

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

EDDIE HUERTA, *Applicant*

vs.

**OLD DOMINION FREIGHT LINE;
ACE AMERICAN INSURANCE COMPANY, administered by
GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ14819876
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
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, except as noted below, we will grant reconsideration, amend the WCJ's decision for the reasons stated below, and otherwise affirm the November 1, 2023 decision.

We grant and amend the WCJ's decision to reflect the June 9, 2021 date of injury stipulated to by the parties. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 10/17/23, at p. 2:5.) We do not adopt and incorporate the Report's reference to the incorrect date of injury and correct that date in the copy of the Report attached to this decision.

The Appeals Board Rules provide in relevant part: (1) that "[e]very petition for reconsideration ... shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration ... shall be separately stated and clearly set forth" (Cal. Code Regs., tit. 8, § 10945) and (2) that "a petition for reconsideration ... may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, 10972).

In accordance with section 5902 and WCAB Rules 10945 and 10972, the Appeals Board may dismiss or deny a petition for reconsideration if it is skeletal (e.g., *Cal. Indemnity Ins. Co. v. Workers' Comp. Appeals Bd. (Tardiff)* (2004) 69 Cal.Comp.Cases 104 (writ den.); *Hall v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 253 (writ den.); *Green v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 564 (writ den.)); if it fails to fairly state all of the material evidence, including that not favorable to it (e.g., *Addecco Employment Services v. Workers' Comp. Appeals Bd. (Rios)* (2005) 70 Cal.Comp.Cases 1331 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd. (Moore)* (2002) 67 Cal.Comp.Cases 948 (writ den.); or if it fails to specifically discuss the particular portion(s) of the record that support the petitioner's contentions (e.g., *Moore, supra*, 67 Cal.Comp.Cases at p. 948; *Shelton v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 70 (writ den.)). The petition filed herein fails to cite with specificity to the record. Therefore, it is subject to dismissal and denial.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 1, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 1, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. The applicant, Eddie Huerta, born [], while employed on June 9, 2021 as a truck driver, occupational group number 350, at Montebello, California, by Old Dominion Freight Lines, sustained injury arising out of and occurring in the course of employment to his lumbar spine and did not sustain injury to his left lower extremity.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 16, 2024

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

**EDDIE HUERTA
GLAUBER, BERENSON & VEGO
KWAN & ASSOCIATES**

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I **INTRODUCTION**

The undersigned issued his Partial Opinion on Decision and Partial Findings, Award & Order to Development the Record on 11/1/2023. Defendant, Ace American Insurance, has filed a timely, verified, Petition for Reconsideration and/or Removal on 11/17/2023.

Defendant contends 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. Failure to grant removal will result in significant prejudice and/or irreparable harm.

Defendant has essentially raised two issues on appeal: (1) that the undersigned committed err in the way he calculated applicant's average weekly wages for temporary disability indemnity benefits, and (2) that the award of temporary disability indemnity benefits is not calculable by defendants due to defendant's claim for credit for duplicative payments made by EDD.

The undersigned disagrees with defendant's contentions.

II **FACTS**

Applicant, Eddie Huerta, born [], began working for Old Dominion Freight Lines, as a truck driver, on 4/12/16. He sustained an admitted injury to his low back on [6/9/21]. Following his injury, applicant was placed on temporary disability and began receiving conservative treatment. According to applicant's credible trial testimony, which was further clarified by reporting from panel qualified medical evaluator, Antoine Roberts, M.D. (Court Exhibit 3, page 2), applicant returned to full time work for XPO Logistics on 5/2/22 working as a truck driver/dock worker.

Following trial the undersigned issued Partial Findings of Fact/Award finding in relevant part applicant's average weekly wage, periods of temporary disability, further medical treatment, reimbursement of EDD's lien (all paid during the TD period), and that the record required further development on the issues of permanent disability/apportionment.

III **DISCUSSION**

DID THE UNDERSIGNED COMMIT ERR IN CALCULATING APPLICANT'S AVERAGE WEEKLY EARNINGS?

No. At trial applicant claimed that his average weekly wages were \$1,839.00. Defendant contended that applicant's average weekly wages were only \$1,296.81. The undersigned noted that the Employment Development Department (EDD) paid applicant disability benefits at a weekly rate of \$1,064.00 which would correlate to a weekly earnings rate for EDD benefit calculation purposes of \$1,596.00.

Defendant represented at trial that its proposed average weekly wage rate was based upon a wage statement. No wage statement was offered into evidence by defendant at trial. As a result, the undersigned gave no weight to defendant's representation.

Applicant's W-2 income form from 2021 is in evidence (Applicant Exhibit 11). It establishes that applicant earned \$37,126.55 for the year until his injury. Applicant testified at trial without impeachment, that he was placed on leave by the employer from 1/1/21 while the employer effectuated a change in terminal work location for the applicant. Applicant credibly testified that he returned to work for the employer on 1/20/21. His last day of work was his date of injury on 6/9/21.

Defendant contends that the undersigned should have calculated applicant's average weekly wages based on the prior 365 days before his injury. No evidence was provided at trial relating to applicant's earnings in 2020. Defendant elicited no testimony from the applicant about when he worked in 2020 and/or how much he was paid. Defendant's argument is without merit.

Based on the foregoing, the undersigned found that applicant worked for 140 days in 2021, from 1/20/21 through his injury on 6/9/21, earning \$37,126.55 which equates to an average weekly wage of \$1,856.33 and a temporary partial disability rate of \$1,237.55 per week.

The undersigned does not believe that he committed err in calculating applicant's average weekly wages for purposes of temporary disability indemnity benefits.

DID THE UNDERSIGNED COMMIT ERR IN AWARDING APPLICANT TEMPORARY DISABILITY INDEMNITY BENEFITS?

No. Applicant claimed entitlement to temporary total disability indemnity benefits during the period from 6/10/21 through 5/26/22. The undersigned found that applicant returned to full time work on 5/2/22 for XPO Logistics. The undersigned's finding that applicant was entitled to temporary disability indemnity benefits during the period from 6/10/21 through 5/1/22 does not appear to be in dispute.

Defendant's primary contention appears to be that they are purportedly unable to calculate the net balance that is owed to the applicant. This contention is also without merit.

The undersigned awarded temporary disability from 6/10/21 through 5/1/22. The weekly rate found applicable was \$1,237.55. The total owed before credit for benefits previously paid, and reimbursement of EDD is easily calculated, i.e. \$62,938.26. Defendant was ordered to reimburse EDD in full in the amount of \$40,584.00. Defendant was also allowed credit for any amounts it had paid during the temporary disability period. At trial defendant represented it had paid benefits from 12/31/21 through 5/6/22 (five days past the TD end date of 5/1/22). Defendant is privy to their precise payments, but based on their representations at trial, since they were only paying at a weekly rate of \$864.54, their total payments from 12/31/21 through 5/1/22 would have been \$15,067.70. The balance remaining unpaid is \$7,284.56.

Based on the foregoing, the undersigned found that applicant was entitled to temporary disability indemnity benefits during the period from 6/10/21 through 5/1/22, less credit to defendant for amounts ordered reimbursed to EDD (exclusive of statutory interest), and less credit for amounts paid by defendant heretofore. The net owed should have been easily calculated, with an attorney fee awarded for 15% of the net unpaid balance.

The undersigned does not believe that he committed err in making those findings. Defendant can claim a credit for the five days of payments made after 5/1/22 against permanent disability, when that component of applicant's claim is ready for adjudication.

IV **RECOMMENDATION**

It is respectfully recommended that defendant's Petition for Reconsideration be denied.

Dated: 11/21/2023

S. MICHAEL COLE
Workers' Compensation Judge