

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

GLORY NANEZ, *Applicant*

vs.

**PASADENA UNIFIED SCHOOL DISTRICT,
permissibly self-insured; administered by
LWP CLAIMS SOLUTIONS, INC., *Defendants***

Adjudication Numbers: ADJ11381920; ADJ11381922

Van Nuys District Office

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings, Award and Order (F&O) issued on March 10, 2025 by a workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that the February 8, 2022 by agreed medical evaluator (AME) Richard Siebold, M.D. is not substantial evidence and not dispositive on any issues and that liability for that medical-legal report was deferred pending supplemental proceedings, jurisdiction reserved; that applicant did not reach permanent and stationary status prior to her death and thus, no permanent disability indemnity is owed and all disability indemnity paid prior to death is converted to temporary disability indemnity; and, that applicant is owed \$26,239.84 in accrued temporary disability indemnity payable less \$3,935.98 withheld for reasonable attorney fees. The WCJ awarded applicant accrued temporary disability indemnity and attorney fees payable as set forth in the findings. The WCJ ordered that the award of attorney fees be deducted from the accrued temporary disability award and be paid to Glauber Berenson Vego; and, that the issue of liens and reimbursement for medical-legal expenses is off calendar, with jurisdiction reserved.

Defendant contends that the WCJ's findings deferring proceedings related to the liability for the AME's bill to supplemental proceedings is not supported by the facts; and, that the WCJ violated defendant's right to due process by failing to provide notice and the opportunity to be heard on the issue of accrued but unpaid temporary disability because it was not raised as an issue

for trial and had it been, defendant would have had additional evidence to submit for admission at trial related to payment of wages by defendant to applicant, and related to apportionment.¹ It was not identified as an issue on the pre-trial conference statement or the minutes of hearing and summary of evidence for the January 6, 2025 trial.

Applicant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Joint Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the record, the contents of the Report, as well as that set forth below, we grant reconsideration in order to amend the F&O to defer the issues of accrued temporary disability owed to applicant and applicant's attorney fees.

I.

Former Labor Code 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, Labor Code 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 Labor Code 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

¹ Defendant also raises an issue related to “the finding of fact that Defendant incurred no costs...associated with the efforts to perfect the record for trial including review and redaction of 18,984 pages of subpoenaed records, paying for an AME supplemental report, and attending eight court appearances...” (Petition for Reconsideration, pp. 10-11.) However, the WCJ issued no such findings of fact, award(s) and/or order(s), and thus, no such findings of fact, award(s) and/or order(s), exist to reconsider. (See F&O, Findings of Fact 1 through 8, Awards, Orders.)

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 April 14, 2025, and 60 days from the date of transmission is June 13, 2025. This decision is issued by or on June 13, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 April 14, 2025 and the case was transmitted to the Appeals Board on April 14, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on June 13, 2025.

II.

The AME in this matter identified five periods of potential temporary total disability on August 4, 2024:

The records done myself suggest that I issued AMA Guidelines on May 20, 2019. **If this patient was sent home because of that review, then modified work was not available for her. She would have to be considered temporarily totally disabled until she passed away**, in my impression, and within reasonable medical probability, given the records reviewed.

There would also be a period of apparent temporary total disability from August of 2017 through March of 2018.

On May 23, 2018, there was another injury, work-related. By June 12, however, in 2018, this was denied by Myers, D.O.

There also appears to be a **period in February of 2020**, off work, with a combination of low back pain plus panic disorder, hypertension, and cough. **She would be temporarily totally disabled at this time as well.**

There is then a record indicating on October 29, 2020, by Dr. Soto, that she was not working. She was taken off because of the QME Examination, likely put off for her back pain. I believe this would be a period of temporary total disability that would also be compensable since it is probably related to my report of the AMA Guidelines on May 20, 2019.

It is not clear to me what further periods of temporary total disability would be applied to the patient. She passed away on June 3, 2021.

(Joint Exh. 2, Report by AME Richard Siebold, August 4, 2024, p. 106.)

Unfortunately, the only issues related to benefits identified for trial and at trial were “2. permanent disability” and “5. whether deceased applicant is entitled to a claim of benefits.” (Minutes of Hearing and Summary of Evidence, January 6, 2025, Issues, pp. 2-3.) No issue specifically related to temporary disability was raised. (*Ibid.*)

Defendant contends that it did not anticipate issues of temporary disability being adjudicated at trial:

Although accrued but unpaid benefits may cover both TD and PD, there were no discussions on the issue of accrued but unpaid TD during the pre-trial discussion before commencing Trial on 1/6/2025, but there were extensive discussions on accrued but unpaid PD including the merit of each party’s rating string. Finally, accrued but unpaid TD was not listed or identified as an issued on the Minutes for the 1/6/2025 Trial...

Thus, Defendant contends that a finding on the issue of accrued but unpaid TD violates its due process because there was no certainty that accrued but unpaid TD was actually being tried since it was never listed or identified as an issue for trial. Defendant had listed two exhibits (Employee’s Absence Card 2009-2021 EAMS Document ID 55606305 and Employee’s Pay History 2017-2021 EAMS Document ID 55606306) on the PTCS relevant to accrued but unpaid TD in the event the issue was raised, but the issue was never raised nor discussed.

Accordingly, during the pre-Trial discussion on 1/6/2025, the Absence Card and the Pay History were not offered as exhibits because they had no relevance to the issues identified for Trial. Had accrued but unpaid TD been a topic for the Trial, the exhibits would have demonstrated the deceased worker continued to receive full pay from the employer from 5/23/2018 through 5/4/2021 before she went on personal catastrophic medical leave without pay starting on 5/5/2021.

(Petitioner for Reconsideration, p. 9.)

Applicant contends that “accrued but unpaid benefits were listed, and case law recognizes that where an issue is logically encompassed within a broader issue (such as PD/TD), the judge may adjudicate it to do justice.” (Answer, p. 2.) “Even if TD was not explicitly mentioned, Labor Code § 5701 authorizes the WCJ to inquire into the facts to determine the rights of the parties and issue any award warranted.” (*Ibid.*)² However, the WCJ did not order further development of the record on the temporary disability issue. More importantly, all parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Here, it appears that defendant reasonably relied on the pre-trial conference statement and the discussions at the time of trial to determine what issues it would need to defend at trial. Consequently, we cannot interpose our own findings on the specific issue of accrued and owing temporary disability, which was not identified as an issue pending at the time of the pre-trial conference statement or as an issue for adjudication at the time of trial. Under these circumstances, we cannot “do justice” as applicant argues, by interposing our own findings on the issue of accrued and unpaid temporary disability without violating the parties’ rights to due process. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] citing *Rucker, supra*, 82 Cal.App.4th at pp. 157-158).

² The WCJ and/or the Appeals Board have the discretionary authority to *develop the record* when it lacks substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) When unexpected issues arise after the close of discovery and/or at the time of trial, the WCJ, “. . . may not leave undeveloped matters which it acquired specialized knowledge should identify as requiring further evidence.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 (*Kuykendall*)).

We note that petitioner also seeks reconsideration of the WCJ's evaluation of the medical evidence with respect to his decision related to the accrued and unpaid temporary total disability. (Petition for Reconsideration, pp. 9-10.) However, given our disposition, as well as the lack of specific citation to the record, we decline to address this contention. (See Cal. Code Regs., tit. 8, § 10945(a)-(b).)

Finally, we concur with the WCJ that it was proper to defer the issue of the medical-legal reimbursement involving the AME's report as stated in the Report:

DISCUSSION:

IT WAS CORRECT TO DEFER DOCTOR SIEBOLD'S COSTS

The party making the communication prohibited by this section shall be subject to being charged with contempt before the appeals board and shall be liable for the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery. (Cal Lab Code § 4062.3(h).) Here, the court found the report is not substantial medical evidence and not dispositive on any medical legal issue. Therefore, Defendant is not liable for the cost of the report. Defendant does not represent Dr. Siebold and it is now up to Dr. Siebold to determine if he wants to proceed against the Applicant's Attorney.

DEFENDANT FAILED TO MEET ITS BURDEN TO SHOW COSTS OR ATTORNEY FEES

The party making the communication prohibited by this section shall be subject to being charged with contempt before the appeals board and shall be liable for the costs incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery. (Cal Lab Code § 4062.3(h).) The burden of proof rests on the party holding the affirmative of an issue. (Labor Code §5705.) To meet its burden, Defendant was required to prove each fact supporting its claim by a preponderance of the evidence. "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, §3202.5.) The threshold of proof requires a showing of more than a mere possibility. In this case, Defendant failed to meet its burden. Defendant did not pay for the report and failed to show the report lead to discovery they would not have otherwise needed to obtain. There are no costs to be awarded. Defendant did not show a bill of particulars with time spent on the issue of ex parte communication. Defendant did not put in any evidence as to what a reasonable hourly rate for its services would be. The court is not allowed

to do independent research. If the code states the undersigned WCJ must award costs and attorney fees, then it is zero costs and no evidence to substantiate attorney fees.

Defense counsel did state the time spent in the Petition for Reconsideration, without reference to any exhibits. (Petition at 5:16-5:22.) By not entering time spent into evidence prior to the submission, Applicant counsel does not have an opportunity to question the veracity of the evidence and those figures should be struck from the petition for reconsideration.

(Report, pp. 3-4.)

Accordingly, in order to avoid a violation of due process, we grant reconsideration in order to amend the F&O to defer the issue of accrued temporary disability benefits owed to applicant at the time of her death and any attorney fees owed to applicant's attorney, but otherwise affirm the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Order issued on March 10, 2025 by a workers' compensation administrative law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued on March 10, 2025 by a workers' compensation administrative law judge is **AFFIRMED** except that it is **AMENDED** in part as follows:

FINDINGS OF FACT

...

7. The issue of accrued temporary disability benefits owed to applicant at the time of her death, and payable to her dependents or any other heir or person or entity legally entitled to payment, is deferred.

8. The issue of applicant's attorney's fees is deferred.

AWARD

Any award of accrued temporary disability indemnity benefits owed to applicant at the time of her death, and payable to her dependents or any other heir or person or entity legally entitled to payment, is deferred. Any award of attorney's fees to applicant's attorney is deferred.

ORDERS

IT IS ORDERED that the issue of liens and reimbursement for medical-legal expenses is off calendar, with jurisdiction reserved, to be reset before this Board upon the filing of a Declaration of Readiness.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2025

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

GLORY NANEZ

GLAUBER BERENSON VEGO

HANNA BROPHY MacLEAN McALEER & JENSEN, LLP

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