WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAFAEL NAVARRO, *Applicant*

vs.

BITECH INC.;
ACCIDENT FUND INSURANCE OF AMERICA, administered by UNITED WISCONSIN INSURANCE OF NEW BERLIN, *Defendants*

Adjudication Numbers: ADJ11413860; ADJ11413862
Marina del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Opinions on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinions on Decision, all three of which we adopt and incorporate, we will deny reconsideration.

We note that former Labor Code[1] 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

> (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 February 20, 2025 and 60 days from the date of transmission is April 21, 2025. This decision is issued by or on April 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. 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 February 20, 2025, and the case was transmitted to the Appeals Board on February 20, 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 section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 20, 2025.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2025

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

RAFAEL NAVARRO
HINDEN & BRESLAVKSY, APC
EMPLOYMENT DEVELOPMENT DEPARTMENT
HEATHER JONES/UNITED WISCONSIN
LAW OFFICES OF STUART NAGEL

PAG/bp

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

JOINT
REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
NOTICE OF TRANSMITTAL TO THE WCAB

I.
INTRODUCTION

1. Applicant's Occupation: Bicycle Mechanic

2. Applicant's Age: 52

3. Date of injury: 05/30/2018; CT 12/01/16 to 05/31/18

4. Parts of Body Injured: Right Knee, Lumbar Spine, Wrists

5. Manner in which injuries have Occurred: Specific injury; Cumulative Trauma

6. Identity of Petitioner: Defendant

7. Timeliness: The petition was timely filed.

8. Verification: A verification is attached.

9. Date of Findings and Award: 01/14/2025

10. Petitioner's contentions:

1. WCJ erred in not allowing credit For TTD overpayment (ADJ11413860)

2. WCJ erred in finding TD dates and deferring P&S date (ADJ11413860)

3. QME and PTP reports are not substantial medical evidence.

4. WCJ adversely effected Defendant's due process rights by denying tax return discovery and restitution (ADJ11413860)

5. Occupational Group Number should be320 and not 360

6. CT injury not industrial. (ADJ11413862)

II.

JURISDICTIONAL FACTS

Applicant, Rafael Navarro, […], while employed on 05/30/2018 as a bicycle mechanic by Bitech Inc. sustained injury arising out of and in the course of his employment to his right knee (ADJ11413860). Additionally, while employed during the period 12/01/2016 to 05/31/2018 as a bicycle mechanic by Bitech Inc., Applicant claims to have sustained injury arising out of and in the course of his employment to his lumber spine, right knee, neck and bilateral wrists (ADJ11413862).

The rather lengthy court proceedings in this matter began with the 07/12/2021 MSC which was continued to allow the PTP to review "subro" (MOH dated 07/12/2021 – EAMS# 74406146). The first trial setting was 11/17/2021. After multiple continuances the trial record opened on 04/26/2023. During trial proceedings, on 08/07/2023, Defendant filed a Notice to Produce seeking Applicant's tax records. Applicant objected and the court deferred decision on this issue to be decided along with all other issues after obtaining trial briefs from the parties. The matters proceeded to trial and were submitted for decision on 07/30/2024. The decision of the court and Findings of Fact and Award on both cases issued on 09/19/2024. Defendant filed a timely Petition for Reconsideration on 10/08/2024. This court rescinded the F&A on 10/16/2024 to address issues raised in the petition. At a hearing on 11/18/2024, with no new evidence or testimony, the matters were again submitted for decision. The decision of the court and Findings of Fact were issued in both cases on 01/14/2025. In ADJ11413860 the court found the right knee industrial and directed further development of the record regarding causation for the bilateral hands, permanent and stationary date, permanent disability and apportionment. In ADJ11413862 the court found the cumulative trauma industrial as to the lumbar spine and bilateral wrists and directed further development of the record regarding temporary disability and further medical treatment. Defendant filed a timely Petition for Reconsideration on 02/07/2025. No response has yet been filed by Applicant.

For the following reasons, the Petition for Reconsideration should be denied.

III.

DISCUSSION

The Petition for Reconsideration takes issue with several areas of the court's opinions and findings asserting as follows: (1) The WCJ erred in not allowing a TD overpayment credit for the period 09/19/2020 to 10/06/2020; (2) The WCJ erred in finding TTD dates while ordering development of the record regarding Applicant's P&S date; (3) The reports of the QME and both PTPs do not constitute substantial medical evidence; (4) The WCJ adversely effected Defendant's due process rights in denying tax return discovery and restitution; (5) the Occupational Group Number should be 320 and not 360; and (6) the WCJ erred in finding the CT claim industrial. None of these contentions have merit.

DEFENDANT IS NOT ENTITLED TO CREDIT FOR TTD OVERPAYMENT FOR TEMPORARY DISABILITY PAID FROM SEPTEMBER 19, 2020 TO OCTOBER 6, 2020 IN CASE ADJ11413860

Defendant asserts that since they overpaid temporary by 29 days, they are entitled to a credit for the claimed overpayment period of 09/19/2020 to 10/06/2020, a period of 18 days, as Applicant never demonstrated that allowing such a credit would cause undue hardship (Petition, p. 10 lines 18-25). Under Defendant's argument "undue hardship" must be proved by every Applicant in cases where Defendant seeks credit for overpayment. This argument misstates the law and appears to be nothing more than a plea for a mechanical credit to be allowed based on the fact Defendant paid 18 days beyond the 104-week limit of Labor Code section 4656.

Credit for overpayment of benefits falls under Labor Code section 4909 which vests discretionary authority in the Appeals Board to grant or deny the request. There is no set requirement or requirements that must be met except that principles of equity are generally applicable. In this case the equities, on balance, do not favor awarding Defendant credit.

First, the apparent basis of Defendant's claim is based on the P&S report of Dr. Lee that was dated 09/30/2020 (Exhibit J) which found a P&S date of 09/19/2020. However, this court found that Applicant's temporary disability period ran beyond that date because Applicant was not found P&S by Dr. Pelton until 05/05/2021 (Exhibit 2). Under logic and law, there can be no allowance for credit for overpayment of temporary disability benefits paid during a period that Applicant was found temporarily disabled.

Second, when a Defendant pays more than 104-weeks of temporary disability benefits in a case where no obvious exception applies under Labor Code section 4656 then Defendant must bear the burden of the overpayment. This is not a case where Defendant simply paid beyond a doctor's P&S date where the report was not served timely. Rather this matter is an instance of failure by the Defendant to monitor their temporary disability payments with regard to a statutory limitation in Defendant's favor. The failure by Defendant to adhere to the law and protect its own financial interests should not in any way be a burden transferred to Applicant.

Third, in making this argument Defendant attempts to shift the burden of proof to Applicant. However, Defendant has it backwards. It is not Applicant's burden to show undue hardship or innocence. Rather it is Defendant's burden to show that the equities require that a credit be allowed since Defendant asserts the issue. Instead, Defendant did nothing more than raise the issue without any explanation as to why the overpayment occurred. Other than simply alleging an overpayment Defendant made no showing that they are entitled to the credit nor any showing that Applicant would not suffer any hardship or that Applicant was at fault for the overpayment. Thus, Defendant has failed to meet its burden of proof here.

As demonstrated above, the equities favor Applicant on this issue, and it is the Defendant that must bear the responsibility of the consequences of its own action or, in this case, inaction.

THE WCJ DID NOT ERR IN FINDING TEMPORARY DISABILITY PERIODS WHILE DEFERRING AND DEVELOPING THE RECORD REGARDING THE PERMANENT AND STATIONARY DATE IN CASE ADJ11413860

Defendant appears to confuse and conflate the issues of periods of temporary disability and permanent and stationary dates. They are not fitted together in lockstep. In this matter, the right knee is accepted and Dr. Pelton found that Applicant became permanent and stationary for the right knee as of 05/05/2021 (Exhibit 2). This court found that Applicant's temporary disability status for the right knee began 07/09/2018 (over 2 years and 9 months prior to the P&S date). Thus, the period of temporary disability was determined despite the reporting of QME Dr. Lee who found an earlier permanent and stationary date as to the right knee (Exhibit J). This court found Dr. Pelton's permanent and stationary opinion more persuasive than that of Dr. Lee based on the overall assessment that Dr. Pelton's reporting was more detailed and thorough than that of Dr. Lee. Thus, the temporary disability period for the right knee was found to run from 07/09/2018 to 05/05/2021.

Determination of the permanent and stationary date, however, is a bird of a different feather. For the accepted right knee, the permanent and stationary date has been determined to be 05/05/2021 based on Dr. Pelton's report dated 05/05/2021 (Exhibit 2). However, the QME Dr. Lee found that Applicant also suffered injury to his bilateral hands as a result of the specific injury of 05/30/2018 which is the subject of ADJ11413860 (Joint Exhibit ZZ). This court found that Dr. Lee's causation opinion regarding the hands was wanting. Therefore, this court has ordered further development of the record on this issue. Since this court may find the hands industrial based on new reporting from Dr. Lee, this leaves open the possibility that Dr. Lee may find a different permanent and stationary date for those body parts than 05/05/2021. Since that possibility exists, this court has no choice but to defer the issue of permanent and stationary date until Dr. Lee's reporting on the hands is complete. Whatever Dr. Lee finds in this regard and whatever the court ultimately decides, it will not affect or reduce the court's previous findings regarding Applicant's temporary disability period due to the right knee.

Additionally, Defendant appears also to be under the misguided impression that WCJs can only decide issues based on one medical report or one examining doctor's reporting – that once a court decides an issue based on one doctor's reports the court cannot rely on other doctor's opinions on other issues. This is not the case. A trier of fact can rely upon the entire medical record in rendering decisions. Here this court did premise its temporary disability findings on the opinions of Dr. Pelton as being the better reasoned as compared to Dr. Lee. However, since Dr. Lee was the only physician to find a potential industrial injury to the hands, and since Dr. Lee's reporting did not adequately explain causation, it was incumbent on this court to order further clarification of this undeveloped opinion under the ***McDuffie*** line of cases.

REPORTS OF DOCTORS LEE, DAHER AND PELTON ARE SUBSTANTIAL MEDICAL EVIDENCE

Defendant asserts that the reports from QME Dr. Lee and PTPs Dr. Daher and Pelton should not be considered substantial medical evidence as they fail to provide "the basis for their findings or conclusions." (Petition, p11, lines 11-15). Defendant additionally claims that these reports are ambiguous and speculative. (Id.). Although Defendant correctly points out that Awards issued by the Workers' Compensation Appeals Board must be supported by substantial evidence per Labor Code section 5952(d), unfortunately, Defendant fails to provide any argument in support of these generalized contentions. This court reviewed all the reports from

these evaluating doctors and found that their reports encompassed Applicant's complaints, reviewed relevant medical reports and records, conducted physical exams and addressed and opined as to relevant medical-legal issues. In short, this court determined that the reports from all three physicians were indeed substantial medical evidence. This court is unable to respond further to Defendant's generic claims that the reports of all three doctors do not amount to substantial medical evidence as petitioner fails to explain the reasons, if any, underlying their conclusionary contentions. Therefore, the contentions must be rejected.

WCJ DID NOT ADVERSELY AFFECT DEFENDANT'S DUE PROCESS RIGHTS IN DENYING TAX RECORD DISCOVERY POST-MSC AND DENYING RESTITUTION

Defendant argues that rulings/findings by this court adversely affected Defendant's due process rights regarding the issues of tax returns, employment issues, restitution, and fraud (Petition, p. 12 lines 1-4). It appears that Defendant is arguing that the court's decisions denying access to Applicant's tax returns and finding that Defendant failed its burden of proving that Applicant earned wages while receiving temporary disability benefits somehow amount to a denial of due process to Defendant. These arguments must fail.

First, despite having some level of awareness prior to the MSC that Applicant may have been working at "Raffi's Bicycles" while receiving temporary disability payments, Defendant made no effort to pursue Applicant's tax returns until after trail proceedings had begun. Although Defendant argued that it was Applicant's Trial testimony that provided the impetus to pursue the tax returns (Trial Brief, p.4 lines 4-18 , EAMS # 50120915) this argument was refuted by the fact that Defendant pursued the tax returns (per 08/07/2023 Notice to produce EAMS#47611544) before Applicant testified at trial in any substantive manner (MOH/SOE 12/20/2023, p. 3 lines 24-25 and p.4 lines 1-23). Defendant knew or should have known that Applicant's tax returns could be the most relevant evidence in support of their fraud/double-dipping contention yet did nothing about it until after they filed the DOR, after the MSC, and after the trial had started. Failure to exercise due diligence and suffering the consequences do not amount to a denial nor an adverse effect on Defendant's due process rights.

As to the issue of whether Applicant worked and/or earned wages while receiving temporary disability benefits, Defendant offers nothing more than a recitation of its exhibits, questionable testimony by witness Ms. Rodriguez that she saw Applicant working at "Raffi's Bicycles", and the sweeping statement that Applicant's ongoing relationship to the bike shop and the new owner, Mr. Sosa, "all seems suspicious" (Petition, p.12 lines 4-18). However, as this court noted in its decision, Defendant's exhibits, including the sub rosa video, did not show that Applicant worked at the bike shop and did not show that Applicant earned any wages there. Also, the testimony of Ms. Rodriquez was given weight it was due based on the finding that her testimony, beyond technical aspects regarding the process of surveillance videotaping, did not match up with what the video showed, leaving this court to wonder why this witness testified that she saw Applicant working in "Raffi's Bicycles" yet there was no video showing such an activity.

Finally, we come to Defendant's claim that there was something "suspicious" about an Applicant being present at his old bike shop while on temporary disability. The assumption being that

Applicant was working at "Raffi's Bicycles" while collecting temporary disability benefits. This court agrees that such a suspicion was reasonable before the MSC and Trial. That was the time Defendant should have initiated discovery about tax forms but chose not to. Then, at trial, Applicant testified credibly under oath that he did not work at "Raffi's Bicycles" while receiving temporary disability benefits and Defendant's only rebuttal was ambiguous video (Exhibit P), still pictures/screen-shots (Exhibit O), cryptic internet business print outs (Exhibits K and M) and the questionable testimony by a hired sub rosa investigator (MOH/SOE 07/30/2024, p.2 lines 18-25 and pages 3-5). Quite frankly, although Defendant asserts that this court was speculating and making assumptions on this issue, it is Defendant assuming and speculating here. Defendant seems to think that all they had to do to get full reimbursement of 104-plus weeks of temporary disability benefits paid was show a couple days and pictures of Applicant in and around "Raffi's Bicycles" along with public record documents showing the name "Rafael Navarro" attached to ownership and tax records. As noted above, while this information (and exhibits) could certainly be considered sufficient to start a further and more thorough investigation, instead Defendant initiated legal proceedings by cutting off their own discovery rights.

What Defendant did not show at trial was that Applicant worked at "Raffi's Bicycles" during the relevant time frames. Defendant did not show that Applicant received any earnings from any source, let alone "Raffi's Bicycles", while getting temporary disability. These two elements were the bare minimum that Defendant needed to show to even hope of prevailing on their very serious claim that Applicant was engaging in fraud and double-dipping. Defendant did not even come close.

Without evidence or even a cognizable argument Defendant contends that Applicant's ongoing relationship with "Raffi's Bicycles" while receiving temporary disability benefits requires further discovery and development of the record. Defendant fails to state good cause for this request and has nothing more to offer than mysterious suspicions and vague conditional assertions that "if" Applicant double-dipped here then Defendant should be granted reimbursement. These arguments simply do not hold water.

Defendant sites no specific due process violations or adverse effects. All Defendant does is recite the equivocal evidence it submitted and assert in a conclusionary fashion that the situation is suspicious. There is no there in Defendant's argument. Suffering the consequences of failure to exercise due diligence does not amount to an impermissible adverse impact on the due process rights of Defendant here.

THE MOST ACCURATE OCCUPATIONAL GROUP NUMBER FOR APPLICANT'S JOB DUTIES IS 360

Defendant asserts that Applicant was only a bicycle repairer. And if Applicant only did bicycle repair this assertion would be fair and accurate. However, Applicant did other duties as well. These other duties consisted of purchasing supplies and selling bicycles which involved climbing to retrieve bicycles up to four times daily (MOE/SOE, 09/18/2023 p.3 lines 1-4). Applicant also had to unload delivery trucks by himself once a week consisting of about 60 packages weighing 10 to 40 pounds (Id. at p.3, lines 5-10). Group 360 covers shipping clerks and warehouse duties such as lifting and carrying and climbing, which were all activities Applicant engaged in on a

regular basis. These additional duties put Applicant in the Group 360 category. Applicant fits into both 320 and 360 and the court awards the higher Occupational Group Number here.

Petitioner contends that more information was required in order to select the best Occupational Group number such as a discussion of daily activities, time spent on each activity, how unloading deliveries were done and how much time was spent on each activity (Petition p.13, lines 3-10) as if there were some magical minimum threshold of answers to these questions that would provide a bright-line distinction between the two group numbers. No such standard applies here. Counter to Defendant's contention the court is not required to show "how the activities went beyond a bicycle repair person" (Petition p.13, line 9). Rather, the only showing necessary is that Applicant performed duties that went beyond bicycle repair to such an extent that the higher group number represents the most accurate one that could be assigned to Applicant's actual job duties. Applicant made that showing.

THE CUMULATIVE TRAUMA OF ADJ11413862 IS INDUSTRIAL PER THE REPORTING OF DR. DAHER

Defendant claims that Dr. Daher did not provide a report indicating "why" the hands or back would be industrial due to continuous trauma (Petition p.13, lines 20-21). This is an incorrect statement as Dr. Daher, in his report dated 10/25/2018, took a history of hands/wrists pain beginning in April or May 2017 (Exhibit 5, p.2 – NOTE: This exhibit was uploaded with every other page being blank so this court refers only to actual medical report page numbers) and of low back pain beginning with an apparent specific incident in February 2017. After the onset of these symptoms for the low back and hands/wrists, Dr. Daher's history notes that Applicant "managed to continue working with persistent pain of the hands, wrists and low back." (Id.). Dr. Daher then diagnosed Applicant with "Repetitive Lumbar Spine" and "Repetitive Bilateral Wrist" sprains and strains. (Id. at 5).

Additionally, Defendant makes much of the fact that Dr. Daher's initial report makes reference to a specific incident Applicant described in February 2017 when Applicant was lifting a "motorcycle" (Exhibit 5, p.2). Defendant speculates as to whether this incident would be considered a specific or cumulative trauma injury. However, this incident was never claimed by Applicant and was thus not addressed by the court and thus did not factor into this court's causation decision regarding the claimed cumulative trauma.

Defendant next states that this court was "making assumptions" (Petition, p. 13, line 23) regarding the meaning of the term "motorcycles". However, Defendant is confusing assumptions versus reasonable inferences. The first reference in Dr. Daher's initial report does indeed refer to Applicant working on "motorcycles" and further noted that Applicant repaired them and cleaned "motorcycle parts" (Exhibit 5, p.2). However, in the very next paragraph Dr. Daher refers to "electrical motorcycles" which weighed 80 pounds and Applicant had a sharp pain when lifting one (Id.).

Certainly, Dr. Daher should have chosen better terms to describe the cycles that Applicant worked upon. This court took Dr. Daher to be referring to bicycles and not motorcycles per se based on juxtaposition of this report with all of the other evidence in this case. Applicant's trial

testimony references working with and on only bicycles. Indeed, the business name that Defendant accused Applicant of working at while allegedly receiving temporary disability was named "Raffi's Bicycles" and not "Raffi's Motorcycles". Furthermore, this court is able to rely on its own general knowledge of the world at large and in that world this court is unaware of any motorcycle that weighs just 80 pounds. However, an electrical bike weighing 80 pounds seems reasonable. Leaving aside the semantics of whether electric bicycles running on electric motors can be referred to as "motorcycles", this court made a reasonable inference here based on the width and breadth of the record that the term "motorcycles" in Dr. Daher's initial 08/14/2018 report referred to bicycles. No assumption was made by the court.

Finally, Defendant argues that the court was speculating when it discussed the absence of non-right knee complaints to various doctors during the June 2018 to August 2018 timeframe being due perhaps to Applicant and his doctors focusing solely on the right knee. In this assertion, Defendant is correct. This court does not know why the reports from Dr. Apramian (dated 06/25/2018, 07/09/2018, 07/16/2018 and 08/10/2018), as reviewed in QME Dr. Lee's 09/30/2020 report (Exhibit J, p. 6), failed to mention the hands, wrists or back. However, omission of such complaints does not necessarily mean that Applicant did not have those complaints. It only means that no such complaints were recorded by that physician. In the instant matter, however, the mere absence of such complaints in prior medical reports is not a valid basis for concluding, as QME Dr. Lee does, that Applicant did not suffer a cumulative trauma injury to the body parts mentioned above. The probative value of the absence of complaints in prior medical reporting is, in this court's view, merely a single factor out of many in terms of analyzing industrial causation, but it is not by itself a determinative one. This is one reason why the court found the reasoning and opinions of Dr. Daher more persuasive than those of QME Dr. Lee as to the causation issue of the cumulative trauma.

Defendant closes their petition by noting that the court deferred decision on multiple issues to further develop the record (Petition p.14, lines 23-25). This is true. Since QME Dr. Lee stated that Applicant injured his hands in the specific injury (ADJ11413860) with only a conclusionary statement, this court has ordered that Dr. Lee explain his reasoning after obtaining the diagnostic tests he has recommended for the hands. Additionally, since temporary disability and future medical care were raised as issues in the cumulative trauma case (ADJ11413862) and since this court found that Applicant sustained a cumulative trauma to the low back and wrists, Drs. Lee and Daher are ordered to opine as to their temporary disability findings, if any, and future medical care considerations, if any, for these body parts. Defendant additionally seeks that the record be further developed on causation and body parts in addition to the above. However, there is no reason to conduct further development of the record on causation and body parts because the record is already more than adequate to support and justify this court's findings and opinions thereon.

RECOMMENDATION

As this court has not acted without or in excess of its powers and as the evidence submitted justifies and supports the Findings of Facts and the Orders and Decisions of this court in both ADJ11413860 and ADJ11413862, it is respectfully recommended that the Petition for Reconsideration be DENIED.

Date: 2/20/2025

DANIEL L. TER VEER
Workers' Compensation Judge

ADJ11413860
OPINION ON DECISION

This matter originally came on calendar for MSC on 07/12/2021 pursuant to the DOR filed by Defendant on 05/27/2021 on the issues of TD, PD, Apportionment and settlement. The MSC was continued twice to 10/11/2021 whereupon the matter was set for Trial based on the joint Pre-Trial Conference Statement (PTCS) filed on 10/08/2021. In addition to parts of body, TD, PD, Apportionment, Occupational Group Number, Attorney Fees and Need for Further Medical Treatment, the PTCS also listed the following issues raised by Defendant: "DEFT: CREDIT FOR TD OVERPAID 09/19/2020 – 10/06/2020; CREDIT FOR TD PAID DURING TIME APPLICANT WAS WORKING AS AGAINST ANY PD OR FUTURE MEDICAL CARE; WORKERS' COMPENSATION FRAUD RE WORKING WHILE RECEIVING TD BENEFITS; RESTITUTION FOR ALL TD BENEFITS PAID."

After multiple trial continuances the trial record opened on 04/26/2023. The parties stipulated that Applicant sustained injury AOE/COE on 05/30/2018 to his right knee; that Applicant's average weekly earnings were $796.75, warranting indemnity rates of $531.17 for TD and $290.00 for PD, and that TD benefits were paid for broken periods from 07/16/2018 to 10/11/2018, 10/25/2018 to 11/20/2018 and 01/02/2019 to 10/06/2020. The issues were as follows: (1) Parts of body injured (left knee, bilateral ankles, low back, bilateral wrists, and sleep); (2) temporary disability for the period 07/16/2018 to 05/05/2021; (3) permanent and stationary date with Applicant claiming 05/05/2021 per Dr. Pelton and Defendant claiming 09/19/2020 per Dr. Lee; (4) Permanent Disability; (5) Apportionment; (6) Occupational Group Number with Applicant claiming 360 and Defendant 320; (7)Need for further medical treatment; (8) Lien of EDD; (9) Attorney fees; (10) Credit for TDoverpayment from 09/19/2020 to 10/06/2020; (11) Credit for TD paid during time Applicant wasworking as against PD or future medical care; (12) Worker' compensation fraud regarding workingwhile receiving TD benefits; and (13) Restitution for all TD benefits paid.

An additional issue arose during trial proceedings when Defendant filed a Notice to Produce dated 08/07/2023 to obtain tax records from Applicant. Applicant objected and the court deferred decision on this issue along with all other issues after obtaining Trial Briefs from both parties.

At the Trial of 07/30/2024 the matter was submitted for decision. The decision of the court and a Findings of Fact and Award issued on 09/19/2024. Thereafter, Defendant filed a timely Petition for Reconsideration on 10/08/2024. This court rescinded the F&A on 10/16/2024 to address issues raised by the Petition for Reconsideration and set a hearing for 11/18/2024. At the 11/18/2024 hearing, with no new testimony or evidence taken in by the court, the matter was again submitted for decision. This decision follows.

APPLICANT SUSTAINED INDUSTRIAL INJURY TO RIGHT KNEE:

Based on the reports of Drs. Pelton, Lee and Daher and the stipulation of the parties, Applicant injured his right knee in the 05/30/2018 industrial incident.

WHETHER APPLICANT SUSTAINED INDUSTRIAL INJURY TO THE BILATERAL HANDS REQUIRES FURTHER DEVELOPMENT OF THE MEDICAL RECORD:

The medical record is incomplete regarding Applicants bilateral hands. The report of QME Lee dated 12/07/2022 finds that the bilateral hands were injured in the specific slip and fall incident. Although Dr. Lee originally stated that the bilateral hands were not industrial, he changed his opinion in this regard after reviewing contemporaneous medical records from the day after the 05/30/2018 specific injury. Dr. Lee finds no bilateral hand pain due to a cumulative trauma but states under the "Future medical treatment" heading at p. 5 of the 12/07/2022 report that an emergency room note from Dr. Goldweber for 05/31/2018, the day after the 05/30/2028 specific date of injury, documented "numbness in both hands." Dr. Lee further stated as follows: "Based on this medical record evidence my opinion is that bilateral hand strain did occur on May 30, 2018 when the patient slipped and fell within reasonable medical probability." QME Lee goes on to state in the very next paragraphs that Applicant is "NOT permanent and stationary at this time" and recommends EMG studies of the bilateral upper extremities. No further reports were issued by QME Lee.

Unfortunately, Dr. Lee did not explain his reasoning regarding causation of the bilateral hand strain. As such, Dr. Lee's opinion with regard thereto is inadequate. To ensure that causation issues as to the bilateral hands are adequately addressed pursuant to the *McDuffie* and *Tyler/McClune* line of cases, further development of the record regarding the bilateral hands is ordered.

APPLICANT DID NOT SUSTAIN INDUSTRIAL INJURY TO THE LEFT KNEE, BILATERAL ANKLES OR SLEEP:

None of the medical reports submitted by the parties finds industrial injury to the left knee, bilateral ankles, low back or sleep attributable to the specific injury of 05/30/2018. Therefore, these body parts/conditions are found not to be industrial.

APPLICANT NOT ENTITLED TO ANY ADDITIONAL TTD BENEFITS:

Applicant was first found TTD by Dr. Apramian on 07/09/2018. Applicant continued on this disability status until 08/10/2018 when Dr. Apramian found that Applicant was able to do modified duties. However, there was no evidence submitted that Defendant made any offer of modified work at that time. Therefore, Applicant continued to be on TTD status until the first examination with PTP Dr. Daher which occurred on 08/14/2018. As of 08/14/2018 Dr. Daher found Applicant to be TTD. This disability status remained in effect until Dr. Daher noted in his 12/15/2018 report that Applicant could do modified duties retroactive to 11/21/2018. However, again, there is no evidence that Defendant made any offer of modified work at that time. Thus, Applicant remained TTD. Dr. Daher himself states in his 12/15/2018 report that if Defendant does not provide modified or alternative work duties, then Applicant "will remain on TTD" (Exhibit 6, at p. 3). Applicant next sees Dr. Pelton approximately 5 months later on 05/08/2019. Dr. Pelton opines that Applicant can only do restricted duties regarding standing activities. No evidence was submitted that the Defendant ever offered modified or restricted duties to Applicant at that time in conformity with Dr. Pelton's work restrictions. Thus, Applicant would remain on TTD status until evaluated by QME Lee on 12/21/2019 (date of report: 12/31/2019). On that date the QME stated Applicant was not yet permanent and stationary and that Applicant required "light duty" (p.5). Again, no offer of

light duty was made at that time. Therefore, as of December 2019 Applicant remained entitled to TTD benefits.

QME Lee opined on 09/19/2020 that Applicant was P&S for the right knee. In contrast, Applicant's treating doctor, Dr. Pelton, did not find Applicant P&S as to the right knee until approximately four and a half months later, on 05/05/2021. Picking between two different dates from two different physicians as to a patient's most accurate permanent and stationary date is always a difficult proposition. However, although it is a close call as both doctors do a creditable job, it is this court's opinion that the P&S date of Dr. Pelton is more accurate than that of QME Lee. As Applicant's treating physician for the right knee, Dr. Pelton seems to have greater access to Applicant's care information than QME Lee. The most glaring example of this is that Dr. Lee appeared to have no idea that Applicant's right knee treatment included platelet rich plasma injections whereas Dr. Pelton, in his P&S report dated 05/05/2021, mentions two such treatments occurring on 08/26/2019 and 01/06/2021. While certainly QME Lee cannot be expected to know of the second injection he should have known about the 08/26/2019 injection. It also appears that this mode of treatment was not completed as of the time of QME Lee's P&S exam on 09/30/2020 and this court finds it significant that Dr. Pelton did not find Applicant P&S until AFTER the second platelet injection of 01/06/2021. Additionally, aside from this glaring omission from the reporting of QME Lee, the general impression of this court is that Dr. Pelton seems to give greater weight and attention to Applicant's subjective symptom presentation than Dr. Lee. In Dr. Pelton's P&S report Applicant's pain is measured on a pain scale whereas Dr. Lee did not do this. Also, Dr. Lee notes that Applicant's right knee complaints consist only of the statement "minimal discomfort… exacerbated with prolonged standing and walking" (P&S report p. 4), whereas in his P&S report Dr. Pelton notes at p. 2 that Applicant complains of "pain and stiffness" and the right knee pain is "worse with sitting, standing, walking, lifting, squatting, climbing, kneeling, crawling and stairs." Thus, Dr. Pelton obtained a more precise history of the relationship between Applicant's symptoms and his Activities of Daily Living (ADLs). Comparing these reports, it is evident that Dr. Pelton inquired more fully into Applicant's condition and disability status than did QME Lee. Again, although in this court's opinion, both doctors did well, the higher quality and greater details of Dr. Pelton's reports are found by this court to be more compelling and persuasive than reports from Dr. Lee regarding the permanent and stationary issue.

Based on the above discussion, Applicant was entitled to TTD benefits for the period 07/09/2018 through 05/05/2021 subject to the limitations of Labor Code section 4656 and less any amounts previously paid. Per the stipulation between the parties regarding the periods in which TTD benefits were paid, Defendant paid 29 days beyond the 104-week (or 730-day) limit of Labor Code section 4656. Thus, Applicant is not entitled to any further TTD benefits.

Although further development of the record may result in a later P&S date, if such a result occurs it will not change the exposure analysis of TTD as the 104-week limit has already been reached for this date of injury.

Since there are no additional TTD benefits awarded herein there are no funds from which any attorney fee can be asserted or deducted.

DEFENDANT NOT ENTITLED TO CREDIT FOR PERIOD OF TEMPORARY DISABILITY BENEFITS PAID FROM 09/19/2020 TO 10/06/2020:

Defendant seeks overpayment credit for TTD benefits specifically from 09/19/2020 to 10/06/2020, a period of 17 days. As noted above defendant paid TTD benefits 29 days beyond the maximum allowed pursuant to Labor Code section 4656. However, no evidence or testimony was introduced indicating this overpayment was due to any action on Applicant's behalf. Therefore, this court finds that the overpayment was solely due to actions by the Defendant. As any credit request is subject to the discretion of this court and as principles of equity require that that the party responsible for an overpayment should bear the burden of that overpayment, this court finds that Defendant is not entitled to any credit for TD payments made beyond the 104-week limit.

PERMANENT AND STATIONARY DATE:

As further development of the record is being ordered by the court this issue is deferred.

PERMANENT DISABILITY:

As further development of the record is being ordered by the court this issue is deferred.

APPORTIONMENT:

As further development of the record is being ordered by the court this issue is deferred.

APPLICANT'S OCCUPATIONAL GROUP NUMBER IS 360:

Applicant's job duties clearly encompassed bicycle repair, which takes a group number of 320. But Applicant also testified to ordering supplies and off-loading deliveries of bicycles and other freight. Applicant testified to unloading deliveries that would average about 60 packages weighing between 10 to 40 pounds at least once a week. Additionally, per Applicant's unrebutted and credible testimony, electric bicycles, which were the heaviest delivered item at 45 pounds each (MOH/SOE 09/18/2023 p. 2, lines 19-20), were delivered by Amazon on almost a daily basis (MOH/SOE 12/20/2023 p. 3, lines 14-16). These activities add warehouse-type duties to Applicant's workload. Therefore, his appropriate Occupational Group Number is 360.

FURTHER MEDICAL TREATMENT:

As further development is being ordered by the court this issue is deferred.

EDD LIEN:

As the court has no information regarding this lien this issue is deferred.

ATTORNEY FEES:

As there is no determination regarding the extent of permanent disability in this matter pending further development of the record and no additional temporary disability benefits awarded, there are no benefits from which to deduct attorney fees at this time.

DEFENDANT NOT ENTITLED TO CREDIT FOR TEMPORARY DISABILITY BENEFITS PAID AS DEFENDANT HAS FAILED TO MEET ITS BURDEN OF PROOF THAT APPLICANT WAS ALLEGEDLY WORKING:

Defendant has failed to meet its burden of proving its allegation that Applicant worked during any period that he received TTD benefits. Although it appears to this court that Applicant maintained some sort of ongoing interest in or relationship to "Raffi's Bicycles" after 2017 per Applicant's testimony, the extent or nature of that interest/relationship remains unclear. However, what is clear to this court is that Defendant did not prove that Applicant worked at "Raffi's Bicycles" and, most importantly, did not prove that Applicant received any earnings from that business, or any other source, during the relevant time frames.

The only evidence of Applicant allegedly owning and operating his own business, aside from Applicant's own trial testimony that he started "Raffi's Bicycles" with his brother, are Exhibits K and M. Exhibit K purports to be the print-out result of an on-line records search labeled "Business Report" for a business named "Raffi's Bicycles". The document appears to have been procured on 03/20/2020 and apparently shows 3 tax liens on the business. The document also notes a "Rafael Navarro" as a known employee, although the word "PRIN" is typed underneath the name. Quite frankly this court is unable to make much of Exhibit K. The source is unknown with no foundation laid as to its provenance. Thus, it is not reliable. The document is cryptic and gives rise to multiple speculative interpretations and thus is not probative on the issue of whether Applicant worked or had earnings during any period where he received TTD benefits.

Exhibit M is an LATAX report for two accounts (same account number) with the legal name of "Rafael Navarro" in which one account has "Raffi's Bicycles" as the DBA. This "Automated Personal Property Assessment" report was apparently printed on 06/01/2022 with an apparent assessment value of $2,500. As with Exhibit K, this exhibit appears to suggest nothing more than a "Rafael Navarro" having his name attached to a business called "Raffi's Bicycles" at a certain address. Although this document was apparently certified, like Exhibit K, Exhibit M offers nothing probative about whether Applicant worked or had any earnings from "Raffi's Bicycles" during the periods in question.

If anything, Exhibits K and M serve to confirm Applicant's credible testimony. Applicant testified to having an ongoing relationship to "Raffi's Bicycles" after he sold it to a Harry Sosa around 2018. Applicant testified that the business of "Raffi's Bicycles" remained in his own name after selling it, as the new owner did not want to inherit any back-owed taxes. This resulted in property assessments sent to Applicant in 2018 and 2022, but Applicant testified that any such payments in response thereto were made under Applicant's name even though Applicant was no longer the owner. Since Applicant concedes that his name is on tax documents subsequent to Mr. Sosa taking over "Raffi's Bicycles" in 2018, Exhibits K and M simply serve as confirmation of same. As noted

above, this court has no question that Applicant maintained some sort of relationship with "Raffi's Bicycles" after 2018 and apparently even to the present. The question here, as raised by Defendant, is whether Applicant received any earnings from this business during the times when TTD benefits were paid. Exhibits K and M offer nothing to assist in analyzing this issue.

Another piece of evidence offered by Defendant to prove that Applicant worked at "Raffi's Bicycles" was sub rosa videotape and pictures that were supposedly screenshots from the sub rosa. Neither piece of evidence does anything to support Defendant's claims. Although the sub rosa video shows two days (11/05/2019 and 02/18/2020) where Applicant is shown apparently opening a scissor gate in front of a store labeled "Raffi's Bicycles", that is all it shows. No video is offered showing Applicant participating in work activities at this business. It must be noted that Applicant admitted in his trial testimony that sometimes during 2018 to 2020 he opened "Raffi's Bicycles" in the morning. Thus, consistent with Exhibits K and M, the sub rosa confirms what Applicant has admitted. However, this video does not show or prove that Applicant had earnings when receiving TTD benefits.

The sub rosa video viewed by the court has no real probative value to the court. On 02/18/2020 the video shows Applicant and the woman he is with open the security scissor gate of "Raffi's Bicycles" and then leisurely strolling about a half block away to purchase something. This behavior seems at odds with someone who just opened their own store for business since it begs the question – who's minding the store? Perhaps someone else was also or already inside. Regardless, it is impossible to conclude that Applicant worked at this store for wages on the two dates shown versus simply opening the security gate. The video gives rise to many different interpretations other than that offered by Defendant. For example, perhaps Applicant is simply helping Harry Sosa as part of the deal transferring ownership. Or, somewhat more plausibly, since "Raffi's Bicycles" apparently is nominally still owned by Applicant yet actually operated by Mr. Sosa, perhaps Applicant is helping to open the store and keep an eye on it since it is still under Applicant's name. Or perhaps Mr. Sosa and/or someone else cannot open the bike store in the mornings so Applicant agreed to do so as a courtesy or part of the ownership transfer agreement. Maybe Applicant is simply helping out until the tax liens are paid off. As noted above, there are many potential scenarios explaining why Applicant was opening "Raffi's Bicycles" on the dates in question, including Defendant's allegation that Applicant was working there for wages. However, since Applicant's unrebutted credible testimony is that he did not work at "Raffi's Bicycles" that is the one scenario, based on all the evidence, that this court cannot accept.

Then we come to the still photos making up Exhibit O. There are ten photos which the defense witness testified were taken from the sub rosa video. Seven of the photos do appear to be from the video. However, the three photos apparently showing Applicant in the store were not from any video presented to and viewed by the court. These photos do appear to show Applicant in a store that sells bicycles, but that is all – it is unclear whether Applicant is working at the store or even where the pictures were taken.

This takes us to the testimony of Defendant's investigator witness, Ms. Rodriguez. Although this court found her testimony to be generally credible as to foundational aspects of the process of obtaining the sub rosa video, the testimony did not match up with the video in several important respects. Despite her testimony that sub rosa video taken on two dates in November 2019 would

show Applicant inside the store behind a counter, talking to customers and working on a bike, none of these activities were depicted on the one November 2019 video date presented to the court. Also, and interestingly, Ms. Rodriquez testified under cross-examination that she was in Raffi's Bike shop on the sub rosa date viewed by the court of 02/18/2020, but this court was never provided with any video from inside the store/shop for that date (or any other date) to back up this account. Given these discrepancies this court takes a dim view of the additional testimony by Ms. Rodriguez that she saw Applicant working in the shop.

Ultimately, all the video and screenshot evidence can offer is confirmation of testimony by Applicant that he opened the bicycle store on some days while receiving TTD benefits. While this evidence suggests Applicant may have operated or helped operate the shop, it does not establish that Applicant actually did so nor that he had any earnings there. Without proving receipt of earnings by Applicant when he was receiving TTD benefits, Defendant cannot make their case for alleged fraud or double-dipping. Based on all the evidence and testimony submitted, this court cannot conclude, nor even reasonably speculate, that Applicant had earnings during the dates temporary disability was paid. In fact, Applicant adamantly and credibly testified that he did not work at "Raffi's Bicycles" while receiving TTD payments. It appears Defendant believes that all it must show is that Applicant had some sort of ongoing relationship with the bike shop along with 2 days of brief video showing Applicant opening the bike shop and, presto, this court must conclude that Applicant had earnings during the entire time that he received TTD payments. Such a proposition is not only overbroad in the extreme but simply not supported by the evidence.

DEFENDANT HAS NOT PROVED WORKERS COMPENSATION FRAUD/DOUBLE-DIPPING BY APPLICANT:

Although this court does not have jurisdiction over fraud claims, it does have jurisdiction to address whether Applicant had earnings while receiving TTD benefits at the same time. Here, based on the above discussion, Defendant has failed to prove that Applicant received TTD benefits while working/receiving earnings at the same time. To the extent that Defendant's use of the allegation of "fraud" encompasses such a scenario regarding TTD benefits herein, Defendant has not met its burden of proof.

THERE IS NO BASIS FOR AWARDING DEFENDANT RESTITUTION OF TEMPORARY DISABILITY BENEFITS PAID TO APPLICANT:

For the reasons outline above, there is no basis to award Defendant restitution of any portion of TTD benefits paid in this case.

DEFENDANT'S NOTICE TO PRODUCE TAX RETURNS IS DENIED:

As will be discussed below, Defendant's eleventh-hour attempt to obtain Applicant's tax returns must fail for lack of due diligence. Sub rosa video allegedly showing Applicant working at "Raffi's Bicycles" was obtained by Defendant in November 2019 and February 2020. Exhibit K was printed on 03/20/2020. Defendant offered Exhibit K and the sub rosa video as proof of Applicant working while receiving TTD benefits. This evidence shows that Defendant knew or should have known that as early as November 2019, or as late as March 2020, that there was a basis to speculate

that there was some sort of ongoing connection between Applicant and his former bike store during the 2018 to 2020 timeframe. Since Defendant offered this evidence to support its contention that Applicant was working/earning while receiving TTD benefits, it must be charged with knowledge of Applicant's alleged "fraud" scheme as of either late 2019 or early 2020. However, instead of investigating further, Defendant filed a DOR.

Defendant, as the moving party, placed this matter on the court's calendar by filing a DOR on 05/27/2021. This resulted in the setting of an MSC on 07/12/2021 which was continued to 08/25/2021, over Defendant's objection, to allow for the PTP to issue a supplemental report. The MSC of 08/25/2021 was jointly continued to an MSC on 10/11/2021. As noted above, on the 10/08/2021 PTCS (for the 10/11/2021 MSC) wherein this matter was set for Trial, the Defendant listed the following issues: "CREDIT FOR TD PAID DURING TIME APPLICANT WAS WORKING AS AGAINST ANY PD OR FUTURE MEDICAL CARE; WORKERS' COMPENSATION FRAUD RE WORKING WHILE RECEIVING TD BENEFITS; RESTITUTION FOR ALL TD BENEFITS PAID." Thus, while it may be argued that Defendant did not conjure its fraud allegation against Applicant prior to October 2021, as of at least the 10/11/2021 MSC the proof is in the pudding that Defendant raised the allegation that Applicant committed workers' compensation "fraud" by allegedly working/earning while receiving TTD benefits.

On 08/07/2023, over two years after filing the DOR and a few months after the Trial record was opened, Defendant filed and served a Notice to Produce to Applicant to appear and produce portions of his federal and state tax returns for the years 2018 through 2020. This Notice was addressed by the court at the 12/20/2023 Trial wherein parties were given leave to file briefs and the court stated that the issue would be addressed along with all other issues at the time of submission.

Defendant's brief makes several arguments to support its tardy effort to obtain Applicant's tax returns. Defendant argues that its pursuit of Applicant's tax forms was not necessary until after Applicant testified at trial inconsistently with Applicant's deposition assertion as to "lack of any business ownership" of the bike shop (Def. Trial Brief p.4, line 12-13). Thus, the discovery cut-off of Labor Code section 5502 should not apply here. Additionally, Defendant argues it could not have anticipated Applicant being untruthful in his 02/05/2020 deposition and could not have obtained Exhibit M prior to Trial (or the MSC) because it did not exist until 06/01/2022. Finally, Defendant's brief argues that Applicant's tax documents herein are discoverable to serve the public policy of preventing fraudulent receipt of TTD benefits while working. None of these arguments hold water.

Defendant's argument regarding Applicant's unanticipated "ownership" testimony to get around the discovery cut-off of Labor Code section 5502(d)(3) has major timeline problems. The Notice to Produce Applicant's tax records is dated 08/07/2023. However, the MSC setting the cases for trial occurred 10/11/2021 and pursuant to Labor Code section 5502 discovery was cut-off as of that hearing date. The only way Defendant can get around the discovery cut-off is to argue, as Defendant does, that it did not know Applicant's tax records were relevant to their fraud claim until Applicant testified at trial about having an "ownership" interest in "Raffi's Bicycles". These arguments would generally work except that Defendant sought the tax records before not after

Applicant's trial testimony about a supposed ongoing ownership interest. The first date of trial testimony from the applicant about anything other than his name was on 09/18/2023 and the first date of testimony from the Applicant about any activities or supposed ownership interests in "Raffi's Bicycles" was 12/20/2023. Thus, the Applicant testimony that supposedly justifies Defendant's argument to get around the discovery cut-off did not occur until the trial hearings of September 2023 at the earliest or December 2023 at the latest. Both these hearings occurred after Defendant sought Applicant's tax records in August 2023. Applicant's testimony on the trial dates of September and December 2023 cannot logically serve as the basis for Defendant's request for tax documents in August 2023. Additionally, this court finds it a bridge too far for Defendant to claim they did not know Applicant may have had an ownership interest (or working/earning relationship) in "Raffi's Bicycles" before hearing Applicant's Trial testimony in 2023 when they had video of Applicant opening the bike store in 2019 and 2020 and procured Exhibit K allegedly showing Applicant's ownership interest in March 2020.

Defendant's argument that it could not have known Applicant was allegedly untruthful at his 02/05/2020 deposition until after hearing Applicant's Trial testimony also does not withstand reasonable scrutiny. The Defendant's alleged evidence of fraud by Applicant was obtained in late 2019 and early 2020. For unknown reasons, it appears Defendant did not conduct further discovery before filing the DOR on 05/27/2021. It would seem to this court that if you are accusing someone of running their own business (and/or receiving earnings from it) while you paid TTD benefits to that person, that obtaining that person's tax forms could have been the best evidence to show whether your assumptions were correct or incorrect. If Defendant had pursued this course of discovery in a timely manner, the instant trial proceedings might not have been necessary at all. Instead, Defendant pursued trial by filing the DOR for the very MSC that cut-off its discovery and now begs for relief from its own actions with a groundless argument that it did not know tax returns were relevant until after the trial started. Defendant cannot and will not here be excused from their own lack of due diligence.

With regard to Exhibit M serving as a basis for Defendant to be allowed to obtain Applicant's tax records, this argument is belied by Exhibit K. Although it is true that Exhibit M did not exist until after the MSC, in this court's opinion Exhibit M is similar to what Exhibit K brings to the table. Exhibit K was printed in March 2020 and per Defendant's assertions shows ownership of the bicycle shop by Applicant. Since Exhibit M was offered for the same proposition, it is difficult to understand how Exhibit K did not trigger Defendant's "awareness" of potential ownership issues back in 2020 whereas Exhibit M did do so in 2022. The argument is inconsistent and unpersuasive and is rejected.

Finally, we come to Defendant's argument that Applicant's tax returns are discoverable in pursuit of the public policy of preventing workers' compensation fraud by preventing Applicants from receiving TTD while working. While this court agrees with this admirable public policy and notes that such fraud is unlawful, enforcement of anti-fraud laws is beyond this court's jurisdiction. Additionally, Defendant asserts this issue for credit purposes. Defendant has the burden of proof on this issue and slept on their rights and no exalted references to public policies will relieve Defendant of its burden of proof nor allow for re-opening discovery for evidence that Defendant had plenty of time to pursue before filing a DOR for an MSC.

ADMISSIBILTY OF EVIDENCE:

Although it is unclear from the record, there appears to have been no objection to the admissibility of Exhibit M, which is a certified copy of an Automated Personal Property Assessment document apparently pertaining to "Raffi's Bicycles" indicating an assessment total of $2,500 and dated 06/01/2022. As there was no objection lodged this exhibit is admitted into evidence.

As to Exhibit O, the Applicant objected to it on the grounds that it was not listed on the PTCS or disclosed at the time of the MSC. However, the sub rosa video itself was disclosed. Although three alleged interior pictures on this two-page exhibit were not observed by this WCJ when viewing the sub rosa video at Trial, since the other images do depict still scenes from the sub rosa video this court finds no prejudicial impact on Applicant as the court has attributed no probative weight at all to the three interior pictures. Exhibit O is hereby admitted into evidence.

DATE: January 14, 2025

Hon. Daniel Ter Veer
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

ADJ11413862
OPINION ON DECISION

This matter originally came on calendar for MSC on 07/12/2021 pursuant to the DOR filed by Defendant on 05/27/2021 on the issues of TD, PD, Apportionment and settlement. The MSC was continued twice to 10/11/2021 whereupon the matter was set for trial based on the Pre-Trial Conference Statement (PTCS) filed on 10/08/2021. After multiple trial continuances the trial record opened on 04/26/2023. The parties stipulated that Applicant's average weekly earnings were $796.75, warranting indemnity rates of $531.17 for TD and $290.00 for PD; that the employer furnished no medical treatment; and no attorney fees or arrangements had been made. The issues were as follows: (1) AOE/COE with Applicant claiming injuries to bilateral wrists, lumbar spine, right knee, and neck; (2) temporary disability for the period 07/16/2018 to 05/05/2021; (3) permanent and stationary date - deferred; (4) Apportionment - deferred; (5) Need for further medical treatment; (6) Liability for self-procured medical treatment; (7) Lien of EDD; (8) Attorney fees; (9) Credit for TD overpayment from 09/19/2020 to 10/06/2020; (10) Failure to provide claim form per Labor Code section 5401; (11) Untimely denial per Labor Code section 5402; (12) Failure to post notice of rights at work per Labor Code sections 3550 and 3551; and (13) Restitution.

An additional issue arose during trial proceedings when Defendant filed a Notice to Produce dated 08/07/2023 to obtain tax records from Applicant regarding the issue of whether Applicant worked while receiving TTD benefits. Applicant objected and the court deferred decision on this issue along with all other issues after obtaining Trial briefs from both parties.

At the Trial of 07/30/2024 the matter was submitted for decision. The decision of the court and a Findings of Fact and Award issued on 09/19/2024. Thereafter, Defendant filed a timely Petition for Reconsideration on 10/08/2024. This court rescinded the F&A on 10/16/2024 to address issues raised by the Petition for Reconsideration and set a hearing for 11/18/2024. At the 11/18/2024 hearing, with no further testimony or evidence taken in by the court, the matter was again submitted for decision. This decision follows.

APPLICANT SUSTAINED INDUSTRIAL INJURY TO LUMBAR SPINE AND BILATERAL WRISTS:

Dr. Daher, the Applicant's PTP, diagnosed Applicant with a repetitive industrial injury to the lumbar spine and the bilateral wrists. The lumbar MRI report by Dr. Safvi (Exhibit 7) noted disc bulges/protrusion at multiple disc levels and the EMG testing report by Dr. Dosumu-Johnson (Exhibit 8) at p.2 noted radiculopathy from the low back into the bilateral lower extremities. The initial PTP report from Dr. Daher dated 08/14/2018, less than three months after Applicant's injuries, noted the doctor was evaluating for both the specific and the CT claims. At page 2 the history notes Applicant experienced a "sharp pain" in the low back while lifting a "motorcycle" in approximately February 2017 (Note: this is a clear misnomer as Applicant worked with bicycles as well as electrical bicycles. Since the report notes Applicant lifting "electrical motorcycles" weighing 80 lbs., this court takes the use of "motorcycles" to refer to electric/e-bicycles). The history goes on to note thereafter that Applicant "continued to experience low back pain" which he managed by taking over-the-counter pain killers. As to the bilateral wrists, Dr. Daher's initial

report notes that in April or May 2017 Applicant experienced the onset of pain which he attributed to "repetitive duties…" It was further noted that Applicant "managed to continue working with persistent pain of the hands, wrists and low back."

In addition to the above, at trial Applicant testified credibly and consistently that he hurt his back and hands as early as 2016 and that he currently still has problems with his hands falling asleep, his right knee hurting and locking up on him, and his back waking him up and causing sleep difficulties.

Applicant further testified that while working for Bitech he had to lift bicycles weighing between 20 to 45 pounds (with electric bicycles weighing 45 pounds) and did so "all the time for every shift" (MOH/SOE 09/18/2023, p.2 line 17-18). Additionally, Applicant testified to doing overhead reaching and bending and gripping and grasping activities with both hands when repairing bicycles. Also, Applicant testified to selling bicycles for Bitech which involved purchasing and charging activities and climbing ladders to retrieve bicycles three to four times daily. When products were delivered on Tuesdays Applicant would unload about 60 packages by himself weighing 10 to 40 pounds each (MOH/SOE 12/20/2023 pp.11-14). The packages were all sizes and contained tubes, bicycle tires, car racks and bicycles and it would take about a half-hour to an hour to complete the unloading of these items. Applicant estimated that during the approximate two years he worked at Bitech he serviced an average of 10 to 12 bikes per day.

Combining Applicant's credible testimony with the findings and opinions by Dr. Daher, this court finds a sufficient causal nexus between the Applicant's job duties and the findings of the diagnostic tests as well as the results of the physical exam and Dr. Daher's diagnoses. Thus, this court finds Applicant suffered a cumulative trauma to the lumbar spine and the bilateral wrists.

As to the claim for sleep and the neck, Dr. Daher does not explain whether these body parts were injured on a cumulative basis or even an industrial basis. Thus, as no other medical reports in evidence make mention of these body parts/conditions and as Applicant did not mention them in his trial testimony, they are not industrial.

As to the right knee, no doctor herein assigns any responsibility for this body part to the CT claim. Dr. Daher, after diagnosing Applicant with lumbar spine and bilateral wrist industrial injuries on a "repetitive basis" studiously omits such description from his right knee diagnosis. The clear implication is that the right knee was only injured as a result of the specific injury of 05/30/2018. Although Dr. Daher mischaracterizes this incident as occurring on 05/31/2018, this court views the error as merely clerical in nature and concludes that the right knee was not injured on a cumulative basis.

In his initial report of 12/31/2019 orthopedic QME, Dr. Christophe Lee does not address the alleged CT claim nor any other complaints from Applicant except the right knee. In his 09/30/2020 report Dr. Lee takes a history of right knee, bilateral hand/wrist and low back pain complaints. Dr. Lee then diagnoses bilateral hand strain and lumbar strain which are non-industrial. In explaining this causation conclusion Dr. Lee notes that Dr. Apramian reports of 06/25/2018, 07/09/2018, 07/16/2018, 08/10/2018, and Dr. Pelton's 05/08/2019 reports only mention the right knee and that Dr. Daher's 10/25/2018 is the first report mentioning low back and bilateral hand wrist pain. Thus,

"based on the medical record" Dr. Lee opined that the hand wrist and low back strains were not arising out of an industrial cumulative trauma claim for the period 12/01/2016 through 05/31/2018. In his supplemental report of 12/07/2022 report Dr. Lee re-iterated his prior causation opinion as to the hands/wrists and low back word-for-word under the "Causation" heading from p.4 - 5, but under the "Future medical treatment" heading he also reviewed the 05/31/2018 emergency room report from a Dr. Goldweber which noted numbness in both hands. Based on this report Dr. Lee changes his opinion to find that a bilateral hand strain occurred as a result of the specific slip and fall on 05/30/2018.

In analyzing which reporting is stronger as between Dr. Daher and Dr. Lee for the cumulative trauma this court views Dr. Daher's reporting as being more credible and persuasive. First, Dr. Lee does not take a history from Applicant about a cumulative trauma in his initial evaluation of the Applicant whereas Dr. Daher does. Second, Dr. Lee bases his causation findings on the absence of any mention of hand/wrist and low back complaints from the end of employment at Bitech on 05/31/2018 to Dr. Daher's report of 10/25/2018. However, there are problems with utilizing such an over simplified criterion. For one, Dr. Daher's initial report mentioning hand/wrist and low back pain was 08/14/2018, a full two-and-a-half-months before Dr. Lee thought such a happening occurred. For another, the absence of complaints to other doctors covering the June 2018 through 08/14/2018 timeframe could have been due to the fact that Applicant's accepted right knee injury dominated the medical treatment process to such an extent that the other complaints, if made, were perhaps drowned out. Additionally, it is not surprising that Applicant may have been more concerned with his right knee than any other pains he was having since the right knee was the primary concern and focus of everyone in the treatment realm. It seems to this court that the mere presence or absence of pain complaints for any given medical examination can be influenced by factors such as focus of the patient, focus of the medical staff, purpose of the visit and any number of other factors. Basing a causation finding on non-existence of a pain or symptom on a certain date or dates is reliably probative of nothing. Rather a causation analysis must look at as many data points as possible to ensure a comprehensive picture. This court notes with interest that Dr. Goldweber's own 05/31/2018 report notes that Applicant was seen the previous day, 05/30/2018, for a right knee injury but notes ONLY complaints of chest pain and bilateral hand numbness in his own 05/31/2018 report when Applicant obviously had right knee complaints at the same time. Certainly, the failure to mention any right knee pain complaints in Dr. Goldweber's 05/31/2018 report does not mean that there were no such complaints that day since Applicant's specific right knee injury occurred a day earlier. Rather, Applicant apparently only went to Dr. Goldweber because his primary symptoms on 05/31/2018 were the chest and hands and those were the only complaints that Dr. Goldweber focused on that day.

To this court, the mere presence or absence of a pain complaint in a medical record is not dispositive of (1) whether or not the patient had a certain symptom that day, and (2) is certainly not dispositive of whether or not a complaint or symptom was industrial. Specific examination dates/notes in medical records are nothing more and nothing less than transient snapshots of a person's medical presentation on that specific date and quite an imperfect one at that. Thus, this court finds Dr. Lee's over-reliance on the absence of complaints to be a poor and insufficient basis upon which to premise a finding of industrial or non-industrial causation. As such, this court finds Dr. Daher's reporting more persuasive than that of Dr. Lee as to causation issues relative to Applicant's cumulative trauma claim.

TEMPORARY DISABILITY:

This court finds the medical record regarding the CT claim to be insufficient to address this issue. The parties are instructed to obtain supplemental reporting from Dr. Daher and Dr. Lee addressing periods of temporary disability in this matter.

PERMANENT AND STATIONARY DATE:

This issue is deferred pursuant to stipulation of the parties and is not addressed herein.

APPORTIONMENT:

This issue is deferred pursuant to stipulation of the parties and is not addressed herein.

FURTHER MEDICAL TREATMENT:

This issue is deferred pending further development of the record.

EDD LIEN:

As the court has no information on this lien, the EDD lien is deferred.

ATTORNEY FEES:

Applicant attorney is not entitled to attorney fees at this time as indemnity upon which attorney fees may be based cannot be determined without further development of the record.

DEFENDANT NOT ENTITLED TO CREDIT FOR TEMPORARY DISABILITY OVERPAYMENT FOR PERIOD FROM 09/19/2020 TO 10/06/2020:

This issue is inapplicable to the herein matter as Defendant has not paid any temporary disability benefits in this case from which Defendant could assert a credit.

ALLEGED FAILURE TO PROVIDE A CLAIM FORM:

As the issue of injury AOE/COE is decided in Applicant's favor this issue is moot.

ALLEGED UNTIMELY DENIAL:

As the issue of injury AOE/COE is decided in Applicant's favor this issue is moot.

ALLEGED FAILURE TO POST NOTICES REQUIRED BY LABOR CODE SECTIONS:

As the issue of injury AOE/COE is decided in Applicant's favor this issue is moot.

RESTITUTION:

As Defendant has not paid any benefits in this case, this issue is moot.

DEFENDANT'S NOTICE TO PRODUCE TAX RETURNS IS DENIED:

Based on the Opinion on Decision in companion case ADJ11413860 Defendant's request herein is denied for the same reasons as discussed in the companion case.

ADMISSIBILTY OF EVIDENCE:

Although it is unclear from the record there appears to have been no objection to the admissibility of Exhibit M, which is a certified copy of an Automated Personal Property Assessment document apparently pertaining to "Raffis' Bicycles" indicating a total of $2,500 and dated 06/01/2022. As there was no objection lodged, this exhibit is admitted into evidence.

As to Exhibit O, the Applicant objected to it on the grounds that it was not listed on the PTCS or disclosed at the time of the MSC. However, the sub rosa video was disclosed. Although three alleged interior pictures on this two-page exhibit were not observed by this WCJ when viewing the sub rosa video at Trial, since the other images on the two pages do depict still scenes from the sub rosa video this court finds no prejudicial impact on Applicant as the court has attributed no probative weight at all to the three interior pictures. Exhibit O is hereby admitted into evidence.

DATE: January 14, 2025

Hon. Daniel Ter Veer
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE