

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

RICHARD CORTEZ, *Applicant*

vs.

**PARAMOUNT PICTURES;
PERMISSIBLY SELF-INSURED, ADMINISTERED BY MURPHY AND BEANE,
*Defendants***

**Adjudication Numbers: ADJ555322, ADJ1127657, ADJ3643619, ADJ3733400, ADJ615070
Marina Del Rey 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 23, 2023

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

**RICHARD CORTEZ
KOSZDIN, FIELDS & SHERRY
LAW OFFICES OF MURPHY AND BEANE**

HAV/ara

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

JOINT REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

- | | | |
|-----|--|---|
| 1. | Applicant's Occupation: | Laborer |
| 2. | Applicant's Age: | 40 to 47 |
| 3. | Dates of injury: | 3/19/90; 7/13/1997;
2/8/1996; 1/26/1996;
5/9/1995 |
| 4. | Parts of Body injured: | multiple |
| 5. | Manner in which injuries
have occurred: | specific injuries |
| 6. | Identity of Petitioner: | Defendant |
| 7. | Timeliness: | The Petition was filed
timely. |
| 8. | Verification: | A verification is attached. |
| 9. | Date of Findings of Fact and
Order: | 10/31/2022 |
| 10. | Petitioner's contentions: | The WCJ acted in excess of
her powers, the evidence does not justify the
findings of fact, the findings of fact do
not support the order, decision, or
award. |

II
FACTS

All five cases set forth above were initially set for expedited hearing before the undersigned WCJ on 7/7/2021 on the issues including Applicant's entitlement to an increase in TTD rate and attorney fees. The cases were continued for expedited hearing on several occasions and then continued to the trial calendar on several occasions until the trial commenced on the record and the cases were consolidated on 6/29/2022. The trial was continued to complete the testimony of the Applicant and the defense witness, Tracy Owen, on 8/18/2022 and on that date the issues were submitted for

decision. The only issues to be decided on all five cases were whether Applicant is entitled to an increase in his TD rate and attorney fees arising therefrom.

A Joint Findings of Fact and Award issued on 10/31/2022. The Findings of Fact concluded Applicant was entitled to an increase in his temporary disability payments retroactive to 1/1/2003 based on the application of Labor Code Section 4661.5. Defendant filed a timely and verified Petition for Reconsideration on 11/22/2022. Then on 11/28/2022 Defendant filed a Declaration to Proceed seeking a court order for Applicant's Social Security Earnings records in order to accurately calculate Applicant's appropriate TTD rate. Applicant filed a verified Answer to Petition for Reconsideration on 12/5/2022. The hearing set on the Declaration filed by Defendant will be deferred until the matter returns from the Recon Unit.

The Petition for Reconsideration should be denied for the following reasons.

III **DISCUSSION**

The WCJ found that Applicant was entitled to a retroactive increase to his temporary disability indemnity and the payment of this retroactive increase should be paid pursuant to Labor Code Section 4661.5. The last date of injury at issue is 1997. Defendant's first argument disputes the method of calculating that retroactive rate contending that Labor Code Section 4453 (c) (1) should be utilized rather than the section relied upon by the WCJ in her decision, Section 4453 (c) (4) and (d). To be clear, there was no evidence whatsoever presented at trial as to how Applicant's previous temporary disability was calculated. The only issue presented at trial was whether or not Applicant was entitled to an increased temporary disability rate pursuant to Labor Code Section 4661.5¹ and the *Hofmeister* decision.

Defendant contends that the calculation of Applicant's earnings should be made in accord with Labor Code section 4453 (c) (1), which sets forth as follows, "Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of injury." To the contrary, Defendant failed to elicit either testimonial evidence or documentary evidence at trial to establish that applicant worked 30 or more hours a week and five or more working days a week. In fact, Defendant actually attempted to make the point at trial and in the pleadings, that Applicant was a day hire studio lot laborer who was never guaranteed another job with Paramount Studios and worked irregularly.

Ultimately, the WCJ made a determination that Labor Code Section 4453 (c) 4 and (d) were a more reasonable and fair method of calculating the Applicant's wages based on the credible and un rebutted testimony of the Applicant, the credible testimony of the defense witness, Tracy Owen and the entire record.

The Applicant testified that from the time he joined the Laborer's Union Local 724 in 1979 and throughout his career that he received periodic increases in his salary pursuant to the union contract. The Applicant testified that in the early to mid-nineties he worked off and on and earned

¹ The Minutes of Hearing and Order of Consolidation dated 6/29/2022 incorrectly cites Section 4061.5 but the trial briefs for both sides cite the correct Section 4661.5

enough to support his family and further that if he hadn't injured himself, it was his intention to continue working as a union laborer. (See Minutes of Hearing and Summary of Evidence dated 8/18/2022, page 2 lines 15 to 17 and 23 to 24)

On cross-examination, Applicant confirmed that he was rehired and terminated on multiple occasions every year of his career and that he worked on a full-time basis at different times during his career working for various studios including Paramount. Defendant's focus on Applicant's work history at Paramount Studios fails to take into consideration the other studios that Applicant worked for prior to his injuries at Paramount. The Applicant also acknowledged that although his income fluctuated throughout the years, he earned enough while working for Paramount Pictures to qualify for health coverage with the Motion Picture Health and Welfare healthcare plan. (See Minutes of Hearing and Summary of Evidence dated 8/18/2022, page 4, lines 1 to 2)

Defendant relies on the holding in *Grossmont Hospital v WCAB 59 Cal Comp Cases 1649* (1997).² to support their position that Applicant is not entitled to a retroactive increase in his temporary disability. Contrary to Defendant's contention, the Court of Appeal in that case did not deny Applicant's claim for a higher TTD rate but rather remanded the matter back to the trial level to determine whether there was a record to establish whether the wage increase was scheduled or reasonably anticipated at the time applicant was injured. The record in the instant case is sufficient to establish that Applicant's wage increases were both scheduled and reasonably anticipated at the time of his injuries.

The defense witness, Tracy Owen, the Vice President of Labor Relations with Paramount Pictures, confirmed that during the time frame at issue, that there was a collective bargaining agreement in place between Paramount Pictures and the union applicant worked for. (See Minutes of Hearing and Summary Evidence dated 8/18/2022, page 6, lines 18 to 20)

Defendant next contends that there was no delay in payment of TD benefits per *Hoffmeister* and Labor Code Section 4661.5 because TD benefits were paid. As Applicant points out in his Answer, the wording in Labor Code Section 4661.5 is clear. The section states as follows, "Notwithstanding any other provision of this division, when any temporary disability indemnity payment is made two years or more after 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. . ."

Applicant cites the panel decision of *Guindon v. Robertson's Ready Mix 2016 Cal. Wrk. Comp. P.D. LEXIS 615*³ and the case, *Jusufbegovic v. Fiesta Ford Lincoln Mercury 2010 Cal. Wrk. Comp. P.D. LEXIS 418* in support of the position that Labor Code Section 4661.5 makes no distinction between a partial or full payment of temporary disability paid so long as the payment is made 2 or more years after the date of injury, and it is in fact for temporary disability. While the *Guindon* decision does stand for the position set forth above, the

² Defendant incorrectly cited this case as Grossman Hospital in the Petition for Reconsideration.

³ Applicant incorrectly cites this panel decision as Guidon in his Answer.

Jusuſbegovic case is not citable authority. Based on the entire record, the interpretation of Labor Code Section 4661.5 in the instant case is consistent with the ruling in *Hofmeister*.

Finally, Defendant raises the legal doctrine of Laches but as Applicant points out in his Answer, no evidence was offered to prove either unreasonable delay by Applicant in bringing his claim or that as a result Defendant suffered prejudice. Applicant testified that he did not bring his claim for retroactive temporary disability as early as 2004 or 2005 because he didn't know about it then and he didn't know he was owed money in 2008. He also testified that in 1995 he didn't know he would still be on temporary disability this long. (See Minutes of Hearing and Summary of Evidence dated 8/18/2022, page 3 lines 8) The applicant's testimony was deemed credible by the WCJ and Defendant failed to present any evidence that any prejudice occurred.

RECOMMENDATION

As the Petition for Reconsideration fails to demonstrate good cause upon which to base the setting aside of the Findings and Award dated 10/31/2022, it is respectfully recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Date: 12/21/2022

CIRINA A. ROSE
Workers' Compensation Judge