

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

CORY SATHER, *Applicant*

vs.

**TRION SOLUTIONS, INC.;
UNITED WISCONSIN INSURANCE COMPANY,
ADMIN. BY NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ12981125
Sacramento District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the October 8, 2021 Amended Award, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant was entitled to temporary disability at the rate stipulated to by the parties at the Mandatory Settlement Conference (MSC).

Applicant contends that the stipulation reflects only his earnings at the time of injury, and not his earning capacity, or in the alternative, that he should be relieved of the stipulation because it was the result of a mutual mistake of fact.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will amend the TTD award to reflect applicant's earning capacity, to include the right to further medical treatment, and to admit Exhibit 1 into evidence.

FACTS

Applicant claimed injury to his right eye, hearing and psyche while employed as a heavy equipment operator on October 13, 2019. Defendant admitted injury to the right eye and hearing, but contested the nature and extent of the injury including injury to the psyche.

Dr. Lindsey Hailston acted as the Qualified Medical Examiner (QME), and evaluated applicant on August 28, 2020. The QME found industrial injury with predominance, and further found applicant temporarily disabled from January 17, 2020 and continuing. (Exhibit X, report of Lindsey Hailston, Psy.D., dated August 28, 2020, at p.25.)

Applicant filed a Declaration of Readiness to Proceed on the issue of temporary disability benefits, and a Mandatory Settlement Conference (MSC) was held on January 28, 2021. The parties completed a pre-trial conference statement, wherein they stipulated that “at the time of injury, the employee’s earnings were \$800.40 per week, warranting indemnity rates of \$533.60 for temporary disability and \$290.00 for permanent disability.” (January 28, 2021 Pre-trial Conference Statement, at p.2.)

The parties proceeded to trial on April 14, 2021, stipulating in pertinent part, “if injury is found to be sudden and extraordinary, the medical reporting of Dr. Hailston determines that applicant is TTD beginning January 17, 2020 and continuing.” (Minutes of Hearing and Summary of Evidence (Minutes), dated April 14, 2021, at 2:18.) The parties also raised the issue of whether applicant could be relieved of the MSC stipulation regarding earnings, with applicant claiming \$880.44 as the correct weekly wage. The parties also placed in issue parts of body (psyche) and whether applicant was entitled to medical treatment for the claimed psychiatric injury if the underlying event was not deemed sudden and extraordinary per Labor Code section 3208.3(d). (*Id.*, at 2:40.)

Applicant’s counsel made an offer of proof that the information reflecting applicant’s salary increase shortly after the date of injury was not “readily available” at the MSC. (Minutes, at 3:29.) Applicant testified to the mechanism of injury. (*Id.*, at 4:19.) Applicant further testified to providing his attorney in February, 2020 with paystubs reflecting a salary increase shortly after his date of injury. (*Id.*, at 5:19.)

The WCJ issued Findings of Fact on July 21, 2021, finding in relevant part applicant to be temporarily disabled from January 17, 2020 and continuing. (Findings of Fact, Finding No. 4.) The WCJ also determined applicant’s average weekly wages to be \$800.40, with a corresponding

temporary disability rate of \$533.60. However, the WCJ deferred any award of TTD pending resolution of a lien filed by the Employer Development Department (EDD). (Findings of Fact Nos. 6, 7 and 9.) In the Opinion on Decision, the WCJ determined, in pertinent part, that the wage stipulation at MSC was the result of unilateral mistake, and denied applicant's motion to be relieved of the stipulation. (July 21, 2021 Findings of Fact, Opinion on Decision, p.2, para. 3.) The WCJ further noted the issue of whether "the six month rule [bars] treatment is moot." (*Id.*, at p.3.) No party sought review of the decision.

The parties resolved the lien of EDD on September 16, 2021, and thereafter submitted a request for an Award of TTD. (EDD Workers' Compensation Lien Settlement Agreement, dated September 16, 2021.) The WCJ issued the requested Award on September 22, 2021 for gross temporary disability in the amount of \$31,181.48 for June 17, 2020 through June 14, 2021, less attorney fees and EDD reimbursement. (Award, dated September 22, 2021.)

Defendant filed a letter with the court on October 4, 2021, noting mathematical error in the Award, and requesting rescission of the September 22, 2021 Award, and attaching a proposed Amended Award.

Also on October 4, 2021, applicant filed a "Petition and Request for Amended Opinion on Decision and Amended Award." Therein, applicant noted the computational error in the September 22, 2021 Award, but further contended that the Amended Award should include an award of future medical care. (Petition and Request for Amended Opinion on Decision and Award, dated October 4, 2021, at 1:21.) Applicant also noted a discrepancy in the July 21, 2021 decision between the average weekly wages listed in the Findings of Fact (\$800.40/week) and that listed in the Opinion on Decision (\$880.40/week), and requested that the Opinion be amended to conform to the Findings of Fact. (*Id.*, at 2:9.)

Applicant filed a further objection to the proposed Amended Award on October 7, 2021. (Correspondence to the WCJ, dated October 7, 2021.) Therein, applicant objected to the period of TTD identified in the Award and in the proposed Amended Award, of June 17, 2021 through June 14, 2021, as not reflecting the July 21, 2021 Finding of Fact No. 4, which provided for TTD starting January 17, 2020, rather than June 17, 2020. Applicant reiterated the request that the July 21, 2021 Opinion on Decision be amended to reflect the weekly wages as set forth in Findings of Fact No. 4. Finally, applicant reiterated the request that the Award be amended to reflect a right

to continuing medical care, pursuant to the finding of industrial injury to the right eye, hearing and psyche. (*Ibid.*)

On October 8, 2021, the WCJ issued an Amended Award, noting typographical error in the Award of September 22, 2021. The Amended Award provided for temporary disability payable at the rate of \$533.60 during the periods of January 17, 2020 through June 14, 2021, less credit for amounts paid to EDD, less sums paid to date, and less a 15% attorney fee on the retroactive amount due. (Amended Award, dated October 8, 2021.) The WCJ also issued an Amended Opinion on Decision, amending the July 21, 2021 Opinion on Decision, to reflect that pursuant to the WCJ's denial of applicant's motion to be relieved of the MSC wage stipulation, applicant's earning were found to be \$800.40/week. (Amended Opinion on Decision, dated October 8, 2021, at p.2.)

On October 12, 2021, defendant filed a Response to applicant's Petition and Request for an Amended Award (Response), averring the July 21, 2021 decision to be final, and characterizing applicant's attempt to amend the decision to include provision for future medical treatment to be procedurally inappropriate and superfluous. (Response, at 2:21.) Defendant further objected to applicant's renewed attempts to characterize the prior wage stipulation as a mutual mistake of fact. (*Id.*, at 3:5.)

Applicant filed the instant Petition on October 25, 2021, challenging only the weekly temporary disability rate of \$533.60. Applicant argued that the trial stipulation regarding average weekly wages concerned only the wages *at the time of injury*, and did not preclude consideration of applicant's scheduled pay raise shortly after the date of injury. (Petition, at 4:9.) Applicant further asserted that at the time of the MSC, defendant had direct knowledge of applicant's hourly rate and scheduled raises, thus establishing that the wage stipulation arose out of mutual mistake of fact. (*Id.*, at 4:18.)

The WCJ's Report responded that the issue of average weekly wages, and applicant's motion to be relieved of his prior stipulation in that regard, was addressed and decided in the July 21, 2021 Findings of Fact. Therein, the average weekly earnings figure was set in accordance with the amount stipulated at the MSC. (Findings of Fact, Finding No. 6.) Consequently, applicant's October 25, 2021 petition seeking to modify the temporary disability indemnity calculations was untimely. (Report, at p.3, para. 1.) The Report also contended that there is no evidence in the record that defense counsel was privy to the information regarding applicant's scheduled salary increase, obviating any assertion of mutual mistake. (*Id.*, at p.3, para. 2.) Finally,

the WCJ asserted that the issue of further medical treatment was not raised with specificity at the time of the April 14, 2021 trial, and that in any event, the issue was moot based on the finding of compensable psychiatric injury. (*Id.*, at p.3, para. 3.)

DISCUSSION

Pursuant to section 5903, “at any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers’ compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration.” (Cal. Lab. Code § 5903.) The Workers’ Compensation Appeals Board is without jurisdiction to grant an untimely petition. (*Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [176 Cal. Rptr. 267, 46 Cal.Comp.Cases 1008].)

An order, decision, or award of the WCAB or workers’ compensation judge is final for purposes of a petition for reconsideration where it determines any substantive right or liability of those involved in the case. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 39, 45 [147 Cal.Rptr. 30].) To be final, an order need not resolve all issues or represent a final determination of benefits. The term does not include intermediate procedural orders or discovery orders, but it does include orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and other orders affecting substantive issues. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 [260 Cal. Rptr. 76, 81].) A change in the amount of benefits owed is a substantive or material change involving the exercise of judicial discretion, as opposed to a “clerical error.” (*Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].)

Here, although the July 21, 2021 Findings of Fact sets the starting date and weekly rate of temporary disability, it specifically defers the award of TTD pending resolution of the EDD lien. (Findings of Fact No. 9.) The first entry of an *award* of temporary disability was made on September 22, 2021. There is no dispute that the Award proposed by the parties and approved by the WCJ contained mathematical error, and at the request of the parties, the WCJ issued an Amended Award of temporary disability on October 8, 2021. Applicant filed the instant Petition on October 25, 2021 challenging the wages used in calculating the TTD awarded. Thus, applicant filed the Petition within twenty days of service of a final order awarding compensation. Accordingly, we conclude that the Petition is timely. (Lab. Code, §§ 5900(a), 5902, 5903.)

Applicant contends that the trial stipulation addresses only applicant's wages "at the time of the injury." (Petition, at 6:8.) Citing to the undisputed 10% raise applicant received shortly after the injury, applicant avers his wage capacity should reflect weekly earnings of \$880.44. We agree.

Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [286 Cal.Rptr. 600].) An estimate of earning capacity is a prediction of what an employee's earnings would have been had [s]he not been injured. (*Argonaut Ins. Co. v. Ind. Acc. Comm. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130].)

Where the employee's actual earnings do not reasonably and fairly reflect his or her true earning power, average weekly earnings may be determined on the basis of his or her earning capacity at the time of the injury. (Labor Code § 4453(c)(4).) In *Lujan v. W.C.A.B.* (1985) 175 Cal. App. 3d 212 [50 Cal.Comp.Cases 693], the court of appeal applied a wage capacity analysis where applicant, through specific demonstrable evidence, established he would have received increased earnings but for the injury. In *Thrifty Drug Stores, Inc. v. W.C.A.B. (Kaye)* (1979) 95 Cal.App.3d 937 [44 Cal.Comp.Cases 809], the court of appeal applied a wage capacity analysis to reflect increased wages that would have been received under a union contract but for applicant's injury. In *Grossmont Hospital v. W.C.A.B. (Kyllonen)* (1997) 59 Cal.App.4th 1348 [62 Cal.Comp.Cases 1649], average weekly wage calculations were required to reflect increases that were scheduled or reasonably anticipated at the time of injury and that would occur during the anticipated duration of the disability.

Here, applicant received an increase in pay from \$800.40 to \$880.44 in November, 2019. (Ex. 1, Paycheck stubs, dated October 11, 2019 through January 23, 2020, p.4.) Applicant's period of temporary total disability commenced January 17, 2020. The increase in salary would have continued through the period of disability. Accordingly, we find that the TTD indemnity awarded should reflect the verifiable wages applicant would have earned had he not been injured. (*Argonaut Ins. Co. v. Ind. Acc. Comm. (Montana)*, *supra*, 57 Cal.2d 589, 594.)

Irrespective of the wage capacity analysis, however, we are also persuaded that good cause exists to set aside the stipulation regarding applicant's 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. (Lab. Code § 5702.)

Thus, “while stipulations between adversary parties concerning the existence or nonexistence of material facts are permissible in workmen's compensation cases, the stipulations are not binding on the appeals board or the referee; the board or referee, as here, may reject a stipulation and base the decision on the evidence presented at the hearing.” (*Turner Gas Co. v. Workmen's Comp. Appeals Bd.* (1975) [40 Cal.Comp.Cases 253]; *Draper v. Workers Compensation Appeals Bd.* (1983) 48 Cal.Comp.Cases 748, 753, fn. 4 [1983 Cal. Wrk. Comp. LEXIS 4001], “[t]he Worker's Compensation Appeals Board does not exceed its authority in making a finding contrary to a stipulation because of its authority pursuant to section 5702 to take further testimony and make a further investigation.”) We believe that substantial justice is better effectuated herein by applying the undisputed wages applicant would have earned but for his industrial injury, irrespective of the erroneous stipulation of the parties. (*Turner Gas Co., supra*, 40 Cal.Comp.Cases 253.)

Alternatively, once a stipulation has been accepted and a decision based on it, the Appeals Board must determine if good cause exists before setting the stipulation aside. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].) Good cause to rescind, alter or amend the award pursuant to section 5803 may consist of a showing of fraud, duress, undue influence, mutual mistake of fact, mistake of law, invalidity of execution, incompetency, or minority at the time of execution of the agreement. (Lab. Code, § 5803; see California Workers' Compensation Law (Cont. Ed. Bar 4th Ed.) §§ 16.61 et seq.; see also *Argonaut Ins. Exch. v. Industrial Acc. Com. (Bellinger)* (1958) 49 Cal.2d 706 [23 Cal.Comp.Cases 34]; *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160 [50 Cal.Comp.Cases 311]; *Carmichael v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 311 [30 Cal.Comp.Cases 169].)

A party may also seek relief from a unilateral mistake where the mistake was due to the fault of the other party, or the other party knows of or has reason to know of the mistake. (*Architects & Contractors Estimating Service, Inc. v. Smith* (1985) 164 Cal.App.3d 1001, 1007–1008 [211 Cal.Rptr. 45].)

Here, applicant received a scheduled raise in November, 2019, as reflected in his paystubs. (Ex. 1, Paycheck stubs, dated October 11, 2019 through January 23, 2020, p.4.) The defendant was aware of applicant's wage history and hourly rate. Consequently, we agree with applicant that

good cause exists to relieve applicant of the wage stipulation, because the defendant knew or had reason to know the wage stipulation was incorrect.

Applicant further contends that the Amended Award should include an award for further medical treatment to the body parts found to be industrial in the July 21, 2021 Findings of Fact. (Petition, at 6:15.) The WCJ's Report responds that the issue raised by the parties for trial was whether applicant was entitled to medical treatment if the psychiatric injury did not meet the "sudden and extraordinary" exception to the 6-month employment rule of section 3208.3(d). However, because the Findings of Fact established that applicant's injury was sudden and extraordinary, and the psychiatric injury was compensable, the issue was rendered moot. While we agree with the WCJ's analysis of the issue under section 3208.3(d), we also observe that there is no dispute that applicant sustained injury to the right eye, hearing, and psyche, and that the record demonstrates the need for medical treatment to cure or relieve from the injury. (July 21, 2021 Findings of Fact, Finding No. 1.) Psychiatric QME Lindsey Hailston, Psy.D. has evaluated applicant, and identified both a psychiatric injury and the need for further treatment, including supportive psychotherapy, and possible medication management under the supervision of a psychiatrist. (Exhibit X, report of Lindsey Hailston, Psy.D., dated August 28, 2020, at p.25; Exhibit Y, report of Lindsey Hailston, Psy.D., dated October 19, 2020, at p.16.) Given the findings of injury, and the support for ongoing medical treatment in the record, we will amend the award to include the need for further medical treatment to cure or relieve from the effects of the injury.

Accordingly, we will amend the October 8, 2021 Amended Award to reflect the TTD rate of \$586.90, and to reflect a need for further medical treatment to cure or relieve from the effects of the industrial injury. Because the October 8, 2021 Amended Award is premised on the July 21, 2021 Findings of Fact, and to ensure uniformity and consistency in the decision, and pursuant to Labor Code sections 5803 and 5907, we will further amend the July 21, 2021 Findings of Fact. We will amend Finding of Fact No. 4, to reflect the agreed upon period of TTD of January 17, 2020 through June 14, 2021, Finding of Fact No. 6, to reflect that applicant's average weekly earnings per Labor Code section 4453(c)(4) were \$880.44, and Findings of Fact No. 7 to reflect a TTD rate of \$586.90. Additionally, Applicant's Exhibit 1 was marked for identification only at trial on April 14, 2021, with a determination as to admissibility deferred to the Opinion on Decision. (Minutes, at 4:16.) The July 21, 2021 Opinion on Decision subsequently allowed the

exhibit into evidence over defendant's objection. (July 21, 2021 Opinion on Decision, p.2, para. 3.) We thus amend the Order to reflect the WCJ's evidentiary determination.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 8, 2021 Amended Award is **AFFIRMED**, except that it is **AMENDED** as follows:

AMENDED AWARD

Pursuant to the Findings of Fact dated July 21, 2021, temporary disability is awarded as follows:

- a. Temporary disability at the rate of \$586.90 during the periods of January 17, 2020 through June 14, 2021 less credit for amount paid to EDD (\$9,332.00), less sums paid to date and less 15% attorney fee on the retroactive amount due.
- b. Further medical treatment necessary to cure or relieve from the effects of the injury.

ORDER

- c. **IT IS ORDERED** that Exhibit 1 be admitted into evidence.

IT IS FURTHER ORDERED that that the July 21, 2021 Findings of Fact are **AMENDED** as follows:

FINDINGS OF FACT

4. Applicant is TTD from January 17, 2020 through and including June 14, 2021.
- ...
6. Applicant's average weekly earnings pursuant to Labor Code section 4453(c)(4) were \$880.44.
7. Applicant's TTD rate is \$586.90.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2022

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

**CORY SATHER
DJG LAW GROUP
GOLD COUNTRY COMP**

SAR/abs

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