastern Util. Service Co*., 230 Miss. 272 [92 So.2d 544, 547].) In weighing the evidence relevant to earning capacity the commission has the same range of discretion that it has in apportioning injuries between industrial and nonindustrial causes. (See e.g., *Aetna Life Ins. Co. v. Industrial Acc. Com., supra* at p. 493.) It must, however, "have evidence that will at least demonstrate the reasonableness of the determination made." (*Davis v. Industrial Com. of Arizona*, 82 Ariz. 173 [309 P.2d 793, 795].)

(*Montana* at pp. 594-595.)

In *Goytia v. Workmen's Comp. Appeal Bd.* (1970) 1 Cal.3d 889, 894 [35 Cal.Comp.Cases 27], the California Supreme Court held that,

> Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut "capacity" to the procrustean bed of the earnings at the date of injury. (*Id.* at p. 894.)

Here, the WCJ added three sources of earnings during a 120-day period selected to represent the earning capacity of applicant at the time of her injury. (Opinion on Decision, p. 11.) The WCJ explained that from December 1, 2015 through March 29, 2016, applicant earned $3,746.96 from Walmart, $2,903.39 from SMX (a temporary agency under a contract with Amazon), and $28,670 from self-employment as a hairdresser, totaling $35,320.35, which divided

by 120 days and multiplied by seven yields a weekly average earning capacity of $2,060.35. (Opinion on Decision, p. 11.)

Trial testimony showed that applicant worked at Walmart during the night shift. (Minutes of Hearing and Summary of Evidence (MOHSOE) dated October 18, 2021, p. 9:20 ["Ms. Anderson was a full-time associate with the overnight modular team."].) She also testified at deposition that she took a leave of absence from Walmart from Thanksgiving 2015 to approximately February 2016. (Defendant Exhibit G, Applicant Deposition Transcript dated July 21, 2016, pp. 44:6-45:2.) Indeed, Applicant Exhibit 1, at p. 467, which is the exhibit the WCJ used in calculating applicant's earnings from Walmart, shows that applicant did not work regular hours at Walmart from December 2015 to February 2016, although applicant was paid for "overtime" from December 11, 2015 through January 8, 2016. (Applicant's Exhibit 1, Applicant's Consolidated Trial Evidence, p. 467.) Instead, from December 6, 2015 through January 10, 2016, applicant worked for SMX (Amazon). (Applicant's Exhibit 1, Applicant's Consolidated Trial Evidence, p. 608.) Applicant testified at trial that the reason she did not continue to work for SMX past January 2016 was because SMX lost their contract with Amazon and they could not employ her any longer. (MOHSOE dated March 21, 2022 at p. 8:20-22.) Thus, it does not appear that applicant had dual employment with Walmart and SMX at the same time to justify adding these two earnings to determine applicant's average weekly earnings. Even if adding these two earnings was proper as a snapshot of applicant's total earnings during this time period, applicant testified that there was no more work for her at SMX because SMX lost its contract with Amazon, thereby questioning whether this amount of earning is a good predictor for applicant's loss of earning capacity.

Furthermore, applicant's self-employment as a hairdresser does not seem to be supported by the record. The WCJ states:

> Based on Applicant's 9, which does appear to be a credible business record of very significant self-employment proceeds, likely with negligible overhead as the hairdressing services were performed in the home, with income that totaled $5,115 in December 2015, $4,540 in January 2016, then grew to $9,630 in February and $9,475 in March of 2016. Not surprisingly, the hairdressing income wanes drastically after Ms. Anderson's injury to $3,990 in April 2016, followed by only $995 in May 2016, after which no earnings from hairdressing are indicated. Exhibit 9 shows that during the 120 days from December 1, 2015 through and including the date of injury, March 29, 2016, Ms. Anderson earned $28,670 from hairdressing, which must be taken into account in order to make a fair accounting

> of her average weekly earnings capacity at the time of her injury, which would be permitted under Labor Code Section 4453(c)(4). While it is acknowledged that Applicant's 9 is not entirely unproblematic due to the fact that it shows only dollar figures paid, which are written after a name and two to four letter code, followed by the time spent on each appointment, without an accounting of concomitant expenses, regarding which Ms. Anderson declined to testify, it is the only evidence available of hairdressing income, it makes sense that such income from personal services would only be recorded in such an informal fashion, and it is unrebutted by anything other than bare skepticism. The undersigned, having taken Ms. Anderson's testimony on multiple occasions, has no such skepticism. On the contrary, this evidence answers the glaring question of how Ms. Anderson was supporting her household on only the income provided by Wal-Mart. Using Applicant's 9 and a flexible "earnings capacity" method allowed by Labor Code Section 4453(c)(4) permits a logical answer to this question.
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> (Opinion on Decision, p. 10.)

First it is not apparent that Applicant's Exhibit 9 demonstrates earnings from hairdressing. (Applicant's Exhibit 9, 2016 Updated Calendars.) Applicant's Exhibit 9 consists of monthly calendars with names written on certain dates, followed by a time, a code, and a number. There is no testimony or document explaining it. The times listed start as early as 6:00 am (February 5, 2016) and end as late as 10:30 pm (December 5, 2024), which are unusual hours for hairdressing.

Second, applicant mentions self-employment in her trial testimony, but as a baker or chef, not as a hairdresser. (MOHSOE dated March 21, 2022, p. 7:20-21.) Third, as the WCJ admits, if the numbers listed in the calendars represent earnings, they do not appear to be net earnings. "[A]verage weekly earnings for purposes of determining the temporary disability indemnity rate must reflect [] net rather than gross income." (*Mack v. Atlas Van Lines* (October 30, 2009, ADJ6649763) [2009 Cal. Wrk. Comp. P.D. LEXIS 529].)

Accordingly, we conclude that an average weekly earnings of $2,060.35 is not supported by the evidence. We are cognizant that the issue of earnings has been highly litigated and that everyone is eager to put this issue to rest. We agree with the WCJ that the parties may benefit from informal settlement of dispute on this issue.

B. Temporary Disability

There appears to be no dispute, at least from defendants, that the period of temporary disability is from April 20, 2016 to October 2, 2017 and from May 15, 2018 to August 29, 2019, which amounts to more than the maximum 104 weeks. (Opinion on Decision, p. 12; § 4656(c)(2).)

Section 4656(c)(2) limits the aggregate disability payments for a single injury to 104 weeks within the period of five years from the date of injury. (§ 4656(c)(2).)

Defendants contend that it owes no further temporary disability indemnity because it already paid 81.43 weeks of temporary disability to applicant within five years from the date of injury, and reimbursed EDD the difference between 104 weeks and 81.43 weeks. (Petition, pp. 12:25-13:10.)

"Section 4904 provides that in determining the amount of the lien to be allowed for [unemployment] benefits, the WCAB should allow such lien in the amount paid for the same day or days of disability for which an award of compensation of temporary disability is made." (*Kelly v. Workers' Compensation Appeals Bd.* (2004) 69 Cal.Comp.Cases 568, 571 [2004 Cal. Wrk. Comp. LEXIS 173], emphasis added; § 4904.)

"An employee's receipt of [unemployment] benefits does not relieve his or her employer or the employer's insurance carrier of liability to pay workers' compensation insurance. (§ 3752.) Hence, when an employee, who was paid [unemployment] benefits, is later awarded workers' compensation for the same period of unemployment, the EDD may apply for a lien for reimbursement of those [unemployment] payments." (*Ibid*., emphasis added.)

Here, EDD provided benefits from February 9, 2020 to September 4, 2021 (Defendant's Exhibit UU), which is after applicant's temporary disability dates of April 20, 2016 to October 2, 2017 and May 15, 2018 to August 29, 2019. We agree with the WCJ that applicant's EDD benefits were not paid for the same days of applicant's temporary disability and, therefore, there is no credit for payments made by EDD or for payments defendant made to satisfy EDD's lien. However, because temporary disability indemnity is taken at two-thirds of the average weekly earnings, we defer the issue of temporary disability pending resolution of the earnings issue. (§ 4653.)

C. Medical Mileage

On its face, traveling from Texas to California multiple times for purposes of medical treatment, racking high medical mileage, seems unreasonable. However, given applicant's testimony that medical providers in Texas would not treat her because of the age of her industrial claim (MOHSOE dated March 21, 2022, p. 5:6-6:12) and in light of the WCJ's reasoning that defendants failed to take medical control by petitioning for a change in applicant's primary treating physician and applicant's reliance that defendants would pay for medical mileage (MOHSOE

dated March 21, 2022, p. 8:8-9), we will allow an award of medical mileage from applicant's home to the place of examination and back. (§ 4600(c)(2).) However, applicant must support her claim of medical mileage through contemporaneous medical records or any other evidence showing that the mileage was incurred for medical treatment. (§ 4600(c)(2); 5705.) We also echo the WCJ's urging that applicant "attempt to find a more pragmatic solution to treatment needs that does not involve travel between Texas and California. Interstate travel is difficult and wasteful, and would not under normal circumstances be considered a reasonable solution, and is permitted in this case only retrospectively." (Opinion on Decision, p. 23.)

Accordingly, we grant reconsideration, affirm the July 30, 2024 Second Amended Findings and Award, except that we amend it to defer the issues of earnings, temporary disability indemnity, and mileage reimbursement.

For the foregoing reasons,

IT IS ORDERED that defendants Walmart, Inc. and ACE American Insurance Company Petition for Reconsideration of the July 30, 2024 Second Amended Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 30, 2024 Second Amended Findings and Award is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

. . .

4. The issue of applicant's average weekly earnings is deferred.

5. The issue of applicant's temporary disability indemnity is deferred.

6. The issue of applicant's medical mileage reimbursement is deferred.

AWARD

Ther are no awards at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2024

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

CORLISS ANDERSON
ALBERT AND MACKENZIE

LSM/oo

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