

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

MIGUEL GARCIA PEREZ, *Applicant*

vs.

**OPPORTUNITY STAFFING, INC.; insured by UNITED WISCONSIN INSURANCE,
administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ13475083
Los Angeles District Office**

**OPINION AND ORDER
GRANTING APPLICANT'S PETITION FOR RECONSIDERATION,
DENYING DEFENDANT'S PETITION FOR RECONSIDERATION,
AND DECISION AFTER RECONSIDERATION**

Applicant Miguel Garcia Perez and defendant Opportunity Staffing, Inc. each seek reconsideration of the November 26, 2024 "Second Amended Findings and Award" (should actually be Third Amended Findings and Award), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that (1) applicant's earnings were \$551.04 per week, warranting indemnity rates of \$367.36 for temporary disability (Finding no. 3), (2) applicant was temporarily disabled for 49 weeks (Finding no. 6), (3) defendant failed to meet their burden regarding apportionment (Finding no. 9), and (4) attorney's fees are awarded in the sum of \$6,003.00 based on 15% of the permanent disability award (Finding no. 11).

Applicant contends that (1) the average weekly earnings should be based on the parties' stipulation that applicant is a max earner, (2) the period of temporary disability should be from July 21, 2020 to April 4, 2022, when applicant was found to be permanent and stationary, (3) applicant is entitled to a Supplemental Job Displacement Benefit voucher, and (4) attorney's fees should be increased.

Defendant contends that the trial court failed to apportion applicant's permanent disability based on a prior workers' compensation claim against a former employer which was settled by Compromise and Release in July 2015.

We have not received an answer to either applicant's or defendant's petitions for reconsideration, although the record contains applicant's answer to defendant's petition for reconsideration of a prior Findings & Award which has since been vacated. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted for the sole purpose of fixing clerical errors—amending the average weekly earnings to \$566.37 per week with temporary disability paid at the rate of \$377.58 per week and admitting Exhibit F into evidence.

We have considered both Petitions for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, affirm the November 26, 2024 “Second Amended Findings and Award,” except that we amend Findings nos. 3, 4, 6, and 11 as explained below. We also admit defendant Exhibit F per the Report.

FACTS

On July 21, 2020, while employed by defendant, applicant was loading heavy boxes when a coworker threw a box in his direction without looking, which hit applicant and knocked him down. (Joint Exhibit 5, report of H. Leon Brooks, M.D. dated July 21, 2020, p. 2.) Injury arising out of and in the course of employment to applicant's neck, lumbar spine, and cervical spine have been admitted. (Minutes of Hearing and Summary of Evidence dated September 7, 2023, p. 2:4-6.)

The procedural history of this matter is long and complicated:

On September 7, 2023 this case was submitted on the record. The issues were as follows:

- 1) Parts of Body Injured: bilateral upper extremities and thoracic spine;
- 2) Earnings: the employee claiming \$1,200.00/week, based on testimony, Labor Code section 4661.5;
- 3) the employer/carrier claiming \$312.00/week, based on \$13.00/hour for 24 hours a week for 3 days a week.
- 4) Temporary Disability, the employee claiming the periods of 7/21/2020 through April 19, 2020;

- 5) Permanent Disability;
- 6) Apportionment;
- 7) Need for further medical treatment;
- 8) Liability for Self-Procured Medical Treatment; and
- 9) Attorney's Fees.
- 10) Penalties per Applicant's petition.

At this time, Defendant submitted an OSI Staffing Wage Statement as Exhibit F. It was marked for identification only and through a clerical error of the court was not admitted into evidence at the time of the last F&A.

Applicant testified on his own behalf on this date of trial, but although he testified as to the hours he worked, he never testified as to the amount he earned at either Best Box or OSI Staffing. Applicant also testified that he had filed a prior worker's compensation claim for his lumbar and cervical spine that he settled for approximately \$47,000.00.

On November 8, 2023, the submission was vacated and the applicant was ordered to subpoena W-2s and/or 1099s, and wage statements for the past 4 years from Best Box, applicant's concurrent employment. The defendant was ordered to obtain W-2s and/or 1099s from OSI Staffing, and wage statements for the past 4 years of applicant's employment.

On March 11, 2024, the case was resubmitted. At this time, the parties stipulated that the applicant was a max earner. However, after discussions with the parties, no agreement was reached to remove wages as an issue. To that end, the Applicant's counsel had the Wage Statements from Best Box admitted into the record as Exhibit 9.

On May 16, 2024, a Findings and Award was issued in which this judge made a finding on the issue of wages based on the evidence (Exhibits F and 9) which did not show the applicant to be a max earner. Based on the reporting of Dr. Brooks (Exhibits S, T, and U), this judge found apportionment.

On June 13, 2024, applicant filed a timely Petition for Reconsideration. On June 21, 2024, an Order Vacating the May 16, 2024 Findings and Award was issued and the case returned to the trial calendar.

On May 16, 2024, after discussions with the parties, which again failed to reach an agreement to remove the issue of wages from issues submitted for trial, the case was again submitted.

On September 20, 2024, a Findings and Award were issued in which this judge reversed herself on the apportionment issue as the why and how analysis of Dr. Brooks (Exhibit U) was lacking and did not constitute substantial medical evidence.

On October [11 and] 14 [], 2024 parties filed separate Petitions for Reconsideration. [Applicant also filed an answer to defendant's petition for reconsideration on October 17, 2024.]

On October 28, 2024, an Order Vacating Findings and Award and Amended Findings and Award were issued deferring Applicant's Petition for Penalties.

On November 13 and 21, 2024 parties filed separate Petitions for Reconsideration.

On November 26, 2024, this judge issued an Order Vacating Findings and Award and issuing a Second Amended Findings and Award to fix an error in calculating applicant's average weekly wage.

On December 17 and 19, 2024, parties filed Petitions for Reconsideration that are the subject of this Report and Recommendation. (Report, pp. 2-5.)

DISCUSSION

I.

Former Labor Code¹ 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. (§ 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.

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

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 30, 2024, and 60 days from the date of transmission is February 28, 2025. This decision is issued by or on February 28, 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 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 30, 2024, and the case was transmitted to the Appeals Board on December 30, 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 30, 2024.

II.

1. Earnings

Section 5702 provides:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.
(§ 5702.)

“Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements.” (*Guzman v. Aerospace Serv. Controls* (July 24, 2017, ADJ7358750) [2017 Cal. Wrk. Comp. P.D. LEXIS 337] citing *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, “A stipulation is ‘An agreement between opposing . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,’ [citation omitted] and serves ‘to obviate need for proof or to narrow range of litigable issues’ [citation omitted] in a legal proceeding.” (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.)

“A stipulation may lawfully include or limit issues or defenses to be tried, whether or not such issues or defenses are pleaded. [Citations.]” (*Guzman, supra*, 2017 Cal. Wrk. Comp. P.D. LEXIS 337; internal quotations omitted.) While it is true that a stipulation may be set aside upon showing of good cause, the parties must be given the opportunity to be heard and argue their respective positions on the stipulation at issue. (*Hernandez v. YRC Freight* (October 14, 2020, ADJ8710519) [2020 Cal. Wrk. Comp. P.D. LEXIS 336].) Rejecting a stipulation without an opportunity to be heard violates due process and section 5702. (*Ibid.*; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158.)

Here, the parties stipulated that applicant was a maximum wage earner on March 11, 2024, after the parties were ordered to develop the record on applicant's earnings. (Minutes of Hearing dated March 11, 2024, p. 2:7.) Although the issue of earnings was still an issue for trial, as the WCJ points out (Report, p. 7), there is no record that defendant moved to be relieved from such stipulation and section 5702 does not permit the WCJ to find contrary to the stipulation absent a hearing and an opportunity for the parties to be heard on this issue. The record does not show a hearing or trial past March 11, 2024. Instead, the record is full of petitions for reconsideration followed by multiple orders vacating and amending Findings and Awards, with the same judicial determination that applicant is not a maximum earner and only clerical changes on the amount of applicant's earnings. This is not permitted absent a full hearing on why the stipulation should be set aside. More importantly, the record does not show that defendant sought to set aside the stipulation.

2. Temporary Disability

On the issue of temporary disability, we appreciate applicant's argument that his injury occurred during a unique time of a pandemic with a shelter-in-place order. However, a decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal. Comp. Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (§§ 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].) Here, we return this matter to the trial level to develop the record on the period of temporary disability. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120-1122 [63 Cal.Comp.Cases 261].)

3. Supplemental Job Displacement Benefit

The November 20, 2024 "Second Amended Findings and Award" did not contain a finding on the Supplemental Job Displacement Benefit and we do not reach this issue.

4. Attorney's Fees

Section 4903(a) provides that a lien against a worker's compensation may attach for a reasonable attorney's fee. WCAB Rule 10844 provides that:

In establishing a reasonable attorney's fee, the workers' compensation judge or arbitrator shall consider the:

- (a) Responsibility assumed by the attorney;
 - (b) Care exercised in representing the applicant;
 - (c) Time involved; and
 - (d) Results obtained.
- (Cal. Code Regs., tit. 8, § 10844.)

We note that attorney's fees are permissibly attached to temporary and permanent disability benefits when warranted. (*See Chagnon v. State, Dep't of Corr.* (July 9, 2008, VNO0521700) [2008 Cal. Wrk. Comp. P.D. LEXIS 536, *3-4] ["Here, applicant was awarded a period of temporary disability. If he were not a state employee, reasonable attorney's fees would have been allowed as a lien against the award of temporary disability indemnity pursuant to section

4903(a).”]; *Cooper v. Recording Indus. Ass'n of America* (June 8, 2009, ADJ870919, ADJ2721302) [2009 Cal. Wrk. Comp. P.D. LEXIS 254] [attorney’s fees awarded from temporary disability indemnity to applicant]; *Lopez v. State* (September 4, 2015, ADJ7995938) [2015 Cal. Wrk. Comp. P.D. LEXIS 530] [attorney’s fees should be calculated on any additional temporary disability awarded, if any, after development on the record on the issue of temporary disability].) Given that the issue of how long applicant was temporarily disabled is deferred, and no award of temporary disability has yet been determined, we, therefore, defer the issue of attorney’s fees.

5. Apportionment

As to the issue of apportionment, we adopt and incorporate the following from the Report:

Labor Code § 4664 Apportionment

Under Labor Code § 4664, the employer is only liable for the percentage of permanent disability directly caused by the injury arising out of and in the course of employment. However, defendant has the burden to prove overlap between the current disability and the previous disability. (See generally, *Kopping v. WCAB* (2006) 71 CCC 1229.)

Here applicant was questioned at trial regarding a prior award to his lumbar and cervical spine. Applicant testified that he had settled a prior claim for those body parts for approximately \$47,000.00. There was no further evidence presented on the subject.

It was not until defendant’s Petition for Reconsideration dated October 11, 2024 that ADJ8004528 was mentioned by case number on the record of this case.

Defendant failed to meet their burden of proof to establish Labor Code § 4664 apportionment.

Labor Code § 4663 Apportionment

Under Labor Code § 4663, apportionment shall be based on causation. However, the defendant must be prepared to present the prior award and any medical evidence supporting it. (See generally, *Johnson v. City of Oakland*, 2020 Cal. Wrk. Comp. P.D. LEXIS 328.) Additionally, under *Escobedo*, a doctor must explain how and why the disability is or is not causally related to the industrial injury.

Here, after reviewing voluminous medical reports from both the current and prior injury, QME Brooks opined “It is my opinion, therefore, that 50% of his permanent impairment affecting his cervical spine is related to his prior condition and 50% is related to the more recent specific injury of 7/21/2020.” There is absolutely no “how and why” analysis as to how he reached that conclusion. Additionally, the prior award and supporting evidence were not provided to the court to review.

Defendant did not meet their burden on Labor Code § 4663 apportionment. (Report, pp. 8-10.)

Lastly, we admonish Clayton Perry for violating WCAB Rules 10421(b)(9). (Cal. Code Regs., tit. 8, § 10421(b)(9).) While we understand applicant’s attorney’s frustration at the procedural history of this case, the WCJ should be afforded with respect. Applicant’s petition is full of inflammatory and disrespectful language that challenges the integrity and neutrality of the WCJ. We provide the following excerpts as an example:

- “The Judge should not be permitted to use judicial resources to conduct pro bono legal work on behalf of defendant by presenting arguments that defendant did not present and preventing the parties from entering into stipulations., [sic] even when they submitted them, and then submitted them again at the Mulligan Trial. Additionally, coming to their rescue at the minimum of seven times to date.” (Applicant’s Petition, p. 8:14-19.)
- “The WCJ alone is impermissibly creating a dispute with applicant on defendant’s behalf as if they were employed as a second defense attorney. The WCJ has not been retained by defendant.” (Applicant’s Petition, p. 12:9-11.)
- “. . . the Judge arguing on defendant’s behalf where defendant has not made the argument” (Applicant’s Petition, p. 14:19-20.)
- “. . . if anyone was misled, it was the applicant. The applicant was arguably misled by (1.) The WCJ entering the stipulation into the record twice without comment, misleading him into thinking that he did not need to present additional evidence. (2.) Misleading his attorney into thinking that defendant was subject to a discovery order when the Judge apparently was never going to punish defendant with an adverse inference or anything for their bilateral refusal to comply with the November 8th, 2023 court order.” (Applicant’s Petition, p. 15:9-15.)

- “How the WCJ divined the total number of hours worked to conclude he sometimes worked less than 30 hours a week based on exhibits F and 9 is beyond me.” (Applicant’s Petition, p. 16:19-21.)
- “This issue of earnings is purely the work of the Judge . . . the Judge, thinking that defense counsel could take the hint from applicant’s petition for reconsideration, vacated the submission and set the matter for trial.” (Applicant’s Petition, p. 23:2, 15-17.)
- “. . . pre-emptively rescuing the defendant by issuing a final order in violation of 8 CCR 10835 because it’s clear the another Mulligan Trial would not work.” (Applicant’s Petition, p. 24:2-22.)
- “. . . forgetting to read LC 4453(c)(4) in that it requires an estimate of earning capacity, not copy and pasting the applicant’s earnings . . .” (Applicant’s Petition, p. 24:24-25.)
- “. . . not understanding the difference between net and gross earnings, again to defendant’s benefit.” (Applicant’s Petition, p. 24:26-28.)
- “. . . it was impermissible advocacy on behalf of defendant . . .” (Applicant’s Petition, p. 25:2-3.)
- “. . . the Judge’s legal services should be ignored as there is no record that they are authorized to act on defendant’s behalf.” (Applicant’s Petition, p. 25:5-7.)

Inflammatory and disrespectful language such as above is prohibited by WCAB Rule 10421(b)(9) and could subject the offending party to sanctions. (§ 5813; Cal. Code Regs., tit. 8, § 10421(b)(9).)

Accordingly, for the reasons set forth above, we grant reconsideration, affirm the November 26, 2024 “Second Amended Findings and Award,” except that we amend Findings nos. 3, 4, 6, and 11 as explained below. We also admit defendant Exhibit F per the Report.

For the foregoing reasons,

IT IS ORDERED that applicant Miguel Garcia Perez’s Petition for Reconsideration of the November 26, 2024 “Second Amended Findings and Award” is **GRANTED**.

IT IS FURTHER ORDERED that defendant Opportunity Staffing, Inc.’s Petition for Reconsideration of the November 26, 2024 “Second Amended Findings and Award” is **DENIED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 26, 2024 "Second Amended Findings and Award" is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

. . .

3. Per the parties' stipulation, applicant is a maximum earner, which in 2020 was \$1,949.15, entitling him to indemnity of \$1,299.43 for temporary disability and the legal rate for permanent disability.

4. Finding no. 4 is stricken.

. . .

6. The issue of the length of applicant's temporary disability is deferred.

. . .

11. The issue of attorney's fees is deferred.

. . .

16. Defendant's Exhibit F is admitted.

AWARD

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1. The issue of applicant's award to temporary disability indemnity is deferred.

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3. The issue of attorney's fees is deferred.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 28, 2025

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

**MIGUEL GARCIA PEREZ
THE CLAYTON PERRY LAW OFFICE FOR INJURED WORKERS
CBE LAW GROUP**

LSM/cs

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