

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

HARRIS WELLS, *Applicant*

vs.

METROPOLITAN TRANSIT AUTHORITY, *Defendants*

Adjudication Numbers: ADJ17343281

Marina del Rey District Office

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

Defendant seeks reconsideration of the First Amended Findings and Award (F&A) issued on January 14, 2025, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a revenue collector on December 26, 2022, applicant sustained injury arising out of and occurring in the course of employment to his bilateral feet, bilateral ankles, and low back; (2) at the time of injury, defendant's workers compensation carrier was Metropolitan Transit Authority/Workers Compensation; (3) at the time of injury, applicant's earnings were \$1,745.86 per week, warranting a temporary disability indemnity rate of \$1,163.91; and (4) no attorneys' fees have been paid and no attorney fee arrangements have been made.

The WCJ awarded applicant (1) temporary disability indemnity for the period of December 30, 2022 to December 20, 2024, for a total of 104 weeks, subject to a credit in defendant's favor for any permanent disability benefits paid during the period, and not subject to a credit in defendant's favor for any payments made to reimburse EDD; and (2) attorney's fees in the amount of 15% of applicant's total recovery.

Defendant contends that the WCJ erroneously found that it is not entitled to receive a credit for any payments made to reimburse EDD.

We received an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and return the matter for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On November 21, 2023, EDD filed a lien claim, seeking reimbursement of state disability benefits paid at the rate of \$1,225.00 per week, commencing January 3, 2023. (EDD Lien, November 21, 2023, p. 8.)

On September 11, 2024, applicant and defendant filed a pre-trial conference statement, framing the following issues for trial: (1) temporary disability, with applicant claiming the period of May 24, 2023 to the present and continuing; and (2) attorney's fees. (Pre-trial Conference Statement, September 11, 2024, p. 3.)

On October 21, 2024, the matter proceeded to expedited trial of the following issues:

1. Temporary disability, employee claiming the period beginning May 24, 2023 to the present and continuing.
 2. Attorney fees.
- (Expedited Minutes of Hearing (Reporter), October 21, 2024, p. 2:14-16.)

At trial, attorneys appeared on behalf of applicant and defendant, but not lien claimant EDD. (*Id.*, p. 1.)

In the Opinion on Decision, the WCJ states:

Although the Defendant is entitled to take credit for Permanent Disability (PD) benefits paid during the period that Applicant was TD, they have not provided any evidence indicating that they have reimbursed Applicant's EDD account and therefore they are not entitled to take credit for EDD payments paid during the period from 5/24/2023, to the present in accordance with this decision. In the recent case of *Richter v. Frontier Communications* (2024) (Panel Decision) 89 CCC 381, the WCAB affirmed there was no credit for EDD benefits paid as there was no showing in the evidence (printout of benefits) that the EDD was paid. Similarly here, Ex. C, the printout of benefits shows no reimbursement of EDD, nor has Defendant alleged they were reimbursed. As such, and in accordance with *Richter*, there is no entitlement to credit for EDD benefits paid. (Opinion on Decision, p. 6.)

In the Report, the WCJ states:

The issue presented was whether the Applicant is entitled to Temporary Disability benefits beginning 5/24/2023 to the present and continuing. Petitioner paid Temporary Disability (“TD”) from 12/30/2022 to 1/8/2023, and then again from 2/18/2023 to 5/23/2023, for a total of \$17,458.65. Petitioner then terminated TD benefit on 5/23/2023, after receipt of a report by Dr. Jindal of the same date. Applicant disputes the substantiality of Dr. Jindal’s medical reporting arguing that the inconsistencies found in Dr. Jindal’s reports of 5/23/2023 and 5/28/2023, do not support a termination of TD benefits. This issue was brought to the WCJ for adjudication at Expedited Hearing and the Findings and Award and Amended Findings and Award (which added the issue of attorneys’ fees inadvertently omitted in the original Findings and Award) issued.

...

The WCJ found that, according to the recent case of *Richter v. Frontier Communications* (2024) (Panel Decision) 89 CCC 38, although the Petitioner is entitled to take credit for Permanent Disability (PD) benefits paid after the Petitioner terminated TD benefits based on Dr. Jindal’s report, it did not provide any evidence proving that it had reimbursed Applicant’s EDD account. In fact, no evidence as to the dates and amounts of EDD benefits were introduced into evidence at all. The post-trial brief submitted by Petitioner acknowledges this and states that EDD paid broken periods from January 3, 2023 onwards. It never asserts that any reimbursements were made to the EDD. Following *Richter*, the WCJ denied Petitioner credit for EDD payments paid for failure to reimburse. The Petitioner distinguishes this case by arguing that since liability for TD benefits was at issue, payment to EDD would be tantamount to conceding the issue of liability for TD prior to trial. In contrast, the Defendant in *Richter* had issued a notice regarding termination of TD benefits indicating that the statutory maximum of 104 weeks had been met and therefore the benefits were ending. The 104 weeks included one year of EDD benefits. The reasoning of the WCAB in denying credit was based in part on the fact that Applicant would be unable to access any further need for EDD benefits as the account had not been reimbursed.

In this case, Applicant was similarly prejudiced by not receiving full TD benefits for an extended period of time. The inconsistencies in Dr. Jindal’s reports upon which the termination of TD benefits was based were clearly evident, yet Defendant failed to investigate. In his report of 5/23/2023, Dr. Jindal found that the “Applicant has permanent work restrictions”, and notes restrictions of no bending at the waist and no lifting and carrying more than 15 lbs. He also indicates that surgery in the form of an MP joint surgical intervention is anticipated in the near future, (Ex. D). However, 5 days later, in his report of 5/28/2023, although he says that the Applicant’s symptoms are worsening, he also says that Applicant can now bend at the waist occasionally, and the lifting and carrying restrictions have increased to no more than 20 lbs., (Ex. E). These reports when viewed together do not

comply with CCR Section 9785 (a) (8), “*permanent and stationary status is the point where the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment.*”

It does not appear that Dr. Jindal’s reports provide substantial evidence of a permanent and stationary status justifying the termination of TD. In particular, the statement that the Applicant needs surgery in the near future does not indicate his condition is well stabilized and not likely to change substantially in the next year with or without medical treatment. On the contrary, these reports substantiate a finding that Applicant is not MMI and remains TD. PQME Chen, stated in both reports that Applicant was not MMI and further testing was required. The inaction on the Petitioner’s part in failing to schedule the testing, aggrieved the Applicant in a similar fashion as in the *Richter* case. Petitioner did not exercise due diligence in investigating the disability status. For these reasons, it is this WCJ’s opinion the Petitioner should not be allowed credit for the EDD benefits paid. (Report, pp. 2-3.)

DISCUSSION

I.

Former Labor Code section 5909¹ 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. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

- (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 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.”

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

Here, according to Events, the case was transmitted to the Appeals Board on February 12, 2025, and 60 days from the date of transmission is April 13, 2025. The next business day that is 60 days from the date of transmission is Monday, April 14, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, April 14, 2025, so that we have timely acted on the petition as required by Labor Code 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 12, 2025, and the case was transmitted to the Appeals Board on February 12, 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 Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 12, 2025.

II.

An adequate and complete record is necessary to understand the basis for the WCJ's decision. (§ 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ is required to "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

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

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.

which the determination was made.” (§ 5313; see also *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at p. 476, (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351]).)

Although applicant and defendant framed the issues of temporary disability indemnity and attorney's fees for trial, the WCJ issued no findings of fact as to these issues. Instead, the WCJ awarded applicant temporary disability indemnity in a manner which determined an issue neither raised nor submitted for decision: whether defendant may take a credit for any reimbursement payments it may have made to EDD.

Because the WCJ issued no findings of fact on the issues of temporary disability and attorney's fees, and because the WCJ issued an award which effectively precludes defendant from pursuing a credit for any reimbursements to EDD notwithstanding that the issue was not raised for trial herein, we will rescind the F&A.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

As we have explained, the record requires further development so that (1) there are findings of fact on the issues of temporary disability indemnity and attorney's fee which support any award thereon; and (2) there is an adequate and complete record on any claim on the part of defendant to entitlement to a credit for any reimbursement payments made to EDD.

Accordingly, we will return the matter to the trial level for further proceedings consistent with this decision.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and return the matter for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the First Amended Findings and Award issued on January 14, 2025 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the First Amended Findings and Award issued on January 14, 2025 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2025

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

**HARRIS WELLS
BERKOWITZ & COHEN, APC
THE WENDEROFF LAW GROUP, APC
EMPLOYMENT DEVELOPMENT DEPARTMENT**

SRO/bp

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