

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

**MAXAMILLION HILLENBRAND, *Applicant***

**vs.**

**CALIFORNIA CABINETS AND STORE FIXTURES; ENDURANCE  
ASSURANCE CORP., *Defendants***

**Adjudication Number: ADJ8195851  
Sacramento 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 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 deny reconsideration.

The WCJ may consider the issue of sanctions in the first instance.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

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

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**NOVEMBER 15, 2021**

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

**MAXAMILLION HILLENBRAND  
RAYMOND M. WYATT, ATTORNEY AT LAW  
STANDER REUBENS THOMAS KINSEY**

**PAG/ara**

I certify that I affixed the official seal of  
the Workers' Compensation Appeals  
Board to this original decision on this date.  
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**REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

**IT APPEARING THAT** on September 16, 2021, defendant filed a timely and verified Petition for Reconsideration from the Findings, Award, and Order issued on August 25, 2021, which determined applicant's wage rate and awarded the amount of total disability benefits due pursuant to that wage rate, and further found that defendant improperly delayed payment of permanent total disability benefits and awarded penalties and interest accordingly. Lastly, I ordered defendant to pay any undisputed portion of applicant's permanent total disability award immediately, regardless of whether defendant sought reconsideration on the issues of applicant's wage rate, penalties, and interest.

Defendant alleges that applicant's permanent and total disability was not finally decided by the February 8, 2021 Decision After Reconsideration, that applicant's automobile allowance was incorrectly decided, and that it was improper to issue penalties because defendant was in the process of an appeal.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that defendant's Petition for Reconsideration be **DENIED** as the February 8, 2021 Decision After Reconsideration was a final determination on the question of whether applicant is permanently totally disabled. Defendant did not file any appeal from the finding of permanent total disability that issued on February 8, 2021; thus, defendant is estopped from raising that as an issue. Defendant did not raise the issue of permanent disability at trial and thus the issue is waived.

To the extent that defendant briefly argues that applicant's wage rate was improperly calculated, defendant failed to cite to any evidence and that argument should be dismissed as skeletal or alternatively denied on the merits. To the extent that defendant argues that penalties are not appropriate, that argument is without merit as defendant did not appeal the finding of permanent total disability and did not pay applicant undisputed portions of the permanent total disability award as required by law.

I further recommend that the issue of sanctions and costs be considered by the Appeals Board and/or be delegated to the trial court for determination. The facts of this case are egregious and the majority of issues raised in the petition for reconsideration appear frivolous.

**FACTUAL AND PROCEDURAL BACKGROUND**

This matter was previously tried and following a Decision After Reconsideration, the Appeals Board issued a finding of fact that applicant sustained 100% permanent total disability. (Opinion and Orders Denying Defendant's Petition for Reconsideration, Granting Applicant's Petition for Reconsideration and Decision After Reconsideration, ["Decision After Reconsideration"], February 8, 2021.) The underlying facts of this case are well recited in the February 8, 2021 Decision After Reconsideration and need not be restated herein.

The Appeals Board issued the following award on February 8, 2021:

**AWARD IS MADE** in favor of applicant **MAXAMILLION HILLENBRAND** against defendant **ENDURANCE ASSURANCE CORP.** of: . . .

b. Permanent total disability indemnity, and a life pension, **in an amount to be determined**, less a reasonable attorney's fee payable to Raymond Wyatt, in an amount to be determined and subject to commutation as determined by the WCJ.

(*Id.* at p. 18 (emphasis added).)

The prior trial judge deferred the issue of applicant's wage rate as moot because he had only found partial disability. When the Appeals Board found applicant to be totally disabled, the issue of wage rate required resolution. The prior trial judge retired and the matter was reassigned for trial on the sole remaining issue: the amount of permanent total disability due.

Applicant's wage rate was the primary issue for trial. Applicant was injured on October 13, 2009. Applicant earned \$63,546.06 in 2008, which was the last full year prior to his injury. (Applicant's Exhibit 5.) Applicant's income dipped significantly in 2009, when he earned only \$46,586.42. (*Ibid.*) Applicant credibly testified at trial that his 2009 income was reduced due to the economic crisis that occurred that year. (Minutes of Hearing and Summary of Evidence, August 16, 2021, p. 3, lines 21-23.) Applicant credibly testified that the employer promised to restore his pay once the economic crisis was over. (*Ibid.*)

The employer's earnings verification notes that applicant also received a \$100.00 per week allowance for his automobile. (Defendant's Exhibit G.)

Defendant sought no appeal of the February 8, 2021 Decision After Reconsideration. When the Decision became final, applicant demanded back payment of total disability on three occasions. (Minutes of Hearing and Summary of Evidence, August 16, 2021, p. 2, lines 7-8.) Defendant failed to pay applicant permanent total disability and continued to pay applicant at the permanent partial disability rate of \$270.00 per week. (See Defendant's Exhibit J, Benefits Printout, June 30, 2021.) Accordingly, applicant filed a petition for penalties and interest and those issues were also set for trial.

## DISCUSSION

### **A. Waiver / Collateral Estoppel**

Issue preclusion, also known as collateral estoppel, applies to bar a party from relitigating an issue already decided if the following requirements are met: (1) "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding"; (2) "this issue must have been actually litigated in the former proceeding"; (3) "it must have been necessarily decided in the former proceeding"; (4) "the decision in the former proceeding must be final and on the merits";

and (5) “the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.” *Branson v. Sun-Diamond Growers of California*, 24 Cal.App.4th 327, (1994) (quoting *Lucido v. Superior Court*, 51 Cal.3d 335, 341, (1990), cert. denied, 500 U.S. 920 (1991)).

The Appeals Board issued an award of permanent total disability on February 8, 2021. Defendant did not appeal this award. The majority of defendant’s petition is an attempt to relitigate the issue of whether applicant is permanently totally disabled. Defendant did not even raise this as an issue for trial. Permanent disability is not checked as an issue in the pre-trial conference statement. Defendant may not raise an issue on appeal that was not raised at trial. Furthermore, defendant is estopped from re-raising an issue that was finally decided, and not appealed. Defendant’s argument as to applicant’s level of disability appears frivolous.

### **B. Applicant’s Wage Rate**

Defendant raises one issue as to applicant’s wage rate, which is an allegation that the employer actually paid applicant \$200.00 per month as an automobile allowance and not \$100.00 per week. Defendant does not cite to any exhibit in evidence or testimony showing this to be true. Per Defendant’s Exhibit G, applicant received a \$100.00 per week allowance for automobile expenses.

Defendant’s allegation as to the car allowance is not supported by citation to the record and is controverted by defendant’s own exhibit. I consider defendant’s argument on this point skeletal and thus waived. (See *Flores v. Cal. Dept. of Corrections and Rehab.* (2014) 224 Cal.App.4th 199, 204 (“an appellant must do more than assert error and leave it to the appellate court to search the record ... to test his claim”); *City of Santa Maria v. Adam* (2012) 211 Cal. App.4th 266, 287 (“[r]ather than scour the record unguided, we may decide that the appellant has waived a point urged on appeal when it is not supported by accurate citations to the record”); *Salas v. Cal. Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1074 (“[w]e are not required to search the record to ascertain whether it contains support for [plaintiffs’] contentions”); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 (“[t]he appellate court is not required to search the record on its own seeking error” and “[i]f a party fails to support an argument with the necessary citations to the record, ... the argument [will be] deemed to have been waived”).)

### **C. Penalties / Interest / Sanctions**

Defendant did not challenge the award of interest in its petition for reconsideration. Defendant only challenges the award of penalties on permanent disability due, claiming that no final award existed on the issue. Defendant’s claim on this point is clearly contradicted by the February 8, 2021 Decision After Reconsideration, which included both a findings of fact and an award of permanent total disability.

Per section 5814:

- (a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or

refused shall be increased up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties. . .

(d) The payment of any increased award pursuant to subdivision (a) shall be reduced by any amount paid under subdivision (d) of Section 4650 on the same unreasonably delayed or refused benefit payment.

(§ 5814.)

Per section 4650(d): “(d) If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee’s wages under a salary continuation plan, as defined in subdivision (g).” (§ 4650(d).)

Here, no good cause was presented for defendant’s failure to pay permanent total disability benefits, once the Decision After Reconsideration became final. While a good-faith dispute existed over the amount of such benefits. Defendant was required by law to forward any undisputed amounts within 14 days. (§ 4650(b)(1).) Defendant failed to do so. Accordingly, I awarded penalties and interest on the amount due.

Defendant’s conduct in this matter appears sanctionable per section 5813. Defendant had no good-faith basis to refuse payment of the undisputed portions of permanent total disability benefits.

At the time that I issued the Findings, Award, and Order, I deferred the issue of sanctions to the court and costs to applicant. I based this deference on the hope that the amount of the penalties and interest would be enough to discourage any such conduct in the future. I strongly admonished defendant that further bad faith conduct would not be tolerated.

Defendant has now filed a petition for reconsideration, which primarily attempts to relitigate the already decided issue of whether applicant is permanently and totally disabled. Defendant raises an issue that was finally decided over seven months ago. The issue was neither raised at trial nor listed on the pre-trial conference statement. Defendant cites to sub-rosa video, which was neither admitted into evidence nor reviewed by the court. Defendant’s attempt to relitigate the decided issue of permanent total disability, its citation of exhibits excluded from evidence, and its failure to pay any undisputed portion of permanent total disability per the February 8, 2021 award constitute frivolous and bad faith conduct.

Applicant testified that he has been living out of his RV while awaiting payment of the February 8, 2021 permanent total disability award. Defendant’s refusal to pay the undisputed portions of the award appears egregious.

For all of the above reasons, I respectfully recommend that defendant's petition for reconsideration be **DENIED**. I further recommend that the issues of sanctions and costs be considered by the Appeals Board and/or be delegated to the trial court for determination.

DATE: 9/22/2021

**Eric Ledger**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE