WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EVERETT FIELDS, *Applicant*

vs.

KNIGHT-SWIFT TRANSPORTATION,
permissibly self-insured, administered by
GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ11602559
Marina del Rey 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. We now issue our Opinion 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, we will affirm the October 26, 2020 Findings of Fact and Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 26, 2020 Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 9, 2021

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

EVERETT FIELDS
HINDEN & BRESLAVSKY
GODFREY, GODFREY & LAMB

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

1.	Applicant's Occupation:	Truck Driver
	Age:	60
	Parts of Body Injured:	Right hip, head, neck, left shoulder, left arm, bilateral wrists, lumbar spine, cervical spine, bilateral knees, and right leg.
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition was timely filed.
	Verified:	The Petition was verified.
3.	Date of Issuance of Findings & Award:	October 26, 2020

4. The Petitioner contends:

a) That this WCJ exceeded my power when awarding retroactive temporary disability in excess of the statutory maximum for the date of injury; That this WCJ erred in finding that defendant did not sustain its burden of proving entitlement to credit for benefits paid by Occupational Accident Policy wholly funded by applicant against temporary disability benefits;

b) That this WCJ erred in finding temporary disability to start on July 7, 2018 as opposed to applicant's last date of work on January 25, 2017; and

c) That this WCJ denied defendant's due process rights by excluding the January 1, 2019 Occupational Accident Policy and failing to develop the record.

II. SUMMARY OF FACTS

Applicant was an employee truck driver for defendant after he graduated from Swift Academy in July 2014. On December 4, 2015, the parties entered into Independent Contractor Agreement (Exhibit A).

On January 24, 2017, while driving a load, applicant's truck hit black ice, hit the guardrail, and rolled over. Applicant was taken by ambulance to Stillwater Billings Clinic,

which is a hospital (Exhibit 1). He reported the injury to defendant's Safety Department on the date of injury but was not provided with a Claim Form. He received benefits at the weekly rate of $700 from the Occupational Accident Policy from February 3, 2017 to September 6, 2018. Parties stipulated that payments for the Occupational Accident Policy were deducted from applicant's paycheck.

On October 15, 2018, applicant, via counsel, filed Claim Form and Application for Adjudication of Claim, alleging injury to multiple body parts. On January 3, 2019, defendant denied injury asserting independent contractor status (Exhibit B).

On May 20, 2019, the parties went to Trial on the issues of employment and injury arising out of and in the course of employment. Defendant raised independent contractor status and affirmative Statute of Limitations defense. On June 28, 2019, this WCJ issued Findings of Fact & Order, Opinion on Decision, finding that applicant was an employee on the date of injury and that the claim is not barred by the affirmative Statute of Limitations defense. Neither party appealed said Decision.

On April 27, 2020, applicant's attorney filed a Declaration of Readiness to Proceed on the issues of temporary disability and medical treatment. There was no objection to said Declaration of Readiness to Proceed in EAMS. On May 19, 2020, the parties appeared before WCJ Jackson for a Mandatory Settlement Conference and WCJ Jackson noted in the Minutes of Hearing that the matter shall be set for Trial on the issue of hip surgery only and that the parties shall submit Points and Authorities. On July 6, 2020, the unsigned Joint Pre-trial Conference Statements were efiled into EAMS, which included issues beyond hip surgery.

At the time of Trial on July 22, 2020, the parties resolved the disputes regarding discovery and medical treatment. The sole issue remaining was the dispute regarding temporary disability. During said hearing, the parties submitted the signed Joint Pre-trial Conference Statements to this WCJ, which was uploaded into EAMS. Trial was continued to August 25, 2020.

Case went forward to Trial on August 25, 2020 with applicant's testimony taken via teleconference. Both parties to file concurrent Post-trial Briefs by September 15, 2020 and the case was submitted. On October 26, 2020, this WCJ issued Findings of Fact & Award, Opinion on Decision.

On November 20, 2020, defendant filed a Petition for Reconsideration, dated November 19, 2020, with attachments. On November 25, 2020, applicant's attorney submitted Applicant's Answer to Defendant's Petition for Reconsideration; Applicant's Petition for Costs, dated November 25, 2020.

III.
DISCUSSION

1. This WCJ did not exceed my power when awarding retroactive temporary disability in excess of the statutory maximum for the date of injury

Labor Code §4661.5 states as follows:

> Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary

> disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computer the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453.

Applicant's date of injury was January 24, 2017 and defendant first picked up temporary disability benefits on June 28, 2019 (MOH (Further)/SOE, August 25, 2020, Page 2, Lines 13–13½), more than two years from the date of injury. Hence applicant's temporary disability rate should be $1,251.38 per week pursuant to Labor Code §4661.5 and Hofmeister. In fact, defendant paid applicant temporary disability benefits at this rate from June 28, 2019 to November 22, 2019.

Furthermore, the parties stipulated to applicant's temporary disability indemnity rate at $1,251.38 at Trial (MOH (Further)/SOE, August 25, 2020, Page 2, Lines 10-10½).

> Where a stipulation has been entered into through inadvertence, excusable neglect, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation, a court may exercise its sound discretion and set aside the stipulation. Huston v. WCAB, (1979) 95 Cal. App. 3d 856, 865.

Defendant did not mention or demonstrate any of the aforementioned grounds in its Petition for Reconsideration in order to set aside said stipulation.

Based on the foregoing, this WCJ did not err in awarding retroactive temporary disability at the weekly rate of $1,251.38.

2. This WCJ did not err in finding that defendant did not sustain its burden of proving entitlement to credit for benefits paid by Occupational Accident Policy wholly funded by applicant against temporary disability benefits

Defendant was asserting credit against the benefits paid to applicant under the Occupational Accident Policy. The Occupational Accident Policy paid benefits from February 3, 2017 to September 6, 2018 at the weekly rate of $700. In its Trial Brief, dated September 15, 2020, as well as its Petition for Reconsideration, defendant raised Labor Code §4909, Appleby v. Workers' Comp. Appeals Bd. (27 Cal.App.4th 187) (1994), and Ott v. Workers' Comp. Appeals Bd. (118 Cal.App.3d 921) (1981) to support their position. Defendant bears the burden of proving it is entitled to said credit.

As stated in this WCJ's Opinion on Decision, dated October 26, 2020, defendant raised Labor Code §4909 but failed to acknowledge the title for said Section, which is "Effect of employer's payment of benefits before settlement." The benefits paid from February 3, 2017 to September 6, 2018 were not paid by the employer/defendant. The parties stipulated that payments for the Occupational Accident Policy were deducted from applicant's paycheck. This stipulation is corroborated by applicant's testimony at Trial (MOH (Further)/SOE, dated August 25, 2020, P.4, Lines 11-12) and the Independent Contractor Agreement, dated December 4, 2015 (Exhibit A), Pages 5, Paragraph 7A, 34 and 36.

As explained by the Court in Appleby, Labor Code §4909 is intended to encourage employers to make voluntary payments to injured employees and obtain a subsequent reduction in the amount determined to be due the employee. In this case, there is no evidence that defendant made any voluntary payments into applicant's Occupational Accident Policy, in part or in whole. Thus, Labor Code §4909 is not applicable herein.

Defendant's reliance on Appleby and Ott is also misplaced because they are distinguishable from the facts herein. In Appleby and Ott, the disability plans therein were fully funded by the employers/defendants. Whereas in this case, there is absolutely no evidence that defendant made any payments into applicant's Occupational Accident Policy.

It is indisputable that the employer mandated applicant to purchase either Occupational Accident or Workers' Compensation coverage for any work related injuries as part of the Independent Contractor Agreement. It is also indisputable that applicant purchased Occupational Accident Policy Plan A and agreed to monthly deductions of $140 from his paycheck. Under Plan A, applicant was entitled to and in fact received disability benefits at the weekly rate of $700 from February 3, 2017 to September 6, 2018 (Exhibit A, Pages 32, 34 and 35). Allegedly, the Occupational Accident Policy, dated January 1, 2019 (Exhibit C), which was not admitted into evidence, contains language "that the benefits are issued as temporary disability and a credit could be taken for worker's compensation benefits" (Petition for Reconsideration, Page 9, Lines 1-2).

If the Occupational Accident Policy did include the aforementioned language, since this WCJ already found applicant to be an employee and not an independent contractor (Findings of Fact & Order, dated June 28, 2019), and that there is no evidence that defendant paid into said Policy, such language, as well as defendant's ongoing assertion of credit are a blatant violation of Labor Code §3751(a).

Labor Code §3751(a) states as follows:

> No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee, either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this subdivision is a misdemeanor.

Ultimately, this WCJ believes that applicant's attorney succinctly addressed this dispute in his Answer, which states as follows:

> Defendant seems to miss the crux of the matter. Defendant did not contribute a single dollar for Applicant's Occupational Accident Benefits. Applicant paid for the Occupational Accident Benefits out of his own paycheck and Defendant has not illustrated how Applicant paying for these benefits entitles Defendant to credit. Defendant is not entitled to free money. (Applicant's Answer to Defendant's Petition for Reconsideration; Applicant's Petition for Costs, dated November 25, 2020, Page 5, Lines 19½-22½.)

Based on the foregoing, this WCJ did not err in finding that defendant did not sustain its burden of proving entitlement to credit for benefits paid by Occupational Accident Policy, which was wholly funded by applicant, against applicant's award of retroactive temporary disability benefits.

3. This WCJ did not err in the start date of applicant's temporary disability benefits

Defendant argued that the start date of applicant's temporary disability should be January 25, 2017, which is exactly what this WCJ found and awarded.

4. This WCJ did not deny defendant's due process rights

Defendant argued that this WCJ improperly excluded the Occupational Accident Policy, dated January 1, 2019 (Exhibit C), and failed to develop the record by admitting said Policy into evidence.

Labor Code §5502(d)(3), in part, states as follows:

> Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

On April 27, 2020, applicant's attorney filed a Declaration of Readiness to Proceed on the issues of temporary disability and medical treatment. There was no objection to said Declaration of Readiness to Proceed in EAMS. On May 19, 2020, parties appeared before WCJ Jackson for a Mandatory Settlement Conference and WCJ Jackson noted in the Minutes of Hearing that the matter shall be set for Trial on the issue of hip surgery only and that the parties shall submit Points and Authorities. The set of unsigned Joint Pre-trial Conference Statements were efiled by defendant on July 6, 2020, which included issues beyond hip surgery (labeled as "TRIAL EXHIBITS (Everett Fields).pdf" (EAMS Doc ID 32978950)). Neither party filed any Points and Authorities until after the August 25, 2020 Trial.

At the time of the August 25, 2020 Trial, defendant wanted to submit the Occupational Accident Policy, dated January 1, 2019 (Exhibit C). Applicant's attorney objected on the basis that said Exhibit was not listed on the Pre-trial Conference Statements and discovery had closed. Defendant argued that he did not realize that the Occupational Accident benefits were disputed for credit. Of course, since this Policy is dated January 1, 2019, it was in existence before the May 19, 2020 Mandatory Settlement Conference. This WCJ did not admit Exhibit C into evidence (MOH (Further)/SOE, Page 3, Lines 11½-16½).

The unsigned Joint Pre-trial Conference Statements efiled on July 6, 2020, clearly show on the "Issues" page, applicant claimed temporary disability from July 7, 2018 to present and ongoing, less amounts paid, while defendant raised Occupational Accident benefits in the sum of $59,100 from February 3, 2017 to September 6, 2018, in addition to temporary disability paid by defendant in the sum of $23,954.99. Any claim for credit for benefits paid by either the Occupational Accident Policy or defendant or both against the claimed temporary disability period was clearly at issue. Defendant's reliance on Kuykendall is once again misplaced as defendant failed to demonstrate that the issue of credit against claimed temporary disability benefits is an unanticipated issue.

In fact, another issue in dispute based on the unsigned Joint Pre-trial Conference Statements was "Earnings." Clearly, defendant asserted $1,050 per week based on "Occupational Accident Policy." Yet, defendant did not list said Policy as an Exhibit. It is this

WCJ's belief that defendant failed to list said Policy as an Exhibit and is using Kuykendall, allegations of denial of due process right and this WCJ's failure to allow development of the record to backdoor this Policy into evidence.

> The WCAB does not have a duty to develop the record where a party who has the burden of proof recognizes the insufficiency of the record and does not take appropriate action. (Lozano v. WCAB (2002) 67 Cal. Comp Cases 970)

Actually, defendant has yet to demonstrate how any terms and/or agreement in the Occupational Accident Policy, dated January 1, 2019, are relevant to the Occupational Accident benefits paid from February 3, 2017 to September 6, 2018.

Based on the foregoing, this WCJ did not deny defendant's due process rights by excluding the Occupational Accident Policy or not developing the record.

Lastly, defendant attached Exhibits A, B, and C to its Petition for Reconsideration. Exhibit A, Panel QME report from, Neil Ghodadra, M.D., dated November 7, 2019, has already been admitted into evidence as Applicant's Exhibit 3. Exhibits B and C are Minutes of Hearing (Further) and Summary of Evidence, dated August 25, 2020, and this WCJ"s Decision, dated October 26, 2020, respectively, which are part of the Board record. There is no need to attach any of these documents to defendant's Petition for Reconsideration. It is respectfully recommended that said attachments be detached and discarded pursuant to 8 CCR §10945(c)(1).

IV.
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied for the reasons stated above.

Dated: December 2, 2020

IVY W. MI
Workers' Compensation Administrative Law Judge