

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

MARK RICHTER, *Applicant*

vs.

FRONTIER COMMUNICATIONS; ZURICH, *Defendants*

**Adjudication Number: ADJ12335903
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the October 13, 2023 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial psychiatric and urological injury and injury to his back while employed as a field technician on August 18, 2018. As relevant here, the WCJ further found that "[d]efendant is not allowed to take any credit for any benefits administered by the [Employment Development Department (EDD)] and shall administer benefits such that applicant is compensated from the carrier a total of 104 weeks of temporary total disability indemnity benefits."

Defendant contends that the WCJ erred in failing to find it entitled to credit for benefits paid by EDD.

We received an Answer from applicant. 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, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons stated in the Report, which we adopt and incorporate, except as noted below, and for the reasons discussed below, we will grant reconsideration, amend the WCJ's decision to find that applicant is entitled to temporary

disability benefits from August 25, 2018 to August 23, 2020 and that defendant is entitled to credit for temporary disability payments it previously made; to affirm that defendant is not entitled to credit for benefits paid by EDD; to make an award of temporary disability; and to clarify that the award is made against the insurance carrier and not the employer. We otherwise affirm the WCJ's decision.

We do not adopt or incorporate the WCJ's recommendation that we deny reconsideration. Rather, we grant reconsideration to make a finding of applicant's entitlement to temporary disability from August 25, 2018 to August 23, 2020, based on defendant's November 3, 2020 Notice Regarding Temporary Disability Benefits Payment Termination. (Joint Exhibit 104). Defendant does not dispute that applicant is entitled to 104 weeks of temporary disability or that the period of entitlement is from August 25, 2018 to August 23, 2020. In its November 3, 2020 Notice, defendant stated:

Payments are ending because you have received a maximum 104 weeks of TTD benefits (including EDD payment from 8/25/18-8/24/19). Benefits paid to you total [\$61,234.68.] Benefits were paid to you as temporary total disability: Period(s) paid were from 08/25/19 through 08/23/20 at \$1,177.59 per week. Please see the attached detailed payment record for specific periods and amount paid.

(Notice Regarding Temporary Disability Benefits Payment Termination, 11/3/20, Joint Exhibit 104.)

The WCJ provided the following relevant facts in the Opinion on Decision:

Applicant alleges he is entitled to temporary disability for the statutory maximum period of 104 weeks. Parties submitted Joint Exhibit 105 dated November 3, 2020, which is the "Notice Regarding Temporary Disability Benefits Payment Start". This letter indicates payment for temporary disability commencing 8/25/19 through 8/23/2020 and continuing until applicant is able to return to work or the medical condition becomes permanent and stationary. The parties further submitted into evidence a letter from the defendant to the applicant dated November 3, 2020, wherein it is noted that payments were ending because he had received a maximum 104 weeks of TTD benefits (*including EDD payments from 8/25/18-8/25/19*).

Included in evidence is Board Exhibit "A", a benefits printout. A review of such printout shows that defendant has only paid TTD from 08/25/2019-8/23/2020 on 11/3/2020 to applicant with no indication that EDD has ever been reimbursed.

The case law provides that “When a defendant reimburses EDD for SDI, it is as if EDD never paid those benefits, and, instead, the payments were actually made to applicant by defendant, i.e., the reimbursement effectively converts the SDI payments into workers’ compensation disability indemnity.” *Salazar v. WTS Int’l, Inc.*, 2014 Cal. Wrk. Comp. P.D.LEXIS 160, *5 (Cal. Workers’ Comp. App. Bd. March 10, 2014) (See also Lab. Code, §§ 4903(f), 4904(b)(1) & (2))

Cal Unemp Ins Code § 2629.1, states in relevant part:

“(e) An employer or insurance carrier who subsequently assumes liability or is determined to be liable for reimbursement to the department for unemployment compensation disability benefits which the department has paid in lieu of other benefits shall be assessed for this liability by the department. In addition, the employer shall pay the department interest on the disability benefits at the annual rate provided in Section 19521 of the Revenue and Taxation Code. The employer shall also pay a penalty of 10 percent of the amount reimbursed to the department if the Workers’ Compensation Appeals Board finds that the failure of the employer to pay other benefits upon notice by the department under this section was unreasonable and a penalty has not been awarded for the delay under Section 5814 of the Labor Code. All funds received by the department pursuant to this section shall be deposited in the Disability Fund.

(f) The employer shall reimburse the department in accordance with subdivision (e) within 60 days of either voluntarily accepting liability for other benefits or after a final award, order, or decision of the Workers’ Compensation Appeals Board.”

At the time of trial, no evidence was presented that EDD has been reimbursed. Therefore, defendant cannot take credit for a payment that was never made. Furthermore, at the time of trial, the parties were given an opportunity to file post-trial briefs. Defendant filed such brief on September 8, indicating that an agreement was reached to settle with EDD on the day of trial, with such settlement including interest. (Defendant post-trial brief, page 2, lines 23-24) Again, although a settlement may have been reached, it did NOT confirm that any payment to EDD has been made in full and final satisfaction of the agreement. Most notably, defendant fails to realize that if they had adhered to both the Labor Code and the Insurance Code as written, wherein if an applicant is found temporarily totally disabled beyond the 104 weeks and EDD is properly reimbursed, applicant would be able to access such funds with State Disability for the timeframes beyond the statutory 104 weeks’ timeframes. By failing to reimburse EDD, defendant inappropriately withheld applicant’s own funds normally available through EDD. It has now been almost three years since defendant indicated that they are liable for TTD but have yet to reimburse EDD. Therefore, defendant is not allowed to take any credit for any benefits administered by EDD. Despite any claim that this would be a windfall the applicant, the facts clearly show that had the benefits been properly administered

by defendant, applicant would have received TTD for 104 weeks and have the ability to access up to an additional 52 weeks of SDI.

(Report, at pp. 3-5, emphasis in original.)

There were no stipulations or evidence presented on the issue of the temporary disability indemnity rate. Therefore, we will defer that issue and order defendant to adjust payment, subject to proof, with jurisdiction reserved at the trial level if there is any dispute.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the October 13, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 13, 2023 Findings and Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

4. The injury herein caused temporary disability from August 25, 2018 to August 23, 2020, for a total of 104 weeks. Defendant is entitled to credit for temporary disability payments it previously made on account thereof. Defendant is not entitled to credit for benefits paid by EDD. The temporary disability indemnity rate is deferred.

* * *

AWARD

AWARD IS MADE in favor of **MARK RICHTER** against **ZURICH NORTH AMERICA of:**

* * *

d. Temporary disability indemnity at a weekly rate to be adjusted by the parties, subject to proof, with jurisdiction reserved at the trial level if there is any dispute, beginning August 25, 2018 to and including August 23, 2020, less credit for any sums heretofore paid by defendant on account thereof.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 5, 2024

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

**MARK RICHTER
THOMAS DEBENEDETTO & ASSOCIATES
FLOYD SKEREN MANUKIAN LANGEVIN, LLP**

PAG/mc

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

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

Workers' Compensation Administrative Law Judge: Alicia D. Hawthorne

Counsel:

Petition for Reconsideration Filed By: Petitioner, Petitioner, Frontier Communications, through their insurance carrier, Zurich North America (Zurich)

Attorney for Petitioner: Floyd, Skeren, Manukian Langevin, LLP, Robert J. Chimits, Esq.
Attorney for Applicant: Law Offices of Thomas. DeBenedetto, Anthony Harris, Esq.

INTRODUCTION

Petitioner, Frontier Communications, by and through their attorney of record, has filed a timely, verified, petition for reconsideration and petition for removal on the standard statutory grounds, from the trial court's October 13, 2023, Findings and Award, pleading that:

1. The evidence does not justify the Findings of Fact;
2. The Findings of Fact do not support the Order, Decision or Award;
3. By the Decision and Award, the Board acted without or in excess of its powers.
4. That the petitioner has evidence which he or she could not, with reasonable diligence, have produced at the hearing.

Specifically, Petitioner contends that this Judge erred in failing to allow credit against the 104- week temporary disability cap for benefits the applicant received from EDD.

The facts surrounding the EDD lien are simple. EDD filed their lien with the WCAB on 9/3/2019. (EAMS DOC ID 30248549).

Applicant's claim was originally denied for benefits on November 16, 2018. Applicant proceeded to a QME with Dr. Anant Ram. Dr. Ram found applicant's injury compensable in his report dated May 23, 2019. This is over 4 years prior to the date of trial and the issuing of the Findings of Facts, Opinion on Decision. However, despite the carrier's knowledge of the EDD lien, they failed to reimburse EDD or address EDD's lien until the date of trial when this WCJ asked the parties about it.

This lien was not hidden from the petitioner; this lien was not unknown to the parties, nor was EDD not forthcoming of their lien. Despite the knowledge of the lien, the carrier did nothing to address the lien until after confronted with this issue and their disregard to applicant's rights.

Understand, applicant is only entitled to 104 weeks of TTD. If applicant is still found to be disabled after they have exhausted the 104 weeks of TTD, applicant can and should turn to EDD to supplement their income up to another year, if appropriate. By failing to address the lien of EDD and attempting to now take credit for 52 weeks of benefits of the 104 weeks applicant is entitled to, applicant loses out of 52 weeks of benefits from SDI he would have absolutely been entitled to once the TTD benefit ran out.

Petitioner contends that the applicant would be unjustly enriched by not being allowed to take credit for the EDD benefits. This argument is seriously flawed. In fact, by not allowing the petitioner to take credit for reimbursement to EDD, the applicant actually is made whole; 104 weeks of TTD and 52 additional weeks of his State Disability Indemnity.

Petitioner contends that they have now reimbursed EDD. However, at the time of trial, the issue presented to this WCJ is whether or not the petitioner is allowed to take credit for 52 weeks of payment from EDD against the 104 weeks [cap]. It is abundantly clear that at the time of the submission of this matter to the undersigned, EDD had NOT been reimbursed by the petitioner.

Whether or not there had been any agreement for reimbursement is irrelevant. At the time of submission, no payment had been made, such that the undersigned could not give credit for payments not received. Petitioner is disingenuous in their presentation that the petitioner had evidence, which he or she could not, with reasonable diligence, have produced at the hearing. The almost 4 years prior to the time trial is enough time to participate diligently in the administration of the claim. Petitioner had been informed that temporary total disability was an issue in which the matter was set for the MSC at the time of the Declaration of Readiness. This matter was not an Expedited hearing, such that at the time of the MSC, petitioner knew discovery would close. In addition, petitioner has improperly attached exhibits to their Petition for Reconsideration, a clear violation of 8 CCR § 10945(c).

However, if for some reason the Board allows documents not in evidence at the time of trial to be part of the record now, it should be noted that the Agreement entered into with EDD is with JULIUS Galliard, the agreement is executed the same day of the trial, but was not offered

into evidence because either it was executed after the trial concluded or it was prior to the beginning of trial and not offered.

In addition, the date attorney for Petitioner signed the settlement on behalf of the petitioner was two years prior to the execution of EDD, thus again recognizing that the EDD lien existed in plenty of time prior to the trial but petitioner chose to do nothing about the lien.

Petitioner further contends that pursuant to *Salazar v. WTS Int'l, Inc.*, when a petitioner reimburses EDD for SDI, it is as if EDD never paid, First, this WCJ agrees that had petitioner reimbursed EDD at any time prior to trial, they would have been entitled to such credit. However, these were not the facts at the time of trial. No payment to EDD had been made and no proof of such payment had been submitted into evidence, In fact, the only evidence submitted on this issue indicates that no payment had been made. (See Board Exhibit A, the benefits printout) Second, the petitioner has failed to properly cite the case of *Salazar* such that no one reviewing the petition could look up such cite.¹ It is noted that such case was cited by this WCJ in the Opinion on Decision.

RECOMMENDATION

For the reasons discussed, it is respectfully recommended that the petition for reconsideration be denied.

DATE: November 16, 2023

Alicia Hawthorne
WORKERS' COMPENSATION JUDGE

¹ It should be noted that if petitioner is insistent that they are entitled to such credit for payments made by EDD, petitioner should refresh their memory on the requirements under Labor Code §4650(d) wherein they were required to administer disputed disability payments within 14 days of acceptance of such claim to avoid a penalty.