

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

JOSEPH MONTECINO, *Applicant*

vs.

**STEAD MOTORS, INC.; SERVICE AMERICAN INDEMNITY
COMPANY, administered by BROADSPIRE, *Defendants***

**Adjudication Number: ADJ16741292
Oakland District Office**

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

Defendant seeks reconsideration of the Findings, Award, and Orders (F&A), issued by the workers' compensation administrative law judge (WCJ) on October 31, 2024, wherein the WCJ found in pertinent part that:

2. Applicant is totally temporarily disabled and is entitled to temporary disability benefits from 9/11/2024 and continuing at the maximum temporary disability rate.
3. Defendant is not entitled to take credit for overpayment of temporary disability benefits from the temporary disability currently due applicant.
4. Defendant's petition for credit for overpayment is deferred.

Defendant contends that the WCJ erred in finding that applicant is entitled to receive temporary disability indemnity pursuant to Labor Code section¹ 4656(c)(3)(C). More specifically, defendant contends that because applicant underwent replantation surgery to reattach an amputated finger, the injury can no longer be considered an "amputation" under section 4656(c)(3)(C). Defendant also contends that WCJ's finding that applicant is totally temporarily disabled is contradicted by the medical evidence. Defendant further contends that section "b" of the Award

¹ All statutory references are to the Labor Code unless otherwise stated.

refers to the wrong Finding of Fact and should be corrected. Defendant also raises issues regarding credit for overpayment of temporary disability benefits.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Report, which we adopt and incorporate to the extent set forth below, and as discussed herein, we will grant reconsideration, amend Award "b" to correct the clerical error, and otherwise affirm the Findings, Award, and Orders. The Appeals Board may correct clerical errors at any time. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145] (stating that that the Appeals Board may correct a clerical error at any time without the need for further hearings).)

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.
 - (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 December 3, 2024, and 60 days from the date of transmission is Saturday, February 1, 2025. The next business day that is 60 days from the date of transmission is Monday, February 3, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, February 3, 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 shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on December 3, 2024, and the case was transmitted to the Appeals Board on December 3, 2024. 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 December 3, 2024.

II.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Bd. en banc).) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” or determines a “threshold” issue that is fundamental to the claim for benefits. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not

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

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.

limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, at 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. Here, the WCJ's decision includes findings on threshold issues, including the finding that applicant is totally temporarily disabled and entitled to temporary disability benefits from September 11, 2024, and continuing at the maximum temporary disability rate and also the finding that applicant sustained injury AOE/COE to his left index finger and lower back. These are findings on threshold issues fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration.

Although the decision contains a finding that is final, petitioner also challenges the finding that defendant's petition for credit for overpayment of temporary disability benefits is deferred (Finding of Fact No. 4). This is an interlocutory order and therefore, we will apply the removal standard to our review of applicant's contentions regarding Finding No. 4. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, based upon the WCJ's analysis of the merits of the petitioner's arguments regarding Finding of Fact No. 4, we are not persuaded that

significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Accordingly, we grant defendant's Petition solely to correct a clerical error in section "b" of the Award, so that it reads "Attorney's fees in accordance with Finding of Fact No. 5." Otherwise, we affirm the Findings, Award, and Orders issued on October 31, 2024.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award, and Orders issued by the WCJ on October 31, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

AWARD

b. Attorney's fees in accordance with Finding of Fact No. 5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 3, 2025

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

**JOSEPH MONTECINO
BOXER GERSON
WINTERSTEEN CASAREZ**

JB/pm

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**NOTICE OF TRANSMISSION TO THE
WORKER'S COMPENSATION APPEALS BOARD**

Defendant filed a timely, verified, petitions for reconsideration from my decision dismissing his petition to reopen.

NOTICE OF TRANSMISSION OF THE PETITION FOR RECONSIDERATION.

The parties are hereby notified that the Petition for Reconsideration filed by defendant on November 25, 2024 is transmitted to the Workers' Compensation Appeals Board for review on December 3, 2024.

DISCUSSION

Applicant, Joseph Montecino, was employed as a service technician by Stead Motors Inc., when he sustained injury to multiple parts of his body on September 13, 2022. Applicant was working on replacing an engine in a truck. The new engine was sitting on a hoist. Once he removed the old engine he used a crank pulley to get to the new engine. One of the bolts holding the pulley broke and the engine fell directly on applicant's left hand amputating a part of applicant's left index finger.

Applicant's claim for benefits was accepted and benefits were provided. On October 8, 2024, defendant sent a termination of temporary disability notice letter to applicant, terminating applicant's temporary disability benefits because of the application of the 104 week cap.

Applicant promptly objected to the termination arguing that applicant was entitled to an exception of the 104 week rule pursuant to Labor Code section 4565(c).

It was my determination that applicant was entitled to extension of his temporary disability benefits to 240 weeks because he did sustain an amputation of a part of his body. It was further my determination that applicant remained temporarily disabled hence temporary disability benefits are due and payable to him. Additionally I deferred ruling on defendant's petition for credit for temporary disability overpayment.

LABOR CODE SECTION 4565(c):

In relevant part, Labor Code section 4565(c) provides that,

(1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:

...

(C) Amputations
(Lab. Code, § 4656(c).)

In *Cruz v. Mercedes-Benz of San Francisco*, (2007) 72 Cal.Comp.Cases 1281, 1283 (Appeals Board en banc), the Appeals Board defined “amputation” as “the severance or removal of a limb, part of a limb, or other body appendage.” (*Id.* at p. 1286.) Subsequent cases have relied on that definition when considering the issue of amputation and section 4565. For example, in *Julie Ramirez v. Workers’ Comp. Appeals Bd.* (2008) Cal.Comp.Cases 1120, 1122 (writ den.), the Board stated that amputation required removal, by surgery or traumatic loss, of external projecting body parts. Further, in *Burrtech Waste Industries v. Workers’ Comp. Appeals Bd. (Collinwood)* (2010) 75 Cal.Comp.Cases 1175 (writ den.), applied when the removal of breast implants left applicant with a “chest that was essentially devoid of breasts, and whatever breasts were left were seriously diminished in size... and were grossly disfigured.” (*Id.* at p. 1177.) As relevant herein, the Judge in that matter stated that, “[t]here is nothing in labor code section 4656 or in *Cruz* that requires the amputation to be the severance of the entire body part.” (*Ibid.*) Additionally, in *Parco Inc. v. Workers’ Comp. Appeals Bd. (Martinez)* 83 Cal.Comp.Cases 1288 (writ den.), the amputation exception applied because the removal of bone from a thumb combined with a shortening of the thumb by 7 millimeters was found to constitute a severance or removal of part of a limb or appendage.

Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 743 says that when the language of a statute is clear, it is enforced according to its terms. The statute states that when a part of the body is amputated, the temporary disability period is extended.

Defendant contends that applicant did not sustain an amputation hence is not eligible for the exception to the 104 week rule because the portion of the finger that was amputated was re-attached. I disagree with defendant's position.

Defendant primarily relies on the argument that "[r]eplantation of a detached extremity takes the claimant out of the Labor Code Section 4656(c)(2) amputation exception for the purposes of temporary disability benefits" (Defendant's Petition for Reconsideration, 11/25/24, page 3, lines 1-3.)

Defendant has produced no case law to support his position that if replantation of the amputated body part occurs then the injured worker is not entitled to the temporary disability extension. The statute is silent on what occurs if replantation occurred.

The reason there is extension of the temporary disability period for amputations is because the recovery from an amputation is reasonably expected to take longer than a case where an amputation did not occur.

As I stated in my decision a broken leg was still a broken leg after it recovered. Applicant still had a portion of his finger amputated, even though replantation occurred.

APPLICANT IS TOTALLY TEMPORARILY DISABLED:

I am slightly perplexed over defendant's claim that there is no medical evidence to support my finding of entitlement to temporary disability benefits. Dr. Chen, the panel qualified medical examiner as well as the treating physician, Dr. Jamasbi, have stated that applicant is totally temporarily disabled, and since no modified work has been offered to date, defendant owes applicant temporary disability benefits.

Dr. Chen in his report of June 27, 2024, (applicant's exhibit 2) on page 2 states that "Mr. Montecino was restricted from grasping, gripping, handling, lifting and fingering with the left hand." On page 3 the doctor states under a paragraph titled temporary total disability "Since 9/13/22, Mr. Montecino has been off work."

The only reasonable way in which one can interpret what Dr. Chen stated in his report is that applicant has been totally temporarily disabled since 9/13/22.

Dr. Chen conducted a physical examination of the applicant and reviewed medical records to reach the above conclusion. His conclusions can therefore be considered as substantial medical evidence.

Dr. Jamasbi, applicant's treating physician, in his report of September 9, 2024 (joint exhibit 102) on page 9 under work status states "[applicant] has the following work restrictions: "Avoid usage of left hand. The patient is not permanent and stationary. If work restrictions cannot be accommodated, then patient would be considered total temporary disability." Since modified work has not been offered to applicant, applicant is totally temporarily disabled according to his treating doctor, Dr. Jamasbi.

TEMPORARY DISABILITY OVERPAYMENT CLAIM:

Defendant's request for credit for temporary disability overpayment has not been denied. It was simply deferred. Since the petition for credit was filed on the day of trial, it would have been a violation of applicant's due process right to address the credit claim issue. Applicant for the first time learned about the claimed credit on the day of trial. Although the trial could have been continued, being an expedited trial on the issue of the right to temporary disability benefits a continuance would have violated applicant's right to a swift determination on an expeditable issue.

RECOMMENDATION

I recommend that the Petition for Reconsideration filed by defendant be ***DENIED***.

Date: 12/03/2024

Lilla J Szelenyi
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE