

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

**LARRY WALTER, *Applicant***

**vs.**

**LOCKHEED MARTIN; ACE AMERICAN INSURANCE,  
Administered by ESIS CHATSWORTH, *Defendants***

**Adjudication Numbers: ADJ919541 (MF), ADJ2853295, ADJ120347, ADJ147180  
Van Nuys District Office**

**OPINION AND DECISION AFTER  
RECONSIDERATION**

We previously granted reconsideration in order to study the factual and legal issues in this case.<sup>1</sup> This is our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, we will rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

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<sup>1</sup> Commissioner Dodd, who was on the panel that issued this decision, was unable to participate in this decision. Another panelist was appointed in her place.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 7, 2022 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

I CONCUR,

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 30, 2024**

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

**LARRY WALTER  
LAW OFFICE OF DENNIS J. HERSHEWE  
GOLDMAN MAGDALIN KRIKES, LLP**

*AS/ara*

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

**REPORT AND RECOMMENDATION**  
**OF WORKERS COMP EN SA TION JUDGE**  
**ON DEFENDANT PETITION FOR RECONSIDERATION**

**I. INTRODUCTION**

The present issues revolve around whether timely payments were made post 06/10/2021 Findings and Award, as to entitlement to further Temporary Disability (TD) benefits, timely payment of Permanent Disability (PD), and proper penalties and interest applicable if the benefits were not timely provided.

Findings and Award issued on 11/7/2022 setting forth that the Carrier did pay appropriate TD. However, the Carrier did not timely pay PD, and therefore penalties, interest and attorneys fees were found payable.

Petitioner Carrier Ace American has filed a timely Petition for Reconsideration dated 11/30/2022, verified by its counsel, Russell Shuben of Goldman, Magdelin & Krikes, petitioned for Reconsideration of the Findings of Fact and Findings and Award that issued 11/7/2022. The statutory basis for Petition for Reconsideration is LC § 5903 (c) and (e), that the “evidence does not support the findings of fact,” And the Findings of Fact do not support the Order, Decision or Award”.

**II. FACTS**

Based upon admission of the parties, Larry Walter, born [], while employed during the period 01/01/2001 to 5/31/2006 as a flight mechanic at Edwards Air Force Base, California, by Lockheed Martin. In this time, Applicant sustained four dates of injury arising out of and in the course of employment to neck, bilateral feet, psych, stomach, lungs, teeth, and bruxism. The applicant claimed to have sustained injury arising out of and in the course of employment to bilateral lower extremities, polyneuropathy, bilateral upper extremities, internal, head, headaches, liver, kidneys, both ankles, both arms, both hands, sleep disorder, low back and jaw.

As noted, there were four dates of injury. ADJ147180 was a specific pf 3/25/2002 (the fuel hose incident). ADJ2853295 was a specific with an approximate date of 03/2005 (the break bar incident). ADJ120347 was a specific with an approximate date of 06/2005 (the fuel soak incident). And, the fourth, set forth as the master file, ADJ919541, is a claim for a cumulative trauma from 01/01/2001 through 05/31/2006.

As to each claim, the parties stipulated that, at the time of injury the employee’s earnings were \$1,159.56 per week, warranting indemnity rates of \$779.58 for temporary disability and maximum rate for permanent disability.

Note that there was a Finding and Award that issued 06/10/2021. Neither party filed a timely Petition for Reconsideration as to that F &A.

## **ISSUES**

1. Did the Judge err in failing to find and afford Defendant credit for an overpayment on temporary disability in the amount of \$73,662.08?
2. Did the Judge err in awarding multiple penalties on permanent disability pursuant to Labor Code Section 5814 in the absence of unreasonable delay in the provision of permanent disability benefits:
3. Did the Judge err in awarding attorneys fee pursuant to Labor Code section 5814.5 where the applicant counsel failed to seek clarification of the F&A before filing his Petition for Penalties and declaration of readiness to Proceed (DOR) when such clarification would likely have obviated the need for proceedings;
4. Did the Judge have jurisdiction to award temporary disability (TD) on 06/01/2006 to and including 05/10/2017, beyond 5 years form the date of injury, in violation of Labor Code Section 4656 (c)(1)(I) which limits TD to within a period of 5 years from the date of injury

## **III. DISCUSSION**

First, note that Defense and Applicant Counsel failed to seek clarification of the Findings and resulting Orders set forth in the present Findings and Award and Opinion on Decision.

### **TEMPORARY DISABILITY**

It is not clear what Defense is asserting. Finding was made that the Defense had, ultimately, paid the entire 5 years of TD benefits.

However, there is now an issue as to the extent of the TD overpayment. As discussed in the Response to Applicant's Petition for Reconsideration, this Judge has seemingly miscalculated. Recommendation is to grant Reconsideration as to the issue, directing the Judge and parties back to a forensic accountant to calculate total periods of TD paid, and sums taken from the payments for attorney's fees, and any previous late payment penalties made.

In the 06/0/2021 Award, the Applicant was awarded TTD:

“a. Temporary disability indemnity at the rate of \$779.58 per week, or wage loss as according to proof, beginning 06/01/2006 to and including 05/10/2017, not to exceed 240 compensable weeks, less credit for any sums heretofore paid on account thereof;”

The applicant has asserted that he was not paid pursuant to this matter. Due to the complexities, and to seek a Clearer understanding of the benefits paid, this WCJ ordered the parties acquire a forensic accountant to determine amounts paid. The Accountant reviewed the payments made. It is possible the Accountant did not understand the differences and coding set forth in the carrier's benefits print out. The Applicant Counsel did seek the accountant's opinion based on additional

hypotheticals. However, the results were that there was no report or analysis in the initial report to “dig out” the benefits, and what each code and payment meant.

The WCJ requested the forensic accounting to assist the Judge in interpreting the rates and benefits paid, along with the periods paid. Further, the timing of the payments were reviewed. This WCJ reviewed the evidence and interpreted the summaries.

In my review of the benefit dates, the Petitioner here did not dispute the periods that were paid. In the 11/07/2022 Award, in review of the periods found, the following was determined to have been paid:

While the Applicant Counsel is correct that they are seeking 240 weeks of TTD, and not 260, a scrivener's error on the Judge's part, the fact remains that the carrier paid, as noted in my Opinion on Decision:

The carrier has paid TTD compensation as follows:

1. Lump sum award for period of 06/01/2006 through 07/25/2013 at the rate of \$779.58 per week for a total of \$178,237.08 (228.632187 weeks), less attorney's fees of \$26,735.56 (Check number DA70805768 pay date 02/24/2014) and less EDD benefits paid of \$41,247 (Check number DA20047370 pay date 10/11/2021), with a balance paid to Applicant of \$110,254.52 (Check number DA71521726 pay date 02/24/2014) (Court Exhibit X11);
2. Separate TTD payments of 119 weeks at the rate of \$779.58 per week from 08/07/2013 through 10/20/2015 (Court Exhibit X11). The report, which includes a summary of payments dates 02/28/2022 indicates a total of \$234,025.65 per code “TT”. (Court Exhibit X11)
3. Separate Attorney's fees arising from the Lump sum TTD stipulation and award/Order of 02/10/2014, for clarification purposes, is noted as above \$26,735.56 (Check number DA70805768 pay date 02/24/2014) (Court Exhibit X11)

There is a 02/10/2014 Joint Stipulation and Joint Order/ Award for payment of TT/TPD for the period 06/01/2006 through 07/25/2013 in the amount of \$178,237.08, less \$26,735.56 in attorney's fees, and less the \$41,247.00 paid by EDD. Total to the Applicant was \$110,254.52.

The accounting indicates that the amount paid to Applicant from the 02/24/2014 Stipulation and Order is recorded in the TTD benefit section (Court Exhibit X11, page 4).

The attorney's fees were paid to Mr. Hershewe 02/24/2014, though set forth and coded as AFX in the report (Defense Exhibit D page 1 [also noted in Court Exhibit X11]). The Judge notes that the attorney fee payment should have been appropriately delineated as coming from the 02/10/2014 TTD Stipulation and Award/Order.

The Carrier has paid EDD an amount of \$41,247.00 as of 10/11/2021. No evidence is offered as to whether this was by agreement or as a payment based on the June 8, 2021 Award. EDD has not asserted any penalty, and the Applicant's sums are now entered. There is no indication that EDD acquired representation by Mr. Hershewe on the issue of penalty. I do not opine on the issue of penalty, or whether this is any. If this issue arises, the parties must enter their evidence as to whether there was a written agreement between carrier and EDD at that time. Certainly, this payment goes back to the 02/10/2014 Stipulation. The stipulation does indicate a payment due to EDD. Interest and a penalty might have accrued. EDD has not otherwise come forward to assert their lien. Any penalty is, presently, a non-issue. The carrier takes credit for the amount reimbursed to EDD at this time, for \$41,247.00, towards the period 06/01/2003 to 07/25/2013.

Defense makes the argument that the overpayment of TTD was in excess of \$73,000. The significant credit was not presented at trial. There was not a request for clarification after the 11/07/2022 Findings and Order. I noted in the Response to Applicant's Petition for Reconsideration that Change in Credit is Appropriate.

### **PERMANENT DISABILTY**

Applicant-counsel noted PD was paid at \$440.00 per two weeks, instead of at the increased rate biweekly rate of \$621.00, that is, \$310.50 per week. He calculates a difference of \$90.50 per week. This is correct. I erred in the PD difference. A change in calculation is correct for \$90.50 per week for 220.57 weeks would be \$19,961.71. Self-imposed increase should have issued for an additional \$1,996.17, plus interest, plus a 25% increase over that entire balance was miscalculated. Attorney's fees from that amount are appropriate to be changed.

Likewise, I failed to consider that the late payment of benefit would take the rate of the date it was due. Therefore, 60-day delay of the PD rate increase would be incorrect.

The Defense, Present Petitioner, does not agree with the finding of late payment of Permanent Disability, the penalties applied or the attorney's fees awarded for having to petition for correction of payment of the benefits.

It is noted, however, that, if the TTD overpayment is found, credits would offset the benefit due. Still, the notices were not provided, and the Judge was left with no evidence to determine the issue otherwise.

### **ATTORNEYS FEES**

Again, due to miscalculation, the determinations for fees, costs and other benefits will need to be recalculated.

**RECOMMENDATION**

I note the calculation of TTD benefits paid and credit is incorrect.

Likewise, the PD paid is in issue. This periods also should be corrected.

This WCJ respectfully recommends that the Petition for Reconsideration GRANTED as to PD issues, and referred back for appropriate action.

DATE: 12/06/2022

**Jeffrey Marrone**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE