

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

DAVID ROUNDTREE, *Applicant*

vs.

**CHERNE CONTRACTING CORPORATION;
AMERICAN HOME ASSURANCE COMPANY,
administered by AIG CLAIMS, *Defendants***

**Adjudication Number: ADJ11228310
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision After Reconsideration. We have considered the allegations of the Petition for Reconsideration. Based on our review of the record, and for the reasons stated in the Opinion on Decision of the workers' compensation administrative law judge (WCJ), which we adopt and incorporate as quoted below, we will affirm the February 11, 2021 Findings and Order.

We adopt and incorporate the following quote of the WCJ's Opinion on Decision:

OPINION ON DECISION

INTRODUCTION

This case was submitted for decision on November 13, 2020 without formal hearing or trial, at the joint request of the parties and with my agreement, as noted in the Pretrial Conference Statement dated October 30, 2020, which was completed by the parties following an MSC on October 28, 2020. The parties stipulated to certain basic facts, the issue to be decided, and the admission of the exhibits which have been marked and admitted as noted and summarized in the

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

Minutes of Hearing (MOH) dated November 13, 2020. As noted therein, the sole issue for determination is defendant's petition for credit against permanent disability (PD) for a claimed temporary total disability (TTD) overpayment in the amount of \$22,569.30 for the period August 10, 2019 through December 17, 2019. (MOH at p. 2.)

The claimed overpayment relates to the nature and timing of the QME reports of Jared Myers, D.O. In his initial report dated August 9, 2019 (Joint 101), Dr. Myers deferred findings on most of the substantive medical legal issues because he had not been sent any medical records. In his subsequent supplemental report dated December 1, 2019 (Joint 102), he found Applicant to be permanent and stationary (P&S) retroactive to the date of the original exam on August 9, 2019. Applicant and Defense counsel filed dueling trial briefs with their respective positions and arguments with supporting authority, each dated November 13, 2020, which have been reviewed and considered and can be found in EAMS/Filenet.

FACTUAL BACKGROUND

The facts relevant to the disputed TTD overpayment/credit claim are largely undisputed. Applicant worked as a steamfitter for Cherne Contracting Corp., and sustained accepted injuries to his left leg, knee, foot, hips, back and wrist, when he was struck by a car while working on a job at the Chevron Refinery. He later underwent surgery for a left tibial plateau fracture in his left knee, which resulted in an extended hospital stay. (Joint 101, 102, and Applicant's Brief at p. 2.) He has not worked since. (*Id.*) After going through the QME process, the parties were left with pain specialist Jared Myers, D.O., as the QME after strikes. In April 2019, an appointment was scheduled and noticed with Dr. Myers on August 9, 2019. (Joint Exhibit 105.) Applicant's attorney mailed and faxed the QME a cover letter related to that exam on July 29, 2019. (Applicant's 1.) The first paragraph of that letter noted that it was Applicant attorney's understanding that the defendant would be providing the QME with the medical file. (*Id.*) Unfortunately, the defendant did not send any medical records to the QME in advance of that exam, and so far as I can tell on this record, did not even send a defense cover letter prior to the exam.

Dr. Myers saw the Applicant as scheduled, and later on August 29, 2019 requested a 15 day extension of time from the Medical Unit to serve his report, due to a death in the family. (Defendant's Exhibit B.) That request was granted by the Medical Unit. (Defendant's Exhibit A.) His resulting initial report dated August 9, 2019 was served on October 2, 2019 per the attached proof of service. (Joint 102.) He noted on page 15 of that report that no medical records had been provided to him and he reserved the right to change his opinions based on review of later provided records. (*Id.*) He deferred providing opinions on the issues of full diagnosis, impairment/disability, potential apportionment, MMI status, and work restrictions, pending review of records. (*Id.* at pp. 15-16.)

Upon receipt of this report, Applicant's attorney on October 11, 2019 sent Dr. Myers a CD with the medical record with a cover letter of the same date asking him to review and comment in a supplemental report.² (Joint 104.) Subsequently, on October 22, 2019, defense counsel also sent Dr. Myers what I assume to be the same medical file, but also included Applicant's deposition transcript. (Joint 103.) Once Dr. Myers had reviewed those records, he issued a second supplemental report dated December 1, 2019, which was served on December 5, 2019 per the attached proof of service. (Joint 101.) That report provided opinions on all the issues that were previously deferred (*Id.* at pp. 36-39), and found that Applicant was P&S as of the date of the original exam August 9, 2019, with impairment of 20 WPI based on gait impairment, and provided work restrictions of no ladder climbing and limit frequent lifting of more than 40 pounds. (*Id.*) The parties stipulated that these opinions rate out to 43% PD after adjustment for age and occupation, which is equivalent to \$64,380.00. (MOH at p. 2.)

Defendant began paying TTD to the Applicant as of January 31, 2018, which continued uninterrupted until December 17, 2019, at which point PDAs began. (Joint 107, Benefit printout.) As noted in defendant's Petition for Credit for Overpayment of TD Benefits dated July 21, 2020, and consistent with the benefit printout, defendant ended PDA's at \$8,700.00 as of July 14, 2020, seemingly because they did not want to over advance in the event a credit for claimed overpayment of TTD was granted.

CLAIMED CREDIT FOR ALLEGED TTD OVERPAYMENT

The issue for determination is defendant's petition/request for credit against PD for the alleged TTD overpayment from August 10, 2019 through December 17, 2019 in the total amount of \$22,569.30. Claims for credit against PD for alleged TTD overpayments are discretionary with the Appeals Board. Whether to award a requested credit against PD for alleged overpayments of indemnity, e.g., temporary disability, is not a right but rather a discretionary determination by a WCJ. (See Labor Code section 4909; *Gamble v. Workers' Comp. Appeals Ed.* (2006) 71 Cal.Comp.Cases 1015, 1028; *SCJF v. Industrial Accident Commission (Verden)* (1965) 30 Cal.Comp.Cases 132 (writ den.); *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Board en bane); *JC. Penney Co. v. Workers' Comp. Appeals Ed. (Edwards)* (2009) 175 Cal.App.4th 818, 827 [74 Cal.Comp.Cases 826, 833].) These type of credit decisions are based in large part on the particular equities of a given fact pattern and the reasons behind the nature and extent of the claimed overpayment. (*Genlyte Group LLC v. Workers' Comp. Appeals Ed. (Zavala)* (2008) 73 Cal.Comp.Cases 6; *Maples v. Workers' Comp. Appeals Ed.* (1980) 111 Cal.App.3d 827, 836-837 [45 Cal.Comp.Cases 1106].)

² I note that Defendant asserts in its Petition for Credit dated July 21, 2020 at what would be page 2, that the doctor probably did not receive that letter and its enclosure, since it was sent to an allegedly incorrect address in Pasadena.

Those cases, including the leading Court of Appeal case of *Maples*, make clear that any decision with respect to a claimed credit must consider and balance the equities of a given case. They emphasize that the conduct of the defendant in terms of their actions or a failure to act, can result in a scenario where it would be unfair and/or inequitable to award a credit, especially where the resulting overpayment can be attributed in part to the defendant's actions or inactions. That is the case here. Had defendant or its counsel in this case timely and properly sent the medical records and Applicant's deposition transcript to the QME in advance of the August 9, 2019 exam, as required by WCAB Rule 35(a) (Cal. Code. Regs. tit. 8, § 35(a)), and as reasonably expected by Applicant's attorney given normal custom and practice, it is highly likely that Dr. Myers would have found Applicant to be P&S as of August 9, 2019, in his initial report. Although there might have been a small TTD overpayment given the service delay and the short extension the QME requested and obtained from the Medical Unit, it would have been dramatically smaller than the current claim and would not have been the defendant's fault.

However, even when the parties were served with the initial QME report on October 2, 2019, it took until October 22, 2019, more than two weeks later, before the necessary records were sent by defense counsel. I point out that Applicant's attorney in this regard was more on top of this than the defendant, having quickly sent the doctor the requested records on October 11, 2019, even though it is unclear if those were received given the address discrepancy noted above. In other words, no responsibility for the delayed reporting and/or retroactive P&S date provided by the QME can be reasonably attributed to the Applicant and/or his attorney. In contrast, most of the delay can be reasonably found to have been the result of the failure to comply with well-established administrative rules and practice that require the defendant to timely provide the QME with all necessary records. This is akin to the situation in *Maples*, where the defendant failed to serve or file the defense QME report they had obtained which found the Applicant to be P&S years earlier, and where they took no action to end TTD and/or obtain an order ending TTD until years later.

I am also sympathetic to Applicant attorney's argument in his trial brief that the size of the requested credit is more than a third of the PD as found by Dr. Myers and that it would be punitive and prejudicial to the Applicant to reduce the PD due, especially when this could have been largely avoided had defendant done what they were required to do and should have done, i.e., timely send all medical and/or other relevant records to the QME in advance of the initial exam.

Defendant's trial brief basically argues that judges have discretion to award credits for benefit payments paid in error in good faith even if there was negligence, citing to the case of *Huston v. Workers' Comp. Appeals Bd.*, (1979) 95 Cal.App.3d 856, 866. (*Id.* at p. 3.) While that might be true, the trial brief does not explain or provide any analysis or rationale as to why such a credit should be awarded on the particular facts of this case, where the overpayment

can be largely attributed to their failure to timely provide medical records to the QME. Defendant's assertion that its conduct was not "egregious" (*Id.* at p. 4.) is likewise not persuasive in terms of why a credit should be allowed. In fact, a failure to timely provide records to a QME for an appointment that had been long scheduled, is largely inexcusable. In my experience, when records are not sent, almost inevitably multiple problems and delays result thereafter. Defendant does not explain in its trial brief why the records and/or a defense cover letter were never sent to Dr. Myers in advance of the first exam. That is probably because there is no reasonable explanation or excuse. Although defendant's trial brief asserts "Defendant's attorney was not aware that he [the QME] had not received records and acted swiftly to remedy that once known," the onus is on defense counsel to coordinate with his client to [ensure] that records and a cover letter are timely sent. Defense counsel is not a passive participant and should have taken the necessary steps to [ensure] that records were timely sent as required by Rule 35(a), and obviously failed to do so.

Having [considered] all the evidence and the relative equities in light of the essentially undisputed facts of this case, as reflected in the parties' stipulations and the record of admitted evidence, I find that the primary reason for delayed P&S opinion from Dr. Myers was defendant's failure to timely provide him with medical records as required by Rule 35(a) and [well-established] custom and practice. Although Applicant's examination had been scheduled and noticed months in advance, defendant still failed to timely provide the QME with the medical file. Given the significance of medical records as part of the medical legal evaluation process, it is not surprising that Dr. Myers felt the need to defer his primary findings in his initial report pending receipt and review of such records. This resulted in the need for a supplemental report and the bulk of the delay with respect to his retroactive P&S finding. Thus, the delays which caused the asserted TTD overpayment could have been avoided had defendant done what they were required to do and should have done. On these facts, I do not believe it is proper and/or equitable to award the defendant a credit for TTD overpayment against PD in my discretion as a WCJ. Accordingly, defendant's petition/request for such a credit is denied.

(Report, 2/11/21.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 11, 2021 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 4, 2022

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

**DAVID ROUNDTREE
BUTLER VIADRO
TESTAN LAW**

PAG/abs

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