

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

TERESA LAZCANO, *Applicant*

vs.

WALT DISNEY TRAVEL COMPANY, PERMISSIBLY SELF-INSURED, *Defendants*

**Adjudication Number: ADJ7957957
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of our January 18, 2023 Opinion and Decision After Reconsideration (ODAR), wherein we affirmed the WCJ's findings that applicant, while employed as a phone service clerical worker from July 24, 2010 to July 24, 2011, sustained industrial injury to the psyche, cervical spine, thoracic spine, lumbar spine, bilateral upper extremities and left lower extremity. We affirmed the WCJ's determination that applicant had sustained permanent and total disability, but amended the award of permanent disability to commence after the final payment of temporary total disability (TTD) on November 12, 2012. We further amended the TTD awarded to five years from the date of injury pursuant to Labor Code section 4656(c)(2).¹

Defendant contends that given our amendment of the permanent disability start date to November 13, 2012, it was error to affirm the award of temporary disability between March 2, 2016 and July 24, 2016. Defendant further challenges the award of permanent and total disability effective November 13, 2012, when applicant returned to work for two subsequent employers in 2014 and 2015. Defendant also contests the underlying award of permanent and total disability given applicant's return to work generally.

¹ All further statutory references are to the Labor Code unless otherwise stated.

We have received an Answer from applicant. Because defendant seeks reconsideration of a decision of the Workers' Compensation Appeals Board, the WCJ has not prepared a Report and Recommendation on Petition for Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer. Based on our review of the record, and for the reasons discussed below, we will dismiss the Petition to the extent it is successive to defendant's November 19, 2021 Petition for Reconsideration. However, in the interests of due process, we will grant reconsideration for the limited purpose of development of the record to address the equitable considerations necessary to a determination of whether defendant should be allowed credit for the additional awarded periods of temporary disability as against the award of permanent and total disability.

BACKGROUND

The following factual background is set forth in our January 18, 2023 ODAR:

Applicant's underlying claim of disability was decided by F&A dated August 27, 2015, which determined that applicant, while employed as a service clerical worker from July 24, 2010 to July 24, 2011, sustained injury arising out of and in the course of employment to her psyche, cervical spine, thoracic spine, lumbar spine and bilateral upper extremities. (F&A, dated August 27, 2015, Findings of Fact No. 1.) The F&A awarded, in relevant part, temporary disability for the period August 31, 2011 to November 12, 2012, and 58% permanent disability. (Findings of Fact Nos. 3 and 5.)

Applicant filed a Petition to Reopen for New and Further Disability on April 12, 2016, alleging a worsening of her condition resulting in additional permanent disability and need for medical treatment. (Petition to Reopen, dated April 12, 2016.)

On June 17, 2021, the parties proceeded to trial and framed issues of the "Petition to Reopen," whether applicant was permitted to raise the issue of temporary disability for failure to list the issue on the Declaration of Readiness to Proceed (DOR), and whether applicant sustained additional temporary disability from March 2, 2016 to May 17, 2017, and also for April 2, 2019 to June 2, 2020. (Supplemental Minutes of Hearing (Minutes), dated June 17, 2021, at 3:19.) The parties submitted extensive additional documentary evidence, including supplemental reporting from Agreed Medical Examiners (AMEs) David Heskiwoff, M.D., in orthopedic medicine, and 3 Lawrence Richman, M.D., in neurology. Applicant also submitted vocational reporting from Paul Broadus, M.A.

On August 11, 2021, trial proceedings continued with the testimony of applicant, followed by the submission of the matter for decision.

On October 25, 2021, the WCJ issued her F&A, determining in relevant part that applicant had sustained an additional period of temporary disability from March 2, 2016 to December 30, 2016, and awarding permanent and total disability. (F&A, dated October 25, 2021, at p. 2.)

In her Opinion on Decision, the WCJ noted that despite findings of additional periods of temporary disability by AME Dr. Heskaioff of March 2, 2016 to May 17, 2017, and for April 22, 2019 to June 4, 2020, Labor Code section 4656(c)(2) limited the court's jurisdiction to award temporary disability to five years from the date of injury of July 24, 2011.2 (F&A, Opinion on Decision, p. 2.) The WCJ further noted that limitation of the award of temporary disability to 104 weeks, and awarded disability through December 30, 2016. (Ibid.) The WCJ further observed that the unapportioned ratings of the AMEs, as well as Dr. Heskaioff's opinion that applicant was unable to compete in the labor market, both supported a finding of permanent and total disability. (Id. at p. 3.)

Defendant's Petition for Reconsideration (Petition) contends in relevant part that the award of temporary disability impermissibly exceeds five years from the date of injury under section 4656(c)(2). (Petition, at 1:22.) The Petition further avers it was error to find applicant permanently and totally disabled, and that the WCJ should develop the record due to the incomplete vocational reporting. (Id. at pp. 1-2.) The Petition further contends that the WCJ impermissibly identified injury to body parts not specifically placed in issue. (Id. at 20:19.)

The WCJ's Report observes that the five year jurisdictional period of section 4656(c)(2) would end on July 24, 2016, and recommends we grant reconsideration to amend the award of temporary disability to conform to that date. (Report, at p. 9.) Similarly, the Report acknowledges that the parties did not stipulate to new and further disability to the shoulders, left leg, left knee, left foot, headaches and sleep as stated in Findings of Fact No. 2, but rather that this was a decision made by the WCJ. (Id. at p. 10.) The Report observes that the reports of AME Dr. Heskaioff and vocational expert Mr. Broadus agree that applicant is not able to reenter the labor market, and that these findings support applicant's assertion of permanent and total disability. (Ibid.) Finally, the WCJ noted that her determination as to injured body parts was based on her review of the medical record. (Id. at p. 11.)

Our January 18, 2023 decision affirmed the WCJ's determination that applicant had sustained permanent and total disability. (ODAR, dated January 18, 2023, at pp. 6-7.) However, we conformed the award of permanent disability to comply with the en banc decision in *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Brower), which provides that the "[w]hen the injured worker becomes permanent and stationary and is determined to be permanently totally disabled, the defendant shall pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability

indemnity terminated.” (*Id.* at p. 552.) Accordingly, we amended the award of permanent and total disability to commence on November 13, 2012, the day following the last day of temporary disability paid on November 12, 2012. (ODAR, p. 6.) We further agreed with the WCJ’s recommendation that we limit the period of awarded temporary disability to conform to the five year jurisdictional limitation of section 4656(c)(2). (ODAR, p. 8.)

Defendant’s Petition for Reconsideration avers error in the award of permanent and total disability because applicant returned to work for a subsequent employer for three months in 2014, and another employer for 12 months in 2015. (Defendant’s Petition for Reconsideration of Opinion and Decision After Reconsideration (Petition), at 14:18.) Defendant further maintains that the award of temporary disability in 2016 is moot given our determination that permanent and total disability benefits begin on November 13, 2012. (*Id.* at 13:14.)

Applicant’s Answer avers defendant’s Petition is successive, and therefore procedurally improper. (Answer, at 4:3.) The Answer further observes that the fact of applicant’s employment subsequent to defendant was already a part of the evidentiary record, and was addressed by the reporting medical and vocational experts. (*Id.* at 9:1.) The Answer requests we deny the petition, and award costs pursuant to section 5813. (*Id.* at 10:4.)

DISCUSSION

It is well settled that where a party fails to prevail on a petition for reconsideration, the Appeals Board will not entertain a successive petition by that party unless the party is newly aggrieved. (*Goodrich v. Industrial Acc. Com.* (1943) 22 Cal.2d 604, 611 [8 Cal.Comp.Cases 177]; *Ramsey v. Workmen’s Comp. Appeals Bd.* (1971) 18 Cal.App.3d 155, 159 [36 Cal.Comp.Cases 382]; *Crowe Glass Co. v. Industrial Acc. Com. (Graham)* (1927) 84 Cal.App. 287, 293-295 [14 IAC 221].) As stated in our en banc opinion in *Navarro v. A&A Framing* (2002) 67 Cal.Comp.Cases 296, 299:

The general rule is that where a party has filed a petition for reconsideration with the Board, but the party does not prevail on that petition for reconsideration, the petitioning party cannot attack the [Appeal’s] Board’s action by filing a second petition for reconsideration; rather, the petitioning party must either be bound by the [Appeals] Board’s action or challenge it by filing a timely petition for writ of review.

Here, defendant's November 19, 2021 Petition for Reconsideration challenged the award of permanent and total disability. (Petition for Reconsideration, dated November 19, 2021, at 17:13.) The instant Petition again seeks to challenge the award of permanent and total disability, arguing that the decision fails to adequately consider applicant's employments subsequent to that of the defendant. (Petition, at 14:18.) However, to the extent that the arguments were not raised with particularity in the defendant's first Petition for Reconsideration, they have been waived. (Lab. Code, § 5904; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ denied); *Jobity v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 978 (writ den.); *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ denied).) To the extent that the Petition reiterates the arguments against permanent and total disability advanced in the original petition, defendant is not newly aggrieved, and a successive petition is inappropriate. (*Goodrich v. Industrial Acc. Com.*, *supra*, 22 Cal.2d 604, 611.) Accordingly, we will dismiss the petition to the extent that it raises successive arguments with respect to the nature and extent of permanent disability.

Defendant further contends that our affirmation of the WCJ's award of TTD from March 2, 2016 to July 24, 2016 is moot, given our application of the en banc decision in *Brower*, *supra*, 79 Cal.Comp.Cases 550, to award permanent disability payments starting November 13, 2012. (Petition, at 13:14.) Defendant correctly notes that in *Brower*, we exercised our discretion "to allow defendant credit for all indemnity benefits previously paid." (*Id.* at 563.) However, our allowance of credit in *Brower* was specifically premised on a weighing of the equitable considerations discussed in *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 834 [168 Cal. Rptr. 884, 45 Cal.Comp.Cases 1106]. In *Maples*, the Court of Appeal observed that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on his part. (*Maples*, *supra*, at 836–837.)

Here, the application of the holding in *Brower*, *supra*, 79 Cal.Comp.Cases 550, requires that permanent disability benefits commence on November 13, 2012, the day following the last date of payment of temporary disability indemnity. The question of whether the defendant may be

entitled to credit for subsequent payment of temporary total disability indemnity as against a different species of benefit is not substantively addressed in the current record.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805].) Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157-158.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Rucker, supra*, at 157-158, citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21].)

Following our review of the record, we believe that principles of due process require that the parties be allowed the opportunity to advance arguments and present evidence responsive to the issue of whether the defendant should be allowed credit for payment of temporary disability subsequent to the commencement date of the award of permanent and total disability. (*Maples v. Workers' Comp. Appeals Bd., supra*, 111 Cal.App.3d 827, 834.)

Accordingly, we will deny the defendant's Petition to the extent its challenge to applicant's permanent disability levels as successive, but grant the Petition for the purpose of allowing the parties their due process right to advance arguments responsive to the issue of credit for temporary disability benefits previously paid by defendant against the award of permanent disability.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the January 18, 2023 Opinion and Decision After Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 18, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

- 4a. The issue of whether defendant is entitled to credit for temporary total disability previously paid as against other species of benefits is **DEFERRED** to additional proceedings at the trial level, with jurisdiction reserved to the WCJ.

AWARD

- a. Permanent disability of 100%, entitling applicant to permanent total disability indemnity at the rate of \$249.92 commencing November 13, 2012, less credit to defendant for sums previously paid, subject to annual COLA adjustments commencing January 1, 2013, and less 15% attorney fees payable to Glauber Berenson, less credit for fees previously paid, in an amount to be adjusted by the parties with jurisdiction retained in the event of further dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2023

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

**TERESA LAZCANO
GLAUBER, BERENSON & VEGO
LAW OFFICE OF KEVIN M. KIM**

SAR/abs

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