

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

JENNIFER MERRITT, *Applicant*

vs.

**BIGGE CRANE & RIGGING and SAFETY NATIONAL CASUALTY COMPANY,
adjusted by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ17040974
Oakland District Office**

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

Defendant seeks reconsideration of our December 2, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O) wherein we granted reconsideration of an August 8, 2024 Findings, Award, and Orders (FA&O) and rescinded and substituted the FA&O with a new FA&O which found applicant was entitled to temporary total disability for the period from September 1, 2022 through April 26, 2023 and ongoing, subject to the 104 week cap under Labor Code¹ section 4656(c)(2).

Defendant contends that applicant's testimony at trial was inconsistent and vague, and applicant failed to meet her burden of proof in demonstrating her intent to work after retirement. (Petition for Reconsideration (Petition), pp. 3, 6.) As such, defendant argues that deference should be given to the workers' compensation judge's (WCJ's) FA&O wherein he found applicant was not entitled to retroactive and continuing temporary total disability. (Petition, p. 6.)

We have received an Answer from applicant. The WCJ did not prepare a new Report and Recommendation on Petition for Reconsideration.

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

We have considered the Petition and the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition and return the matter to the trial level for further proceedings by the WCJ solely to address the issue of reasonable attorney fees relating to the award of temporary total disability as set forth in our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration of December 2, 2024.

FACTS

Applicant, while employed on July 25, 2022 by defendant as a material hoist operator, sustained an industrial injury to the bilateral shoulders, neck, and upper extremities.

Prior to the injury, applicant submitted paperwork to defendant in March of 2022 indicating an intended retirement date of September 1, 2022. (Exhibit A, Applicant Deposition, April 19, 2023, p. 15, lines 4-16.)

On April 19, 2023, applicant was deposed by defendant and testified as follows:

Q: Do you plan on eventually going back to work at all?

A: I haven't thought about it.

(April 19, 2023 Deposition, p. 21, lines 3-8.)

Q: For my retirement present to myself, I bought myself a 3 month trip to Europe, and I went and had to come back after six weeks because I had to see the doctor. I've been to Mexico, I go to Mexico a lot. My family lives down there. I've been to Mexico once or twice since my retirement, which is supposed to be complete with travel. I was supposed to leave when I retired and not come back. So I had to cut everything out except for important ones. I have a 80 year old sister that needed help. She lives down there, and I went to help her. And I also went to see my nephew's house that he just purchased in a different part of Mexico. My world is travel. I should be traveling right now.

Q: You said you're supposed to leave, so were you planning on moving to Mexico?

A: Yes. I plan on traveling. I've been to 26 countries. I'm a traveler. That's what I'm supposed to be doing right now. When I retired, that was my whole thing.

(*Id.* at pp. 33-34.)

Applicant treated with Dr. David Suarez who served as her primary treating physician and found her temporarily totally disabled during the period from June 8, 2023 through May 16, 2024. (Exhibits 1-7.)

The parties proceeded with discovery and retained Dr. Kyle Natsuhara as the panel Qualified Medical Evaluator (QME). In his December 5, 2023 report, Dr. Natsuhara found applicant temporarily totally disabled and continuing. (Exhibit 11, pp. 18-19.)

According to the benefit printout provided by defendant, defendant paid applicant total temporary disability benefits from September 1, 2022 through April 26, 2023. (Exhibit B.)

In a May 9, 2023 letter to applicant, defendant indicated that temporary disability was being terminated as applicant “retired from employment.” (Exhibit D.) Defendant also alleged a temporary disability overpayment spanning the entirety of temporary disability period paid, from September 1, 2022 through April 26, 2023, totaling \$43,077.66. (*Ibid.*)

On August 19, 2024, the matter proceeded to trial. Applicant testified that she intended, and was willing, to return to work but for the work injury. (Minutes of Hearing and Summary of Evidence (MOH & SOE, August 19, 2024, pp. 5-6; Report, p. 5.) She also testified that any thoughts of a permanent move to Mexico was not feasible and “only a dream.” (*Ibid.*)

On August 28, 2024, the WCJ issued a Findings, Award, and Order and Opinion on Decision indicating, in relevant part, that applicant was not “entitled to receive payments for temporary disability indemnity” as applicant intended to remove herself from the labor market when she submitted paperwork for retirement and failed to provide any evidence of “retained earnings capacity.” (FA&O and OOD, pp. 1, 6-7.)

On September 24, 2024, applicant filed a Petition for Reconsideration contending that the WCJ erred in finding that she intended to remove herself from the labor market given her trial testimony wherein she indicated a willingness and intent to return to work but for the work injury.

On December 2, 2024, we issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration wherein we rescinded and substituted the FA&O with a new FA&O which found applicant was entitled to temporary total disability for the period from September 1, 2022 through April 26, 2023, and ongoing, subject to the 104 week cap.

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 December 23, 2024, and 60 days from the date of transmission is February 21, 2025. This decision was issued by or on February 21, 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 constitute notice of transmission.

Here, according to our review of the record, we did not receive a Report and Recommendation by a workers’ compensation administrative law judge. However, a notice of transmission was served by the district office on December 23, 2024, which is the same day as the transmission of the case to the Appeals Board on December 23, 2024. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on December 23, 2024.

II.

Turning now to the Petition, defendant contends that applicant's testimony at trial was inconsistent and vague, and that applicant failed to meet her burden of proof in demonstrating her intent to work after retirement. (Petition, pp. 3, 6.) As such, defendant argues that deference should be given to the WCJ's August 8, 2024 FA&O wherein the WCJ found that applicant was not entitled to retroactive or continuing temporary total disability. (Petition, p. 6.)

As explained in our January 22, 2025 O&O, the WCJ previously confirmed that applicant testified that but for the work injury, applicant was and continues to be willing to go return to work. (Report, p. 5.) Further, although it is true that at the time of applicant's April 19, 2023 deposition, applicant testified she was not thinking about work, we also find it reasonable for applicant to have felt differently at that time as she had recently undergone surgery. (O&O, p. 6.) Since then, applicant has repeatedly expressed a desire to return to work. (Minutes of Hearing and Summary of Evidence (MOH & SOE), August 19, 2024, pp. 5-6; Petition, pp. 2-3.) Given the above circumstances, we do not find applicant's testimony to be inconsistent or vague.

With respect to the issue of applicant's burden of proof in establishing her right to retroactive and continued temporary total disability indemnity, the WCJ in her prior Report and Recommendation on Petition for Reconsideration cited to the cases of *Jimenez v. San Joaquin Valley Labor, Superior Nat'l Ins. Co.* (2002) 67 Cal.Comp.Cases 74 (Appeals Bd. en banc.) and *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 802. The WCJ argued that in seeking temporary disability, applicant had a burden to prove that she "retained earnings capacity after her retirement." (Opinion on Decision (OOD), pp. 6-7.) As discussed in our January 22, 2025 O&O, however, *Jimenez* and *Ochoa*, are distinguishable in that the applicants in those cases were seasonal employees and therefore necessarily had two different temporary disability rates, one for off-season and one for in-season. As such, the applicants in those cases needed to provide evidence of off-season wages. Conversely, applicant here is not a seasonal employee. As such, applicant carries no such burden.

Lastly, the issue of attorney's fees from our January 22, 2025 order of retroactive and ongoing temporary disability indemnity is not at issue in defendant's current Petition. Any grant of reconsideration, however, has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open

for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration is granted, the WCAB has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the original petition for reconsideration. Further, since orders of temporary disability indemnity generally involve calculation of attorney’s fees, we believe it prudent that the fees be addressed sooner rather than later. Accordingly, we grant defendant’s Petition and return this matter to the trial level for further proceedings by the WCJ solely to address the issue of reasonable attorney fees relating to the award of temporary total disability as set forth in our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration of December 2, 2024.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our December 2, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 21, 2025

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

**JENNIFER MERRITT
LAW OFFICE OF CHRISTINA LOPEZ
LAUGHLIN, FALBO, LEVY & MORESI**

RL/cs

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