WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA AGUILAR, ***Applicant***

vs.

TOSCANA COUNTRY CLUB; SENTRY INSURANCE, ***Defendants***

Adjudication Number: ADJ15621172
Riverside District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award and Order ("F&A") issued on November 8, 2024, wherein the workers' compensation administrative law judge ("WCJ") found applicant entitled to permanent disability ("PD") at a rate of $290.00 per week. Defendant argues that applicant's PD rate should instead be $160.00 per week, the statutory minimum, because she was a seasonal worker injured only a few months into her employment, with no history of prior seasonal employment to indicate she would have completed the season in the absence of injury.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition and the Report, as well as the record. For the reasons discussed below, although we agree with the WCJ that applicant is owed PD at $290.00 per week, we will grant reconsideration and amend the F&A to defer the issue of the credit defendant asserted pursuant to Labor Code section 4909 for alleged temporary disability ("TD") overpayments, because the WCJ's decision to allow the credit is not supported by substantial evidence or a sufficiently thorough consideration of the issue.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a specific injury to multiple body parts sustained on December 21, 2021 while employed by defendant as a housekeeper. The parties

have stipulated to, among other issues, the fact of injury, that it arose out of in the course of applicant's employment, and that applicant sustained 46% PD as a result of the injury.

The matter proceeded to trial on September 10, 2024. The parties listed the following issues for trial: (1) temporary disability; (2) permanent disability; (3) apportionment; (4) need for further medical treatment; (5) attorney fees; (6) the permanent disability rate; and (7) defendant's claim for credit for TD overpayment. (Minutes of Hearing / Summary of Evidence ("MOH/SOE"), 9/10/24, at p. 3.) Exhibits were admitted, and the matter was taken under submission without testimony or argument. (*Id.* at pp. 3–5.)

With relation to the last issue – the credit for alleged TD overpayments - the parties stipulated to the following periods of TD payments, all at the rate of $515.16 per week: (1) January 13, 2022 to June 15, 2022; (2) November 1, 2022 to May 15, 2023; and (3) October 9, 2023 to December 31, 2023. (*Id.* at p. 2.)

The Petition for Credit filed by defendant asserts the following claims for credits for overpayments: (1) $469.79 for having paid TD benefits at $538.99 per week from January 13, 2022 to May 30, 2022 rather than the correct rate of $515.16; (2) $1,231.98 for TD benefits paid from May 31, 2022 to June 15, 2022; and (3) $3,900.50 for TD benefits paid from November 9, 2023 to December 31, 2023, after applicant was found to have reached maximum medical improvement ("MMI") by the AME on November 9, 2023. (Petition for Credit, at pp. 1–2.)

On November 8, 2024, the WCJ issued the F&A, finding in relevant part that applicant was entitled to PD at the rate of $290.00 per week, and that defendant was entitled to a credit against the resulting PD award for TD overpayments in the amount of $5,468.55. (F&A, at p. 2, ¶¶ 11, 15.) The Opinion on Decision makes clear that the WCJ based the PD rate off a calculation of what applicant would have earned had she worked for the entire seasonal period from October 2021 to May 2022. (Opinion on Decision, at p. 5.) Regarding the claim for credit for TD overpayment, the WCJ referenced the three periods of overpayment claimed in the Petition for Credit, writing: "The undersigned calculated the total figure to be $466.35, $1,102.44, and $3899.76 respectively." (*Id.* at p. 6.) The WCJ decided to award the credit because the total amount of $5,468.55 was "a small portion of the value for impairment awarded." (*Ibid.*)

The instant Petition for Reconsideration followed, with defendant asserting error with regard only to the calculation of the PD rate.

DISCUSSION

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 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 6, 2024, and 60 days from the date of transmission is February 4, 2025. This decision is issued by or on February 4, 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 December 6, 2024, and the case was transmitted to the Appeals Board on December 6, 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 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 December 4, 2024.

II.

Initially, we note that following the grant of reconsideration, the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. As we observed in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35, 51–17] (Appeals Board en banc), section 5906 provides that "[u]pon the filing of a petition for reconsideration … the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge. …" (Lab. Code, § 5906.) Similarly, section 5908 provides that "[a]fter … a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award." (Lab. Code, § 5908.) Thus, it is settled law that a grant of reconsideration 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 [218 P. 1009] [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*Pasquotto, supra,* citing *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [270 P.2d 55, 19 Cal.Comp.Cases 98].) Accordingly, the fact that petitioner seeks reconsideration only with regard to the proper PD rate does not limit us from considering other aspects of the F&A.

Here, we agree with the WCJ that the proper PD rate in this case was $290.00 per week, the statutory maximum, rather than the statutory minimum rate of $160.00 per week, as defendant would have it. Defendant's argument – essentially, that we should take into account only applicant's two months of earning history prior to her injury, but then divide those earnings by the

entirety of the seasonal employment period – makes little conceptual sense. Even assuming for purposes of argument that defendant's basic approach to the calculation of applicant's average weekly wage ("AWW") can be seriously entertained, there is no evidence in the record to suggest that applicant would not have remained in her job through the end of the season in the absence of her injury. To divide applicant's actual earnings by the entirety of the seasonal employment period in effect punishes her for being injured earlier rather than later in the season, based only on defendant's speculation that she might not have completed the season even in the absence of injury. We see no basis in either the statutory law or the case law to support the use of such pure speculation to reduce the AWW. The cases defendant cites are not apposite, each involving actual past work histories that were used to calculate the relevant AWWs, not mere speculation. We will therefore affirm the WCJ's conclusion that applicant was due PD at the $290.00 rate.

However, in the course of reviewing the record in order to reach the above conclusion, we have also considered the WCJ's determination that defendant was due a credit pursuant to Labor Code section 4909 for TD overpayments, to be credited against applicant's PD award. For the following reasons, we do not believe that the WCJ's conclusion is based upon substantial evidence, and we will therefore amend the F&A to defer the issue.

Under Labor Code section 4909, the Appeals Board is allowed to "take[] into account," (i.e., to allow a credit) for any payment, allowance, or benefit paid by the defendant to the injured employee when it was not then due and payable or when there was a dispute or question concerning the right to compensation. (Lab. Code, § 4909.) The Supreme Court has stated that the allowance of credit is within the Appeals Board's discretion. (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].) An Appeals Board panel stated that "[w]hether a credit is to be allowed is a matter directed to the discretionary authority of the trier of fact to be weighed in the light of the circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities presented." (*Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Board panel decision).) Thus, the allowance of a credit is a matter of discretion and not a legal entitlement.

In *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106], the Court of Appeal stated that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one

benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on their part. (*Maples, supra,* 111 Cal.App.3d at pp. 837–38.)

More generally, 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 v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) 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].) As required by section 5313 and explained in 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." (*Hamilton, supra*, at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] … For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans, supra.* 68 Cal. 2d at p. 755.)

Here, the WCJ's conclusion that defendant was entitled to a credit against PD for TD overpayments is conclusory in several respects. First and foremost, like any other issue in workers' compensation proceedings, entitlement to a Labor Code section 4909 credit must be actually proved by the party seeking to benefit from the credit. Here, we cannot tell from the Opinion on Decision on what basis the WCJ concluded that defendant had proved overpayments in the amounts calculated by the WCJ. For example, the parties stipulated to TD being paid at the rate of $515.16 during all periods, including during the first period of alleged TD overpayments. (MOH/SOE, at p. 2.) This appears to conflict with the argument in the Petition for Credit that TD benefits were instead paid at $538.99 per week during that period, and therefore that there was a TD overpayment. However, the Opinion on Decision does not contain any explanation for why

the WCJ appears to have disregarded the parties' stipulation, or what evidence he relied on to establish that in fact TD was in fact overpaid during this period. To add confusion to the issue, the amounts calculated by the WCJ differ slightly from the amounts sought in the Petition for Credit. There is no explanation in the Opinion on Decision as to how the WCJ arrived at the figures quoted, and why they differ from those sought by defendant in the Petition for Credit.

Moreover, although the Opinion on Decision states that the amount of the alleged TD overpayment is "small," it does not explain why that conclusion makes allowance of the credit equitable. As stated in *Maples*, the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit. The fact that TD and PD serve different statutory purposes results in the equities weighing against such a credit more strongly than they do in the case of a credit being sought against the same benefit.

Finally, we note that there were three separate periods of TD overpayment alleged in the Petition for Credit, each apparently based upon different facts, and therefore subject to different equitable considerations. For example, the second period of TD overpayment appears to have been rooted in defendant's failure to stop TD benefits at the end of the season, instead paying applicant for an additional two weeks. It is unclear why defendant's apparent lack of knowledge of the end of its own employment season should result in a reduction of applicant's PD benefits, especially given that defendant has already benefitted significantly from asserting the end of the season as a reason not to pay continuing TD benefits.

In short, the Opinion on Decision simply does not allow us to adequately determine the basis for the WCJ's decision to allow the Labor Code section 4909 credit. Accordingly, we will amend the F&A to defer this issue. In all other respects, the F&A is affirmed.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the November 8, 2024 Findings and Award and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 8, 2024 Findings of Fact and Award and Order. Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

15. The issue of defendant's asserted credit for temporary disability overpayments is deferred.

ORDER

Defendant's entitlement to credit for temporary disability overpayments is deferred pursuant to Finding of Fact 15.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 4, 2025

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

MARIA AGUILAR
LAGORIO LAW GROUP
PARKER IRWIN
EMPLOYMENT DEVELOPMENT DEPARTMENT

AW/*pm*

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