

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

ELISE KING, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF WATER RESOURCES, legally uninsured; adjusted
by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9611007
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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 29, 2021

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

**ELISE KING
STATE COMPENSATION INSURANCE FUND**

pc

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 ON
PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation: Associate Governmental Program Analyst.
Applicant's Age at Injury: 52,
Date of Injury: Cumulative through May 27, 2014.
Parts of Body Injured: Psyche.
Manner in Which Injury Occurred: Cumulative trauma.
2. Identity of Petitioner: Applicant.
Timeliness: Applicant's petition was timely filed.
Verification: Applicant's petition was properly verified.
3. Date of issuance of Findings and Award: September 1, 2021.
4. Petitioners Contentions:
 - A. Petitioner contends that the finding that there is no legal basis for commuting applicant's medical award does not support the order, decision or award.
 - B. Petitioner contends that the finding that the injury resulted in an additional period of temporary disability from July 1, 2017 to and including September 20, 2017, could be based on the period of March 11, 2016 through June 1, 2016 to simplify the Labor Code section 4656(c) and Labor Code section 4903(g) issues.
 - C. Petitioner contends that the finding that applicant became permanent and stationary on August 9, 2019 is not supported by the evidence.
 - D. Petitioner contends that the finding of 14% permanent disability after apportionment is no supported by the evidence.

FACTS

On September 2, 2014, applicant filed an Application for Adjudication of Claim alleging stress.

The case initially came to trial on September 12, 2017 in front of Judge Samuel. After reading the stipulations, issues and exhibits into the record, testimony was taken from four witnesses and the matter was continued to another day of trial.

On February 12, 2018, the parties again appeared in front of Judge Samuel and five additional witnesses testified. Judge Samuel allowed applicant time to

file a trial brief and noted that the case would be submitted for decision as of March 1, 2018.

On May 31, 2018, Judge Samuel issued a Findings, Award and Order, finding that applicant: 1) sustained an injury that arose out of and occurred in the course of employment to her psyche; 2) that applicant reasonably and necessarily incurred medical expenses, and 3) that applicant was in need of further medical treatment (Findings, Award and Order, May 31, 2018), Judge Samuel awarded reimbursement of self-procured medical expenses that were to be adjusted between the parties as well as further medical care. Judge Samuel deferred the issues of temporary disability, permanent disability, apportionment, and attorney fees. Though it is noted in the Opinion on Decision that Judge Samuel felt that Guy Medford would be entitled to a 15% attorney fee on the indemnity benefits, but did not make a specific finding at that time (Opinion on Decision, May 31, 2018, at page 8).

On June 11, 2018, defendant filed a Petition for Reconsideration. The WCAB issued their Opinion and Order Dismissing Petition for Reconsideration on August 14, 2018.

On March 4, 2019, the case was again set for trial with Judge Phenix as Judge Samuel had retired. The issues listed on the Pre-Trial Conference Statement included temporary disability, permanent and stationary date, and EDD's lien.

On March 8, 2019, applicant filed a Petition to Reopen alleging that applicant's condition worsened.

At the May 16, 2019 trial, the parties entered into stipulations resolving the claim of temporary disability through March 10, 2016 for \$73,423.62, less \$27,293.62 for previous payments, less \$16,281.00 payable to EDD pursuant to a separate stipulation, and less \$4,750.00 payable as an attorney fee to the Law Office of Guy Medford. All other issues, including penalties, attorney fee on penalties were reserved and deferred. The separate stipulation resolved EDD's lien for the period of June 3, 2014 through June 1, 2015 in the amount of \$11,281.00 plus \$5,000.00 of interest for a total of \$16,281.00.

On January 25, 2021, the case was again set for trial in front of the undersigned as Judge Phenix had retired. The issues listed on the Pre-Trial Conference Statement included: 1) temporary disability; 2) permanent and stationary date; 3) permanent disability and apportionment; 4) need for further medical treatment; and 5) the lien of EDD and Guy Medford who was relieved as attorney of record on October 7, 2020.

On March 8, 2021, the parties appeared and the stipulations, issues and exhibits were read into the record. The issues for trial were: 1) temporary

disability from August 20, 2013, through September 20, 2017; 2) permanent and stationary date; 3) permanent disability and apportionment; and 4) applicant's request for commutation of her medical award. The case was continued to April 20, 2021, June 7, 2021 and August 13, 2021 to receive testimony. The case was submitted for decision on August 13, 2021.

On September 1, 2021, the subject Findings, Award and Order issued.

On September 27, 2021, applicant filed a timely and verified Petition for Reconsideration challenging the Findings, Award and Order. Specifically, applicant challenged the finding that: 1) the injury resulted in an additional period of temporary disability from July 1; 2017 through September 20, 2017; 2) applicant became permanent and stationary on August 9, 2019; 3) applicant's injury caused permanent disability of 14% after apportionment; and 4) there is no legal basis for commuting applicant's medical award. Defendant filed an Answer on October 5, 2021.

DISCUSSION

First of all, applicant attached exhibits to her Petition for Reconsideration that were not part of the adjudication file. WCAB Rule 10945(c)(2) states that a document that are not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence (Cal. Code Regs., tit. 8, § 10945).

WCAB Rule 10974 states that when reconsideration is sought on the ground of newly discovered evidence or fraud, the "*petition must contain an offer of proof, specific and detailed, providing: (a) the names of witnesses to be produced; (b) a summary of the testimony to be elicited from the witnesses; (c) a description of any documentary evidence to be offered; (d) the effect that the evidence will have on the record and on the prior decision; and (e) as to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.*" (Cal. Code Regs., tit. 8, §10974). A petition for reconsideration may be denied if it fails to comply with WCAB Rule 10974. Applicant is seeking, in part, reconsideration on the grounds of newly discovered evidence, but failed to provide a full and accurate statement of the reasons why the exhibits could not have reasonably been discovered or produced before submission. It appears that the benefit notice (Exhibit 2-2) and emails (Exhibit 5-2) were all available prior to the January 25, 2021 mandatory settle conference. Regarding the undated article listed as Exhibit 5-1, applicant again failed to provide a reason why the article could not have been produced prior to submission. It should be noted that applicant produced 49 exhibits for trial, all admitted into evidence over defendant's objection. Any claim that the undersigned precluded applicant from offering exhibits that were disclosed on the Pre-Trial Conference Statement is without merit.

With regard to Findings of Fact number 5, applicant argues that the finding that there is no legal basis to commute her medical award does not support the order, decision or award. Applicant argues that the finding and order denying her request to commute her medical award is essentially a denial of equal protection and access to medical providers without undue burdens due to implicit bias and healthcare inequities for black Americans in our local, state and country's current health environment (Petition for Reconsideration, September 27, 2021, at page 4, lines 1-3).

Labor Code sections 5000 through 5106 address compromise and releases as well as lump sum payments. Labor Code section 5101 instructs how to determine lump sum payments for temporary, permanent disability and death benefits. The undersigned is unaware of any Labor Code section, regulation or case that would allow commutation of a medical award other than by a Compromise and Release.

With regard to Finding of Fact number 2, it appears that applicant does not necessarily disagree with the temporary disability finding. However, applicant argues that the remaining weeks left under the 104 week cap should be based on the period between March 11, 2016 and June 1, 2016 thereby simplifying the Labor Code section 4656(c) and Labor Code section 4903(g) issues (Petition for Reconsideration, September 27, 2021, at page 10, lines 26-28 and page 11, at line 1). The undersigned addressed the temporary disability issue in detail in the Opinion on Decision.

Specifically, Dr. King found that applicant became permanent and stationary on March 10, 2016 (Joint Exhibit AA, at page 113; Joint Exhibit BB, at page 39, lines 1-4). Dr. King felt that sometime between April 2017 and December 2018 applicant's psychiatric condition substantially improved due to the psychotherapeutic treatment she was receiving (Joint Exhibit CC, at page 64). Noting applicant's improvement, Dr. King felt that applicant reached MMI again on August 9, 2019 (Joint Exhibit CC, at page 65 and 77).

Dr. King testified that applicant was MMI when he saw her in March 2016, but that her condition got better, but does not know specifically when the improvement began and ended (Joint Exhibit DD, at page 36, lines 23-25, and page 37, lines 1-15), Dr. King could not give specific dates because applicant could not identify when she improved psychologically, but Dr. King noted that her reporting of symptoms were significantly different (Joint Exhibit DD, at page 41, lines 21-24). Dr. King agreed that applicant likely came off MMI status when she began the psychotherapy (Joint Exhibit DD, at page 44, lines 8-17).

The undersigned found the additional period of temporary disability from July 1, 2017 through September 20, 2017 based on the work status report of Dr. Sizer (Applicant Exhibit 8). In light of the evidentiary record, this period of temporary disability was consistent with Dr. King's opinions as expressed above.

Applicant's argument that she should be awarded temporarily disability between March 11, 2016 and June 1, 2016, because this would avoid the potential overlap between the unemployment benefits that she received, is not supportable on this record.

With regard to Finding of Fact 3, applicant does not provide any argument or reasoning as to why she disagrees with the permanent and stationary date of August 9, 2019. This date was based upon the opinion of Dr. King (Joint Exhibit CC, at pages 65 and 77).

With regard to Finding of Fact 4, applicant argues that Dr. King's apportionment opinion is not substantial medical evidence. Dr. King took a detailed history from applicant, reviewed pertinent medical records and concluded that there was apportionment to factors other than the industrial injury (Joint Exhibit CC, at page 68-71).

Dr. King justified apportioning 17% of applicant's permanent disability to pre-existing compulsive traits that made it challenging for applicant to adopt to new environmental demands and various personalities (Joint Exhibit CC, at page 68). This apportionment is supported by Dr. King's observation that although applicant showed some capacity for interpersonal empathy and flexibility in her thinking, applicant has an abrasive and forceful quality to her speech and interpersonal style that was off-putting (Joint Exhibit CC, at page 53).

Dr. King justified apportionment of 10% of applicant's permanent disability to family stressors, which included her son's potential of being exposed to dangerous conditions in the military and a degree of discord in her marriage (Joint Exhibit CC, at page 69). Dr. King was also uncertain how forthcoming applicant was regarding her concerns about her children abusing substances and her husband gambling (Joint Exhibit CC, at page 69).

Dr. King justified apportionment of 13% of applicant's permanent disability to her non-industrial multi-nodular goiter (Joint Exhibit CC, at page 69). This apportionment is consistent with Dr. Nacouzi's conclusion that applicant's thyroid goiter was non-industrial and contributed to her stress (Joint Exhibit EE, at page 11; Joint Exhibit FF, at page 18, lines 16-18).

Dr. King justified apportionment of 5% of applicant's permanent disability to applicant's non-industrial difficulty maintaining steady employment since March 10, 2016 (Joint Exhibit CC, at page 70). Specifically, Dr. King felt that applicant's lack of steady employment has resulted in diminished financial stability noting that her current financial situation was more precarious than it was on March 21, 2016 (Joint Exhibit CC, at page 70). Dr. King also noted that applicant reluctantly disclosed at the end of the initial evaluation that she had filed for bankruptcy on two occasions in the past after not reporting this

information when specifically asked on the intake questionnaire (Joint Exhibit CC, at page 63).

Nothing in applicant's Petition for Reconsideration would change the analysis or conclusions set forth in the Findings, Award and Order issued on September 1, 2021.

RECOMMENDATION

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

NOAH W. TEMPKIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE