WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ENRIQUE VARGAS, *Applicant*

vs.

INFINITY STAFFING SERVICES; ARCH INSURANCE COMPANY, administered by SEDGWICK; *Defendants*

Adjudication Number: ADJ12980584
San Jose District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings & Award ("F&A") issued on February 15, 2024, wherein the workers' compensation administrative law judge ("WCJ") found that applicant was owed permanent disability ("PD") benefits at the rate of $160 per week, based upon a stipulation of the parties. Applicant contends the WCJ erred in determining PD benefits at that rate, because the facts as found by the WCJ indicate that PD should be awarded at the rate of $290 per week, and there is good cause to set aside the stipulation to the contrary because applicant is not a seasonal worker and did not intend to stipulate to PD at the statutory minimum rate when his actual wages clearly support the higher $290 per week rate. Defendant argues that applicant should be held to his stipulation, even if it results in an award that cannot be squared with the statutory scheme based upon the WCJ's finding that applicant was not a seasonal worker.

We received an Answer. We also received a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition, the Answer and the Report, as well as the record. For the reasons discussed below, we will grant reconsideration and amend the F&A to award applicant PD at the $290 per week rate to which he is clearly statutorily entitled based upon the WCJ's finding that he was not a seasonal worker.

FACTUAL BACKGROUND

Applicant Enrique Vargas filed an Application for Adjudication, alleging a specific injury to his right shoulder, right hip and back sustained on August 30, 2019 while employed by defendant as a laborer.

The matter initially proceeded to trial on April 13, 2023. On the Pre-trial Conference Statement ("PTCS") filed prior to trial, the line for PD is left unfilled, and in the section for "Other Issues," the parties wrote: "TD Overpayment 12/1021 – 4/19/22 for total $7,298.40; applicant objects to TDOP claim. PD Rate – Defendant claims $160 per week due to seasonal employee." (PTCS, at pp. 2–3.) On the day of trial, after discussion, the parties filed an Amended Pre-trial Conference Statement ("Amended PTCS"); in this document, the PD rate is listed as $160 per week. (APTCS, at p. 2.) In the "Other Issues" section of the Amended PTCS, the words "applicant objects to TDOP claim. PD Rate – Defendant claims $160 per week due to seasonal employee" are struck out. (APTCS, at p. 3.)

At trial the parties stipulated to the following statement:

> At the time of the injury, applicant's earnings were $554.13 per week, warranting a temporary disability indemnity rate of $369.42 and a permanent disability indemnity rate of $160.

(Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 4/13/2023, at p. 2.) The issues for trial were listed as: (1) a dispute over the PD rating; (2) temporary total disability (TTD) overpayment from 11/10/201 through 4/19/2022 in the amount of $7,928.40; and (3) attorney fees. (MOH/SOE, at p. 3.) Exhibits were admitted, and testimony was taken from applicant. (*Id.* at pp. 3–9.)

The WCJ issued her first Findings and Award ("First F&A") on June 9, 2023, wherein the WCJ found applicant 62% permanently disabled, payable at a PD rate of $160 per week. (First F&A, at p. 2.) However, the Finding of Fact relating to the PD rate, while finding a rate of $160 per week, actually calculated the total sum due as $106,502.50, the amount that would have been appropriate if the PD rate had been $290 per week. (*Id.*, at p. 1, ¶ 6.) The WCJ found no TTD overpayment, based upon a determination that applicant was not a seasonal worker, and was therefore entitled to TTD payments year-round. (*Id.*, at p. 1; ¶ 5; Opinion on Decision, at p. 3.)

Defendant filed a letter requesting clarification from the WCJ as to the appropriate amount of money due, noting the discrepancy between the First F&A's award based upon a PD rate of

$160 per week and the total amount, which would only be appropriate for a PD rate of $290 per week. The WCJ responded on June 16, 2023 by issuing an Amended Findings and Award ("AF&A"), correcting the total amount to be $58,760.00. (AF&A, at p. 1.)

Applicant filed a Petition for Reconsideration, arguing that the WCJ should have set aside the portion of the stipulation referencing a PD rate of $160 per week, because the WCJ's finding that applicant was not a seasonal worker made it inappropriate to award PD at anything other than the $290 per week rate the statute would normally require for a worker with applicant's average weekly earnings.

On July 14, 2023, interpreting the Petition as a Petition to Set Aside the stipulation, the WCJ rescinded the First F&A, to allow applicant to be heard. (Order Rescind / Setting Aside Findings & Award, at p. 1.)

After various proceedings, the matter proceeded to trial a second time on December 5, 2023. At that date, the parties stipulated to the First F&A, with the exception of the PD rate. (MOH/SOE, 12/5/2023, at p. 2.) The sole issue for adjudication was listed as: "Permanent disability rate of $160 versus $290, per applicant's Petition to Set Aside, and whether or not there is a good cause to set aside stipulations of permanent disability rate." (*Ibid.*) The parties were given leave to file trial briefs by December 22, 2023, at which time the matter was taken under submission. (*Ibid.*)

Applicant's post-trial brief included a Declaration from applicant's attorney, Michael Grimm. (Declaration of Attorney Michael Grimm, Esq.) The Declaration states that Mr. Grimm "did not intend to agree that the correct PD rate was $160.00 per week. Instead, I intended to agree that the PD rate that defendant had **previously paid** on this matter was $160.00 per week." (*Id.* at p. 1 (emphasis original).)

On February 15, 2024, the WCJ issued the instant F&A, finding no good cause for applicant to be relieved of his stipulation to the $160 per week PD rate. (F&A, at p. 1, ¶ 3.) The WCJ therefore reissued the award, again based upon the $160 per week PD rate. (*Ibid.*) The appended Opinion on Decision makes clear that the WCJ found no good cause based the course of conduct of the parties, namely that the parties had filed the Amended PTCS removing references to the dispute over PD based upon whether applicant was a seasonal worker.

The instant Petition for Reconsideration followed.

DISCUSSION

For injuries occurring on or after January 1, 2013, permanent disability benefits are payable at a weekly rate of two-thirds of average weekly earnings, for a period of weeks that varies based on the percentage of PD sustained. (§ 4658(e).) For injuries occurring on or after January 1, 2014, average weekly earnings for purposes of PD are subject to a minimum finding of $240 per week, and a maximum finding of $435 per week. (§ 4453(b)(9).) This therefore results in a minimum PD payment of $160 per week, and a maximum PD payment of $290 per week.

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall,* "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall, supra,* 77 Cal.App.4th at p. 1119.)

Pursuant to Labor Code section 5702[1]:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(§ 5702.) This grant of discretion does not validate "capricious decisionmaking" and good cause must exist in order to reject a stipulation clarifying the issues in controversy. (*Weatherall, supra,* 77 Cal.App.4th at pp. 1119.)

"Good cause" to set aside or amend an order or stipulation depends upon the facts and circumstances of each case. "Good cause" includes mutual mistake of fact or law, duress, fraud, undue influence, and procedural irregularities. (*Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 975 [35 Cal.Comp.Cases 362]; *Santa Maria Bonita School District v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 848, 850 (writ den.*); City of Beverly Hills v. Worker's Comp. Appeals Bd. (Dowdle)* (1997) 62 Cal.Comp.Cases 1691, 1692 (writ den.); *Smith*

[1] Further references are to the Labor Code unless otherwise specified.

v. Workers' Comp. Appeals Bd. (1985) 168 Cal.App.3d 1160, 1170 [50 Cal.Comp.Cases 311] (writ den.).) To determine whether there is good cause to amend, rescind or disregard a stipulation, the circumstances surrounding its execution and approval must be assessed. (See § 5702; *Weatherall, supra,* 77 Cal.App.4th at pp. 1118-1121; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 199 Cal.App.3d 784, 790-792 [52 Cal.Comp.Cases 419]; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 864-867 [44 Cal.Comp.Cases 798].)

Here, before directly considering the stipulation, we must step back and consider what the parties were litigating in this case. Specifically, the parties submitted to the WCJ for decision the issue of whether defendant had overpaid TTD. Defendant's argument was predicated upon the theory that applicant was a seasonal worker, and therefore that TTD payments were not due during the off-season. (See *Jimenez v. San Joaquin Valley Labor, Superior Nat'l Ins. Co.* (2002) 67 Cal.Comp.Cases 74 (en banc).) Exhibits were submitted on this point, and applicant provided testimony clearly aimed at determining whether he was in fact a seasonal worker. (See J. Exs. B1–B3; MOH/SOE 4/13/2023 at p. 8.) The WCJ's conclusion that applicant was not a seasonal worker was not challenged by either party during any of the extended proceedings following the issuance of the First F&A, and was implicitly accepted by the parties at the second trial on December 5, 2023 when they stipulated to the findings of the First F&A. (MOH/SOE, 12/5/2023, at p. 2, ¶ 3.)

It is with this backdrop that we must consider the significance of the parties' original stipulation to weekly earnings of $554.13, and a PD rate of $160 per week. Given that the weekly PD rate is set under section 4658, subdivision (e) at two-thirds of average weekly earnings, and that average weekly earnings for purposes of PD are capped at $435 per month, it is apparent from applicant's weekly earnings that he would ordinarily be entitled to PD at a rate of $290, the statutory maximum, rather than $160, the statutory minimum. As a result, taken at face value, the stipulation appears to be contrary to the statutorily-required method of computation, and therefore to represent either (1) a mutual mistake of law, or (2) an attempt to deliberately stipulate to a PD rate unauthorized by statute.

If the stipulation represented a mutual mistake of law, it would be properly set aside upon request, based upon the authorities cited above. If the stipulation represented an attempt to stipulate to a PD rate that is statutorily unauthorized, the WCJ would have been *required* to set it aside, because parties "cannot stipulate to circumvent a legislatively designated code section as the exclusive statutory vehicle." (*McCarthy v. CB Richard Ellis, Inc.* (2009) 174 Cal.App.4th 106,

116.) Moreover, given that section 5702 authorizes the WCAB to make factual findings contrary to the stipulations of the parties, to the extent that the $160 PD rate is unauthorized by law for an injured worker with applicant's average weekly earnings, we think the WCJ was in fact *required* to, if not set aside, at least ignore the stipulated PD rate and calculate the correct rate based upon the governing statutory law. A WCJ must follow the law, whether or not the parties have stipulated to, in effect, disregard it. (See *McCarthy, supra,* 174 Cal.App.4th at 116.)

All that said, we do not think the parties were engaged in either a mutual mistake of law, or in a deliberate attempt to ignore the statutorily-mandated method of computing the PD rate. Instead, we believe the course of litigation shows that the stipulation entered the record as it did because of a lack of attention to detail, i.e., inadvertence. The crux of the dispute the parties submitted to the WCJ was whether applicant could properly be considered a seasonal worker. This matters because the method of computing a seasonal workers' average weekly earnings can be different from the method used to compute average weekly earnings for more regularly employed workers: seasonal workers' average weekly earnings may be in appropriate circumstances be determined with reference to the entire year, not just the period of seasonal employment. (See § 4453(c)(1)&(4); *Jimenez, supra,* 67 Cal.Comp.Cases at 77.)

The stated PD rate of $160 per week therefore appears to clearly correspond to defendant's contention that applicant was a seasonal worker and that, assuming the season was short enough, he could conceivably be due PD only at the statutory minimum, because his actual earning capacity under section 4453, subdivision (c)(4) would be reduced below the statutory minimum of $240 per week provided by section 4453(b)(9), resulting in PD payments at the statutory minimum rate.

However, the parties clearly did not intend to stipulate to applicant's seasonal status, because they (1) stipulated to weekly earnings of $554.13 per week without providing any other evidence as to applicant's earning capacity, and, more importantly, (2) necessarily submitted the question of whether applicant was a seasonal worker to the WCJ for decision as part of the dispute regarding TTD overpayments.[2] Obviously, applicant "did not intend to stipulate away [his] case while urging it." (See *Burrows v. State* (1968) 260 Cal.App.2d 29, 33 [stipulation that was a result

[2] We do not think much weight should be placed upon the fact that the Amended PTCS struck out the reference to the dispute over the PD rate. The Amended PTCS also struck out the reference to applicant objecting to defendant's claim regarding TTD overpayments, and yet that issue was still submitted to the WCJ for decision. We cannot therefore assume that the striking out of the words in question were meant to be an admission from applicant that he was a seasonal worker entitled to PD only at the statutory minimum rate, rather than at the rate his wages would have otherwise warranted.

of a misunderstanding of the proper application of the governing law did not serve to bar plaintiffs' case].) Just as obviously, defendant did not intend to stipulate to weekly earnings of $554.13 at the same time it was contending that applicant was a seasonal worker whose actual earning capacity was much lower, and to whom it had overpaid out of-season TTD benefits.

In short, it appears that the stipulation cannot reasonably be taken at face value.[3] It appears to represent a "fudge" halfway between the position of applicant, that he was not a seasonal worker and therefore had average weekly earnings of $554.13 (and therefore a PD rate of $290 per week), and the position of defendant, that he was entitled to PD only at the minimum rate of $160 per week (because he was a seasonal worker with much lower actual earning capacity). Given the WCJ's determination that applicant was not a seasonal worker, the stipulation to the $160 per week PD rate is, to again borrow the words of the *Burrows* Court, "nothing but an erroneous legal conclusion which the trial court should not have accepted." (*Burrows, supra,* 260 Cal.App.2d at 34.)

In light of the above, we believe the WCJ erred in refusing to set aside the stipulation. In the ordinary course of affairs, we would rescind the F&A and return the matter to the WCJ for further proceedings, because in the absence of the stipulation there would be no basis for determining applicant's weekly earnings, and therefore his PD rate. However, in this case the WCJ initially rescinded the First F&A and reset the matter for trial, and then obtained the parties' stipulation to everything in the First F&A aside from the PD rate, including applicant's weekly earnings. Accordingly, we will therefore amend the F&A to (1) find good cause to set aside the stipulation as to the $160 per week PD rate; and (2) be based upon the $290 per week PD rate that is derived from applicant's weekly earnings of $554.13, as stipulated by the parties at the December 5, 2023 trial.

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[3] This interpretation is also reasonably consistent with the Declaration submitted by applicant's attorney, stating that he intended to stipulate to the fact that defendant had paid PD at $160 per week, not that he agreed that the correct PD rate was $160 per week. (Declaration, at p. 1.) However, we make our ruling based upon the legal reasoning stated herein, and not based upon the contents of the Declaration itself.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the February 15, 2024 Findings & Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 15, 2024 Findings & Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Good cause is found to set aside the stipulation regarding the permanent disability rate of $160.00.

4. Applicant's injury caused permanent disability of 62%, entitling applicant to 367.25 weeks of permanent disability indemnity payable at the rate of $290.00 per week commencing 9/4/2022 in the total sum of $106,502.50.

AWARD

(1) Permanent disability indemnity of 62% payable at the rate of $290.00 per week, commencing 09/04/2022 less permanent disability advances to date, and less the award of attorney fees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 30, 2024

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

ENRIQUE VARGAS
REYNOSO LAW OFFICE
ALBERT & MACKENZIE

AW/*pm*

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