WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IRMA AVILA THOMASON, *Applicant*

vs.

FRANK D. LANTERMAN DEVELOPMENT SERVICES, STATE OF CALIFORNIA, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ3120504
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and her surviving spouse seek reconsideration of the June 26, 2024 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant while employed on October 4, 2006, as a senior psychiatric technician by defendant sustained injury arising out of and in the course of employment to the bilateral shoulders, bilateral wrists, and left elbow; that applicant reached maximum medical improvement (MMI) on July 7, 2021; and that all permanent disability had been advanced to the applicant before the MMI date so that Labor Code section[1] 4658(d)(2) does not apply in this case.

Applicant contends that defendant had fifty or more employees at the time of injury and failed to issue a return-to-work offer for a period of at least 12 months within 60 days of her becoming permanent and stationary (P&S). As such, she is entitled to a 15% increase under section 4658(d)(2). Applicant and her surviving spouse further contend that the fact that applicant retired in August 2009 prior to reaching P&S status is irrelevant in so far as section 4658(d)(2) is concerned.

[1] All further references will be to the Labor Code unless otherwise indicated.

We have received an Answer from defendant. 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 (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant applicant's Petition solely to amend Finding of Fact 5 to clarify that there were no permanent disability benefits remaining to be paid to applicant within 60 days of July 7, 2021, and as such, applicant is not entitled to an increase under Labor Code section 4658(d)(2), but since defendant did not make an offer of regular, modified, or alternative work to applicant within 60 days of July 7, 2021, defendant is not entitled to a decrease under Labor Code section 4658(d)(3)(A). We will otherwise affirm the F&A.

FACTS

Applicant claimed that while employed on October 4, 2006 by defendant as a senior psychiatric technician, she sustained an industrial injury to her bilateral shoulders, bilateral wrists, and left elbow.

At the time, applicant's average weekly wage was $1,035.08, which equates to weekly payments of temporary disability at $690.06 and permanent disability at $230.00.

The claim was ultimately accepted, and temporary disability benefits were paid from June 15, 2008 to July 11, 2009. (Minutes of Hearing, June 18, 2024, (MOH) Stipulation 3.)

According to defendant's Answer, upon termination of the temporary disability period, defendant began issuing permanent disability advances. Permanent disability advances of $7,721.43 were paid during the period from July 12, 2009 to March 3, 2010 based upon defendant's estimate of 11% permanent disability.

Thereafter, the parties agreed to use Dr. James Matiko as the Agreed Medical Examiner (AME). Dr. Matiko served as the AME from 2010 until 2019, when he became unavailable.

In his October 17, 2013 report, Dr. Matiko found a 9% whole person impairment which rates to 10% permanent disability not including apportionment. (Joint Exhibit 2, p. 8.) A specific P&S date was not provided. (*Ibid*.) In light of the prior payment of permanent disability, additional permanent disability was not paid.

In his September 3, 2014 report, Dr. Matiko indicated that applicant was deemed "permanent and stationary" as of her last evaluation on "September 25, 2013." (Joint Exhibit 1, p. 8.) Permanent disability in excess of Dr. Matiko's prior reporting was not indicated.

Dr. Neil Halbridge then replaced Dr. Matiko as the new AME, and in a report dated July 20, 2021, he found applicant P&S as of July 7, 2021, with a resulting 38% permanent disability after rating. (Joint Exhibit 3, pp. 7-10.) According to defendant's Answer, based upon these findings, a $28,837.07 payment was issued by defendant on August 12, 2021.

Dr. Halbridge was cross examined by way of deposition on November 15, 2021. At the deposition, he increased impairment for the right wrist from 6% to 12% whole person impairment thereby causing an increase in permanent disability to 45%, which equates to 236 weeks of disability at $230.00 per week for a total of $54,280.00. (Joint Exhibit 6, pp. 6-7.) According to defendant's Answer, a final payment of $9,579.50 was issued by defendant on November 24, 2021 in response to Dr. Halbridge's testimony.

In total, applicant was paid $46,138.00 which reflects a 45% permanent disability value less 15% withheld for attorney's fees. (MOH, Stipulation 3.)

According to applicant's Petition, applicant apparently retired from the workforce sometime in August 2009 prior to reaching P&S status.

It is undisputed that defendant had 50 or more employees at the time of injury but at no point issued a return-to-work offer to applicant.

DISCUSSION

I.

Preliminarily, former 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. (Lab. Code, § 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)
>
> (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 under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under 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 August 6, 2024, and 60 days from the date of transmission is Saturday, October 5, 2024. The next business day that is 60 days from the date of transmission is Monday, October 7, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on October 7, 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 was served on August 6, 2024, and the case was transmitted to the Appeals Board on August 6, 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 October 7, 2024.

II.

Turning to the merits of the Petition, current section 4658(d)(2), which applies to injury dates from January 1, 2005 to December 31, 2012, provides that:

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[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

> If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment ***remaining to be paid*** to the injured employee ***from the date of the end of the 60-day period*** shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.

(Lab. Code, § 4658(d)(2) (emphasis added).)

There is no dispute that defendant had 50 or more employees at the time of injury. Additionally, according to the WCJ, applicant reached P&S status on July 7, 2021. Applicant, however, was apparently already retired by then. The WCJ argues that provision of a return-to-work offer under section 4658(d)(2) would have been an "idle act" under Civil Code section 3532 since applicant "would have been unable to accept the offer due to being retired." (Report, p. 3.)

The clear language of section 4658(d)(2), however, makes no such exceptions. Further, prior decisions have found that irrespective of applicant's retirement status, an employer must make a return-to-work offer to avoid liability for the 15% increase on any remaining payments under section 4658(d)(2). (See *University of California v. Workers' Comp. Appeals Bd.* (2020) 85 Cal.Comp.Cases 311 [writ den.]; *Kings County v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 378 [writ den.]; *Visalia Unified School Dist. v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 1255 [writ den.].) Prior case law therefore confirms that it is applicant, not defendant or even the WCJ, who determines whether a return-to-work offer can be accepted. The defendant may not withhold an offer due to retirement or any other perceived unavailability.

Defendant argues that there is "no disability payment remaining to be paid that is subject to the 15% increase" since prior payments totaling $46,138.00 reflect that applicant was paid in full for her 45% permanent disability, less the 15% withheld for attorney's fees, and that all payments were issued within 60 days of the July 7, 2021 P&S date in accordance with section 4658(d)(2).

Applicant, however, contends that there were various P&S dates throughout the history of the claim and since a return-to-work offer was not issued within 60 days in every instance, the 15% increase is applicable. We note that pursuant to *American Ins. Co. v. Workers' Comp. Appeals Bd.* (2003) 68 Cal.Comp.Cases 926, 931 [writ den.], "[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." Assuming arguendo that applicant is correct in that there are multiple P&S dates for section 4658(d)(2) purposes, we continue to believe that all payments were still made within the 60-day period outlined above. However, we will consider each payment in turn.

Applicant cites Dr. Matiko's reports from October 17, 2013, and September 3, 2014, as evidence of applicant's prior P&S status. (Petition, p. 5.) According to Dr. Matiko, applicant became P&S September 25, 2013. (Joint Exhibit 1, p. 8.) Applicant concedes, however, that payments from July 12, 2009 to March 3, 2010, totaling $7,721.43, are not subject to the 15% increase. (Petition, p. 6.) These payments, reflecting an estimated 11% permanent disability (less attorney's fees), were ultimately applied towards Dr. Matiko's 10% permanent disability finding as per his October 17, 2013 report. (Joint Exhibit 2, pp. 7-8.) Since the payments were made prior to the September 25, 2013 P&S date (and presumably because they were in excess of Dr. Matiko's findings, particularly after application of his 50% nonindustrial apportionment which would have further reduced permanent disability to 5%), applicant concedes they are not subject to the 15% increase. (*Ibid*.)

Applicant argues that Dr. Halbridge's April 12, 2021 report triggered a 15% increase since applicant was found P&S on this date and defendant failed to follow through with "any offer" of "modified, alternate, or regular work." (Petition, p. 5.) Dr. Halbridge, however, did not provide an actual P&S date in this report. He indicated only that applicant "*may* be at a permanent and stationary status" and clarified that "prior medical records [would] need to be authorized for review" prior to issuance of a formal finding. (Joint Exhibit 5, p. 9, emphasis added.) Further, Dr. Halbridge did not provide enough information within his April 12, 2021 report to allow defendant to make further permanent disability estimates and thereby continue permanent disability payments under sections 4658(d)(2) and 4650(b)(1). Pursuant to section 4650(b)(1), an employer is to continue permanent disability payments so long as they are able to make a "reasonable estimate of permanent disability indemnity due" and applicant has not returned to work with the same employer at a position which pays "at least 85 percent," or with a different employer at a position which pays "100 percent," of applicant's "wages and compensation" at the time of injury. (Lab. Code, § 4650(b)(1).)

Ultimately, it was not until his July 20, 2021 report that Dr. Halbridge was able to provide a concrete P&S date of July 7, 2021. As noted above, a lump sum of $28,837.07 was issued by

defendant on August 12, 2021 based upon this report and the corresponding increase to 38% permanent disability. Applicant alleges that a 15% increase applies to this payment since a return-to-work offer was not provided subsequent to the July 7, 2021 P&S date. Applicant, however, fails to recognize that according to the plain language of the statute, the increase only applies to payments "*remaining to be paid.*" (Lab. Code, § 4658(d)(2), emphasis added.) At the time, there were no remaining payments as applicant had been paid in full, less attorney's fees, within 60 days of July 7, 2021.

Subsequent to his July 20, 2021 report, Dr. Halbridge was deposed. During his November 15, 2021 testimony, permanent disability was further increased from 38% to 45%. A new P&S date was not provided. Within 10 days, a final lump sum of $9,579.50 was issued to applicant. Applicant believes that the 15% increase applies to this payment as well. Defendant, however, could not have anticipated Dr. Halbridge's testimony nor his finding of an additional permanent disability. At the expiration of the 60-day period from November 15, 2021, there were no remaining payments as applicant had already been paid in full, less attorney's fees, before the end of the 60 days, and an earlier payment was not possible.

Applicant is under the belief that the section 4658(d)(2) 15% increase applies to all permanent disability payments except for the initial $7,721.43 paid during the period from July 12, 2009 to March 3, 2010. As noted above, however, applicant fails to explain what, if any, remaining payments were due. Per our analysis, applicant was paid in full for the entirety of her 45% permanent disability, less attorney's fees, and all payments were timely. As such, we agree with defendant that the 15% increase under section 4658(d)(2) is inapplicable. However, since a return-to-work offer was not provided, defendant is also not entitled to the benefit of a 15% decrease under 4658(d)(3)(A). Defendant is to pay at the flat permanent disability rate.

Accordingly, we grant applicant's Petition solely to amend Finding of Fact 5 to clarify that there were no permanent disability benefits remaining to be paid to applicant within 60 days of July 7, 2021, and as such, applicant is not entitled to an increase under Labor Code section 4658(d)(2), but since defendant did not make an offer of regular, modified, or alternative work to applicant within 60 days of July 7, 2021, defendant is not entitled to a decrease under Labor Code section 4658(d)(3)(A). We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the July 23, 2024 Findings and Award is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 23, 2024 Findings and Award is **AFFIRMED** except it is **AMENDED** as follows:

FINDINGS OF FACT

5. There were no permanent disability benefits remaining to be paid to applicant within 60 days of July 7, 2021. Therefore, applicant is not entitled to an increase under Labor Code section 4658(d)(2). Defendant did not make an offer of regular, modified, or alternative work to applicant within 60 days of July 7, 2021. Therefore, defendant is not entitled to a decrease under Labor Code section 4658(d)(3)(A).

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2024

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

IRMA AVILA THOMASON
LAW OFFICES OF RICHARD D. WOOLEY
STATE COMPENSATION INSURANCE FUND

RL/abs

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