WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDWART HOVANESIAN, *Applicant*

vs.

ARCADIA TRANSIT, dba SUPER SHUTTLE OF SAN FERNANDO, illegally uninsured; TIMMY MARDIROSSIAN, an individual and substantial shareholder of Arcadia Transit, Inc.; SEDIK MARDIROSSIAN, an individual and substantial shareholder of Arcadia Transit, Inc.; and EDA AGHAJANIAN, an individual and substantial shareholder of Arcadia Transit, Inc., *Defendants*

Adjudication Number: ADJ10810740
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Arcadia Transit doing business as Super Shuttle of San Fernando (defendant) seeks reconsideration of the Amended Findings and Award (F&A) issued on January 15, 2025, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a driver on January 19, 2017, sustained industrial injury to his right knee, low back, dental, neck, psyche, and in the form of headaches. The WCJ found in relevant part that applicant's average weekly earnings were $1,744.86 per week, and that applicant was temporarily totally disabled (TTD) from January 19, 2017 to January 3, 2018.

Defendant contends that applicant's payroll records support average weekly earnings of $776.30 per week, and that the medical reporting relied upon by the WCJ in determining the period of TTD is not substantial medical evidence.

We have received an Answer from applicant. 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 will grant reconsideration and affirm the WCJ's analysis but restate the Findings of Fact and Award to conform to Labor Code[1] sections 5313, 5806 and 5807.

FACTS

Applicant claimed injury to his right knee, low back, dental, neck, psyche, and in the form of headaches, while employed as a driver by defendant Arcadia Transit dba Super Shuttle on January 19, 2017. Defendant admits injury to all claimed body parts save psyche.

The parties have obtained reporting from Qualified Medical Evaluators (QMEs) Ara Darakjian, M.D., in psychiatry, Ramin Jebraili, M.D., in orthopedic medicine, and Leon Barkodar, M.D., in neurology. Applicant also obtained reporting from primary treating physician Marvin Pietruszka, M.D., and from Mayer Schames, DDS in dentistry.

On October 15, 2024, the parties proceeded to trial and stipulated that applicant reached a permanent and stationary status on April 6, 2022, and sustained 18 percent permanent partial disability. (Minutes of Hearing and Summary of Evidence (Minutes), dated October 15, 2024, at p. 2:3.) The parties further stipulated that applicant's permanent disability rate was $290.00 per week. The parties placed in issue the parts of body injured, applicant's earnings, and the period of TTD. (*Id.* at p. 2:17.) The WCJ heard testimony from applicant and ordered the matter submitted for decision the same day.

On January 15, 2024, the WCJ issued her F&A, determining in relevant part that applicant's average weekly earnings were $1,744.86 per week, and that pursuant to the reporting of QME Dr. Jebraili, applicant was TTD from January 19, 2017 to January 3, 2018. (Findings of Fact No. 2.) The WCJ observed that applicant's earnings capacity was most accurately reflected in a 2015 tax form indicating annual earnings of $90,732.99.

Defendant's Petition avers the reporting of Dr. Jebraili fails to adequately explain the basis for the physicians' opinions regarding the length of TTD. (Petition, at p. 2:1.) Defendant further contends that the WCJ's reliance on applicant's 2015 earnings as reported in Internal Revenue Service (IRS) Form 1099-K is inaccurate, and that the payroll records attached to applicant's

[1] All further references are to the Labor Code unless otherwise noted.

Petition but not otherwise received in evidence support average weekly wages of $776.30 for the period July 10, 2016 to January 13, 2017. (Petition, at p. 2:22.)

Applicant's Answer observes that the payroll records attached to defendant's Petition were not listed in the March 14, 2024 Pretrial Conference Statement, and defendant did not attempt to introduce these records at trial. (Answer, at p. 2:18.)

The WCJ's Report states that applicant's federal income tax wage reporting from 2015 offered the "best chance of answering the earnings question that would have encompassed all of 2016, the last full year of work." (Report, at p. 2.) The WCJ also observes that the best orthopedic evidence of periods of TTD was the medical reporting of Dr. Jebraili, the same QME the parties relied upon for the stipulated permanent and stationary date, and that the period of disability identified by the QME roughly coincides with the 10 months the applicant testified he was unable work. (*Ibid*.) Accordingly, the WCJ recommends we deny reconsideration.

DISCUSSION

I.

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.
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> (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 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 February 6, 2025, and 60 days from the date of transmission is April 7, 2025. This decision is issued by or on April 7, 2025, 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 February 6, 2025, and the case was transmitted to the Appeals Board on February 6, 2025. 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 February 6, 2025.

II.

The WCJ awarded temporary disability for the period of January 19, 2017 to January 3, 2018, based on the findings of orthopedic QME Dr. Jebraili. (Finding of Fact No. 2.)

Defendant's Petition contends the report of Dr. Jebraili is not substantial evidence because the QME identified a period of temporary disability "without any explanation from the doctor four years after." (Petition, at p. 2:4.)

The WCJ's Report observes, however, that Dr. Jebraili was "the one physician [the] parties relied upon for the permanent and stationary date, so his opinions reasonably have merit and roughly coincide with the 10 months the applicant said [he] could not work." (Report, at p. 2.) Applicant's undisputed testimony at trial was that "he was not able to work after the accident … he was off work for 10 months." (Minutes, at p. 3:3.) We also note that defendant declined to cross-examine applicant at trial or to challenge applicant's accounting of the period of disability to which he testified. Nor does the evidentiary record reflect earnings during the identified period of disability. Thus, in weighing the evidence of temporary disability, the WCJ accorded the greater

weight to applicant's undisputed trial testimony, coupled with the fact that the parties had stipulated to the permanent and stationary date identified by Dr. Jebraili.

We also note that while the QME did opine to applicant's period of temporary disability in his April 6, 2022 report which issued more than four years after applicant's industrial injury, the QME identified the period of temporary disability only after a review of applicant's contemporaneous treatment records with primary treating physician Dr. Pietruszka. (Joint Ex. E, Report of Ramin Jebraili, M.D., dated April 6, 2022, at p. 2; see also Joint Ex. G, Report of Ramin Jebriali, M.D., dated February 23, 2021, at pp. 9-10.) Here again, defendant declined to challenge the QME's opinions regarding the period of temporary disability either by request for supplemental reporting or in deposition. Additionally, the Appeals Board is empowered to choose among conflicting medical reports and rely on that which it deems most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221].)

Based on the foregoing, we discern no error in the WCJ's weighing of the evidence, or in the WCJ's reliance on the reporting of QME Dr. Jilbraini to identify a period of TTD from January 19, 2017 to January 3, 2018.

The F&A also analyzes the evidence responsive to the issue of applicant's average weekly wages. Section 4453(c) provides four methods to calculate average weekly earnings. (Lab. Code, § 4453(c)(1)-(4).) As relevant here, section 4453(c) provides 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.
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> …
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> (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.
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> (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.

(Lab. Code, § 4453(c).)

Subdivision (c)(1) thus provides for temporary disability calculations where the applicant is regularly employed on a full-time basis, and the subdivision uses the applicant's regular earnings at the time of injury as the metric for temporary disability calculation. Subdivision (c)(4) on the other hand provides an alternative calculation where the work at the time of injury is part-time, irregular, or the applicant's earnings at the time of injury "cannot reasonably and fairly be applied."

In *Goytia v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 889 [35 Cal.Comp.Cases 27] (*Goytia*), the California Supreme Court distinguished between the various approaches to calculating average earnings as follows:

> The language of the statute leads to two conclusions: first, average weekly earnings under subdivision [(c)(4)][2] differs from average weekly earnings under the other three subdivisions; subdivision [(c)(4)] applies "where the employment is for less than 30 hours per week, *or* where for any reason the foregoing methods . . . cannot reasonably and fairly be applied." (Italics added.) Since the prior three subdivisions calculate average weekly earnings solely on the basis of prior earnings, the statute apparently contemplated that prior earnings are not the sole basis for the determination of earning capacity or average weekly earnings under subdivision [(c)(4)].
>
> Secondly, subdivision [(c)(4)] states that in determining average weekly earning capacity the appeals board should give "due consideration" to actual earnings "from all sources and employments." Pre-injury earnings constitute one factor, but not the exclusive factor, in determining such earnings. The subdivision in alluding to earning "capacity" must necessarily refer to earning potential which may not, and probably will not, be reflected by prior part-time earnings.

(*Id.* at pp. 894-895.)

Here, the WCJ noted that the record contained multiple earnings statements for discrete one-week periods, ranging from $0.01 for a week when applicant did not work, to the first week of January, 2017, during which time applicant earned $2,488. (Finding of Fact No. 2.) Records from the last week of December, 2014 reflected earnings as high as $4,058.15. (*Ibid*.) In addition, some of the "weeks" of earnings reflected just three days of work. Given the disparate earnings reflected in the weekly records, the WCJ chose instead to rely on applicant's 2015 tax records which included applicant's Internal Revenue Services (IRS) form 1099 showing a complete year

[2] Labor Code §4453, subsections (a) through (d) have since been renumbered as (c)(1) through (4).

of earnings at $90,732.99. We agree with the WCJ's analysis and note that the evidence in the record reflected widely varying weekly earnings such that sections 4453(c)(1)-(3) could not "reasonably and fairly be applied," and that it was appropriate to utilize the last yearly earnings record as the basis upon which to determine earning capacity. (Lab. Code, § 4453(c)(4).)

Defendant's Petition attaches earnings records from 2016 and 2017 that are not a part of the evidentiary record and urges our reliance on those records as a more accurate reflection of applicant's earnings. We decline to do so, however, because the attachments to defendant's Petition were not listed as exhibits in the Pre-trial Conference Statement, were not offered into evidence at trial, and are not alleged to be newly discovered evidence that defendant could not have, through the exercise of reasonable diligence, obtained prior to the close of discovery. (Lab. Code, § 5502(d)(3); see also Cal. Code Regs., tit. 8, § 10974.)

Moreover, our Rules specifically prohibit the offering of new evidence as an attachment to a Petition for Reconsideration except under limited circumstances. Workers' Compensation Appeals Board (WCAB) Rule 10945 (Cal. Code Regs., tit. 8, § 10945) sets out the required content of Petitions for Reconsideration, and subdivision (c) specifically provides:

> (c)(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.
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> (2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.

(Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).)

Insofar as defendant does not contend reconsideration is warranted by newly discovered evidence, the attachment of alleged earnings records to the Petition is contrary to our Rules and incompatible with the closure of discovery mandated by section 5502(d)(3). (Cal. Lab. Code, § 5502(d)(3).) **We strongly admonish defendant Arcadia Transport dba Super Shuttle of San Fernando and its counsel Martin J. Wall and Wall, McCormick, Baroldi & Dugan for failing to comply with our rules, and observe that future noncompliance may result in the imposition of monetary or other sanctions.**

However, notwithstanding our agreement with the WCJ's reasoning in this matter, we nonetheless find it necessary to grant defendant's Petition in order to restate the Findings of Fact and the Award. Section 5313 provides:

> The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal.Wrk.Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*), "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Id.* at p. 475.)

A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Section 5815 also provides:

> Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised.

Sections 5313 and 5815 thus require the WCJ to "file finding upon all facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).)

We further observe that the Labor Code provides for the enforcement of an Award issued by the WCAB through the entry of a judgment in Superior Court. Pursuant to section 5806, any

party affected by a judgement of the WCAB "may file a certified copy of the findings and order, decision, or award of the appeals board with the clerk of the superior court of any county … [j]udgment shall be entered immediately by the clerk in conformity therewith." (Lab. Code, § 5806.) The execution of a judgment entered on a finding made by the WCAB is available to those parties seeking to enforce their right to the benefits specified in an Award. (*Vickich v. Superior Court of Los Angeles County* (1930) 105 Cal.App. 587, 592 [288 P. 127] ["The execution on a judgment entered upon an award of the Industrial Accident Commission, although in the form of an execution upon a judgment of the superior court, is in reality an execution upon the award of the commission."].) Section 5807 further provides that, "[t]he certified copy of the findings and order, decision, or award of the appeals board and a copy of the judgment constitute the judgment-roll." (Lab. Code, § 5807.)

However, for a party to avail themselves of this statutorily authorized mechanism for enforcement of an Award issued by the WCAB, the Award itself must be sufficiently clear and specific as to allow for its reduction to a judgment. Accordingly, section 5313, and *Hamilton*, *supra*, require that the WCJ issue an award of sufficient clarity that it can be enforced as a judgment, should the need arise. (Lab. Code, §§ 5313; 5806; 5807.)

Here, the Findings of Fact appear to mix citations to the evidentiary record and analysis with the WCJ's ultimate Findings of Fact. We are concerned that this approach will result in significant confusion should a party seek to reduce the F&A to a judgment. We also observe that insofar as the WCJ awards a period of temporary disability, the Award does not specify the weekly indemnity rate.

Accordingly, we will grant defendant's Petition and rescind the F&A. We will then restate the WCJ's Findings of Fact and Award based on the WCJ's analysis as well as the analysis set forth herein. In the future, we encourage the WCJ to issue Findings of Fact and/or Award along with a *separate* Opinion on Decision describing the WCJ's analysis of the "evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.)

In summary, we agree with the WCJ's analysis of the periods of temporary disability as supported in the evidentiary record. We also agree with the WCJ's application of a wage capacity analysis based on applicant's last full year of earnings to reach a determination of average weekly wages. We will grant defendant's Petition, however, to restate the WCJ's Findings of Fact and

Award to clearly set forth the decision in a manner consistent with sections 5313, 5806, 5807 and *Hamilton, supra*, 66 Cal.Comp.Cases 473, 476.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of January 15, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Findings and Award issued on January 15, 2025 is **RESCINDED** and the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. EDWART HOVANESIAN, while employed on January 19, 2017, as a driver at various locations in California, by ARCADIA TRANSIT DBA SUPER SHUTTLE, illegally uninsured at the time of injury, sustained injury arising out of and in the course of employment to the right knee, low back, dental, neck and psyche, and in the form of headaches.
2. Applicant's earnings at the time of injury were $1,744.86 per week, sufficient to produce a temporary disability indemnity rate of $1,163.24 per week and a permanent disability indemnity rate of $290.00 per week.
3. The injury resulted in temporary disability from January 19, 2017 to January 3, 2018, payable by defendant at the weekly rate of $1,163.24, less any monies paid by the defendant to applicant during that period.
4. Applicant's injury caused permanent disability of 18 percent equivalent to 65.5 weeks of indemnity payable at the rate of $290.00 per week in the total sum of $18,995.00. Defendant is entitled to credit for permanent disability advances, if any, according to proof, with WCAB jurisdiction reserved in the event of a dispute.
5. There is need for future medical treatment to cure or relieve from the effects of this injury.
6. The reasonable value of the services and disbursements of applicant's attorney is 15% of the permanent disability awarded herein.

AWARD

AWARD IS MADE in favor of **EDWART HOVANESIAN** against **ARCADIA TRANSIT, INC., DOING BUSINESS AS SUPER SHUTTLE**, and Timmy Mardirossian, an

individual and substantial shareholder of Arcadia Transit, Inc.; Sedik Mardirossian, an individual and substantial shareholder of Arcadia Transit, Inc.; and Eda Aghajanian, an individual and substantial shareholder of Arcadia Transit, Inc. of:

a. Temporary disability indemnity at the rate of $1,163.24 per week beginning January 19, 2017 to and including January 3, 2018, less credit for any sums heretofore paid on account thereof.
b. Permanent disability of 18 percent, entitling applicant to 65.5 weeks of disability indemnity at the rate of $290.00, in the total sum of $18,995.00, less credit to defendant for all sums heretofore paid on account thereof, if any, and less $2,849.50 payable to Susan Cahill as attorney fees to be commuted from the far end of the award.
c. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

ORDER OF COMMUTATION

d. **IT IS ORDERED** that the sum of $2,849.50 be commuted from the final weekly payments of permanent disability in order to pay attorney fees awarded herein.

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

April 7, 2025

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

EDWART HOVANESIAN
CAHILL LAW OFFICE
WALL, McCORMICK, BAROLDI & DUGAN
EDA AGHAJANIAN
SEDIK MARDIROSSIAN
TIMMY MARDIROSSIAN
UEBTF
ARCADIA TRANSIT
OFFICE OF THE DIRECTOR - LEGAL UNIT

SAR/oo

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