

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

JOSHUA MURPHY, *Applicant*

vs.

**MATTHEWS SKYLINE LOGGING, INCORPORATED, insured by CALIFORNIA
INSURANCE COMPANY, administered by APPLIED RISK, *Defendants***

**Adjudication Number: ADJ12440587
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

As stated by the WCJ in the report, we emphasize that on February 10, 2020 applicant, by then in pro per, stipulated that "[t]he employee has been adequately compensated for all periods of TD claimed through February 10, 2020." (Minutes of Hearing and Summary of Evidence (MOH/SOE), 2/10/20, at p. 2:20-21.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 23, 2021

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

**JOSHUA MURPHY
MICHAEL SULLIVAN**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant, Joshua Murphy, acting in pro per, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated December 3, 2020.

Mr. Murphy suffered an industrial injury on July 16, 2019 during the course of his employment as a log hauler for the employer, Matthew Skyline Logging, Inc. The injury occurred while the applicant was driving down a steep grade on a dirt road and the brakes on his truck malfunctioned causing his trailer and cab to flip over. A determination regarding body parts was deferred. He was age 36 on the date of injury.

In a Findings and Order dated December 3, 2020, the undersigned WCJ found that the applicant's earnings at the time of injury were \$1,148.38 per week producing a temporary disability rate of \$765.59 per week and that the applicant failed to provide sufficient evidence to support a higher average weekly wage and temporary disability rate.

Petitioner contends:

- a. Employer failed to produce required evidence to support Plaintiffs claim. (Issues, 12/22/20.)
- b. Plaintiff discovered discrepancy in pay whereby employer was shorting Plaintiff pay. (Issues, 12/22/20.)

II. FACTS

Applicant sustained an injury on July 16, 2019 during the course of his employment as a log hauler for Matthews Skyline Logging Inc. The injury occurred while the applicant was driving down a steep grade on a dirt road and the brakes malfunctioned causing his trailer and cab to flip over.

When the applicant was represented by an attorney, the parties reached a Compromise and Release agreement. However, after executing the settlement but prior to approval, the applicant dismissed his attorney and the matter was set for trial regarding the validity of the Compromise and Release.

In the Findings and Award dated March 3, 2020, the undersigned WCJ ruled that the Compromise and Release is a legally binding agreement but it was inadequate based on the current record. The Compromise and Release was not approved.

Two months later, on May 4, 2020, the applicant, now acting in pro per, filed a Petition for Penalties and Declaration of Readiness to Proceed to an Expedited Hearing on numerous issues, including temporary disability rate. An expedited hearing took place on June 10, 2020 and was continued, in part, to provide the parties additional time to collect evidence. On page 2 of the Minutes of Hearing, it states "Parties are encouraged to gather evidence regarding average weekly wage and TD rate, Issue is ripe for adjudication at the upcoming Expedited Hearing." (Minutes of Hearing, 6/10/20.)

An expedited hearing was held on July 13, 2020. The matter was continued, again, for receipt of the Qualified Medical Examiner (QME), Dr. Chittenden's supplemental report with the aim that the ensuing report could resolve the outstanding issues.

The next expedited hearing was held on August 24, 2020, but again continued, over defendant's objection, for receipt of the QME supplemental report which had not yet issued. The Minutes of Hearing state "Matter is continued, over defendant's objection, for receipt of Dr. Chittenden's supplemental report. The issue of average weekly wage and temporary disability rate will be heard at the upcoming expedited hearing absent good cause," The Information and Assistance Officer, Chari Ferrero, was present at each expedited hearing to assist the pro per applicant, Mr. Murphy.

The QME, Dr. Chittenden issued a supplemental report on September 16, 2020 stating that the applicant was permanent and stationary on January 13, 2020. (Def. Exh. I-I, Dr. Chittenden, 9/16/20.)

This matter proceeded to an expedited hearing on October 12, 2020 on the sole issue of average weekly wage and temporary disability rate. The defendant paid temporary disability benefits commencing on July 16, 2019 at a weekly rate of \$765.59 based on the average weekly wages of \$1,148.38, pursuant to the regular, overtime, and commission earnings reflected within the employer's wage statement. (Def. Exh. G).

Although a specific amount of earnings was not articulated by Mr. Murphy, he contended that the statutory maximum for temporary disability of \$1,251.38 was appropriate

based on earning capacity set forth in Labor Code §4453(c)(4). In support of his contention, Mr. Murphy submitted voluminous hand-written log sheets, showing the hours spent on and off duty for each day he was employed by Matthews Skyline Logging.(App. Exh. 10.)

Additionally, Mr. Murphy testified at the expedited hearing in substance as follows. Mr. Murphy started working for the employer in April of 2019 and sustained his industrial injury about 3 months later on July 16, 2019. (MOH/SOE, p. 3, lines 8-9.) He worked about 80 hours a week, although it varied on the project. (MOH/SOE, p. 3, lines 10-11.) At the time the applicant was hired, his hourly rate was \$20. (MOH/SOE, p. 3, lines 28-29.) The applicant was paid on an hourly rate, bi-weekly for about two months. The amounts varied. (MOH/SOE, p. 3, lines 33-34.) About three pay periods prior to the industrial injury, the applicant's wages changed from hourly to a commission; he received roughly 29% of "gross carrier compensation for that delivery". (MOH/SOE p. 3,lines 38-41.)

A Findings and Order issued finding that Mr. Murphy's earnings at the time of injury were \$1,148.38 per week producing a temporary disability rate of \$765.59 per week. Based on the record, it was found that Mr. Murphy failed to provide sufficient legal basis to increase the average weekly wage and temporary disability indemnity rate. It is from this Findings and Order that petitioner seeks reconsideration.

Attached to the Petition for Reconsideration were documents not previously disclosed to the court. Mr. Murphy included two Subpoenas Duces Tecum for records held by Matthews Skyline Logging and Eddie Ranch Properties, LLC for "log haul rates for SPI and MFP in 2019" both dated December 21, 2020, almost three weeks after the Findings and Award issued. On the Declarations for Subpoena Duces Tecum, it states "These documents are material for claimant to show how much he was paid for each loadin order to meet burden of proof in wage dispute." In addition, there is a hand written note from Molly Patton indicating that Kelly, the secretary of Matthews Skyline Logging, refused the subpoena and refused to produce the documents, she 'drop served her'. (Letter from Ms. Patton, 12/21/21.)

Also attached to the Petition for Reconsideration is an email exchange with "Katie" and Mr. Murphy, wherein he requests log haul rates paid to Matthew's Skyline logging back in 2019 for the Bachelor Valley Rd. Middle Creek Area Hauling Doug Fir to MFP in Ukiah and Pine to SPI in Lincoln." Katie responded by telling Mr. Murphy that she does not have the records he is requesting. (Email, 12/21/20.)

III. **DISCUSSION**

Mr. Murphy seeks reconsideration on the grounds that, "... the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing." (Labor Code §5903(d).) (Petition, 12/3/20.) Specifically, Mr. Murphy claims that it is not 'in the interest of justice to dismiss the wage issue when there is a strong effort to conceal the amount earned per load by Matthews Skyline Logging and their payroll company Applied Omaha'. (Issues, 12/22/20.)

A petition for reconsideration based on Labor Code §5903(d), must contain an offer of proof, specific and detailed, providing:

- a) the names of witnesses to be produced;
- b) a summary of the testimony to be elicited from the witnesses;
- c) a description of any documentary evidence to be offered;
- d) the effect that the evidence will have on the record and on the prior decision;
and
- e) as to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.
(Cal. Code Regs., tit. 8, § 10856.)

Here, there is no showing as why the two Subpoenas Duces Tecum or any of the proffered documents, could not have been obtained or discovered at any time before this case was ultimately submitted in October. In the alternative, Mr. Murphy could have called an employer representative to testify under oath at the expedited hearing but chosen not to. The undersigned WCJ continued the expedited hearing three times over the span of five months, a very uncommon occurrence, for the benefit of the pro per applicant to accumulate the specific evidence necessary to support his claim.

Mr. Murphy submitted handwritten "Driver's Daily Log" for each day he worked for Matthews Skyline Logging, however, it was insufficient to support a higher average weekly wage. In the Opinion on Decision, the undersigned WCJ stated:

"The offered log sheets are unreliable and void of any evidence of Mr. Murphy's earning capacity at the time of his injury. Although he was getting

paid by commission, there is no mention of the delivery prices or the amount of the commission received. Additionally, there were more than one log sheet completed for a certain day, rendering it difficult to identify the correct version.

(App. Exh. 10, log sheets dated 4/29, 4/30, 5/6, 5/7, 5/8, 5/9, 5/10, 5/13, 5/14.)"

Finally, Mr. Murphy's allegation that Matthews Skyline Logging is concealing much more than the rate of pay is unsubstantiated and may extend beyond the limited jurisdiction of the Workers' Compensation Appeals Board. (Issues, 12/22/20.) Regardless, that was not the issue presented before the court. Instead, the sole issue was whether Mr. Murphy sustained his burden of proof to show that a higher average weekly wage was appropriate based on Labor Code §4453(c)(4). The undersigned WCJ found in the negative.

While this court certainly empathizes that Mr. Murphy is without the aid of an attorney, his petition does not disrupt the court's narrow finding regarding an average weekly wage.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Katie F. Boriolo
Workers' Compensation
Administrative Law Judge

Dated: January 11, 2021