WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD LEE NEILL, *Applicant*

vs.

LUCKY'S GLASS, L.L.C., and NATIONAL LIABILITY & FIRE INSURANCE COMPANY, administered by NORTH AMERICAN RISK SERVICES, *Defendants*

Adjudication Number: ADJ11078708
Long Beach District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings of Fact & Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 21, 2022, wherein the WCJ found in pertinent part that that the temporary disability indemnity rate was based on an increased average weekly earnings rate of $560.00; that applicant was entitled to a period of temporary disability indemnity for the period from December 5, 2017, through December 2, 2019; that the Employment Development Department (EDD) paid applicant disability benefits during the period from February 14, 2018, through August 15, 2018, at $257.00 per week, but the EDD had not yet filed a lien and jurisdiction was reserved as to the EDD lien; that defendant did not timely pay temporary disability indemnity benefits so it was subject to a 10% increase; and that defendant did not timely pay permanent disability indemnity benefits so it was subject to a 10% increase.

Defendant contends that applicant's earnings should be based on his wages at the time of his injury, that defendant submitted Offers of Proof instead of calling witness it had previously identified; that applicant is not entitled to an award of temporary disability indemnity after December 5, 2017, that there should not have been an order that the EDD be reimbursed for benefits it paid to applicant, and that there was no unreasonable delay in paying benefits so the 10% penalties were not warranted.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received a Response (Answer) from applicant. We have considered the allegations in the Petition and the

Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to his cervical spine, right shoulder, and lumbar spine, while employed by defendant as a window/door installer/glazier during the period from May 25, 2017, through November 9, 2017.

Applicant's primary treating physician (PTP) was William Mealer, M.D. (See App. Exhs. 1 – 18.) Applicant was evaluated by orthopedic qualified medical examiner (QME) Theodore Georgis, Jr., M.D., on July 16, 2019. Dr. Georgis examined applicant, took a history, and reviewed the medical record. The diagnoses were neck with radicular right arm pain, probable cervical spine sprain/strain with right cervical radiculitis, right shoulder sprain/strain, and low back and right radicular leg pain; probable chronic sprain/strain with right lumbar radiculitis. (Joint Exh. D, Theodore Georgis, Jr., M.D., July 16, 2019, p. 43.) Regarding applicant's disability status, Dr. Georgis stated:

> Mr. Neill remains significantly symptomatic, and as far as I can tell, he is still being recommended for active treatment by his treating physicians. As such, has not reached maximum medical improvement. ¶ He is not permanent and stationary for rating purposes as of today's date. ¶ I don't anticipate him reaching a permanent and stationary status for at least six months, to allow for additional treatment to be completed.
> (Joint Exh. D, p. 45.)

On April 2, 2021, Dr. Georgis re-evaluated applicant. The doctor re-examined applicant, took an interim history, and reviewed additional medical records. He noted that, "Dr. Mealer released the patient back to regular duties and declared him permanent and stationary on November 6, 2020." (Def. Exh. F, Dr. Georgis, April 2, 2021, p. 11.) Dr. Georgis concluded that:

> The patient, at this point in time, is at maximum medical improvement. ¶ The patient is permanent and stationary for rating purposes as of November 6, 2020, the date that Dr. Mealer declared him as such.
> (Def. Exh. F, p. 12.)

Later in his report, Dr. Georgis stated: "All diagnostic testing and treatment to date in this case has been reasonable and necessary. ¶ All periods of temporary disability in this case have been reasonable." (Def. Exh. F, p. 17.)

The parties proceeded to trial on April 7, 2022. The stipulations included: injury arising out of and occurring in the course of employment (AOE/COE) to applicant's cervical spine, right shoulder, and lumbar spine; at the time of the injury applicant's earnings were $422.35 per week; applicant's last day of work for defendant was November 9, 2017; based on the reports of QME Dr. Georgis, applicant's injury caused 38% permanent disability; and that applicant had reached maximum medical improvement/permanent and stationary status as of November 6, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 7, 2022, p. 2.) The issues included: applicant's claim for temporary disability indemnity during the period from November 27, 2017, through November 6, 2020; whether applicant was entitled to an average weekly earnings adjustment based on his 2022 earning capacity; and whether applicant was entitled to the Labor Code section 4650 10% increase for nonpayment of temporary disability indemnity and permanent disability indemnity. (MOH/SOE, pp. 2 – 3.)

DISCUSSION

We first note that pursuant to Appeals Board Rule 10945(c)(1):

> Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.
> (Cal. Code Regs., tit. 8, § 10945.)

In violation of Appeals Board Rule10945(c), defendant's Petition has 14 pages of exhibits attached. The exhibits will not be considered, and counsel is reminded that failure to comply with the Appeals Board Rules may be deemed sanctionable conduct.

Regarding defendant's various arguments: Defendant first argues that applicant's earnings should be based on his wages at the time of his injury. As explained by the WCJ, when there has been a delay between the legal obligation to pay and the actual payment applicant is entitled to disability benefits paid based on the earning capacity at the time of payment. (*Goytia v. Workers Comp. App. Bd*. (1972) 1 Cal. 3d 889, 895 [37 Cal.Comp.Cases 104].) (Report, p. 4.)

Defendant next argues that it submitted Offers of Proof instead of calling witness it had previously identified. We first note that the MOH/SOE do not include any offers of proof. Also, as explained by the WCJ, "[W]hen the Court inquired, Petitioner's counsel indicated that its

witnesses would not have contradicted the applicant's sworn testimony, if they took the stand. An attorney's statements on what (s)he believes a witness would say is not evidence." (Report, p. 5.)

As to whether applicant is entitled to an award of temporary disability indemnity after December 5, 2017, the WCJ noted, "The parties, Dr. Mealer and Dr. Georgis all concur that the applicant did not reach MMI status until November 6, 2020. (Exhibit F, Exhibit 18)." (Opinion on Decision, p.2)

Regarding the argument that there should not have been an order that the EDD be reimbursed for benefits it paid to applicant, it must be noted that the F&A does not include an order that the EDD be reimbursed. The WCJ deferred the issue and reserved jurisdiction. (F&A, p. 3.)

Finally, as to the argument that there was no unreasonable delay in paying benefits so the 10% increase in indemnity benefits was not warranted, the WCJ explained:

> The evidence does not reflect there exists any rebuttal, let alone substantial evidence, contradicting the PTP or QME's opinions regarding compensability and TD status. … [C]onsidering that there is 104 weeks of undisputed retroactive TTD, defendant should have at least paid indemnity at the uncontested rate of $281.57 per week. ¶ Permanent disability, established by the QME, was also not in dispute by the time of the MMI report and yet, inexplicably, no advances were paid.
> (Report, p. 6.)

Having reviewed the entire record we agree with the WCJ's conclusion that:

> Based on the lack of citation to cases supporting Petitioner's [defendant's] reasoning and arguments, as well as the lack of evidence and legal foundation in support of its points made in the Petition, the Court recommends that its Amended Findings of Fact and Award remain undisturbed.
> (Report, pp. 5 – 6.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Amended Findings of Fact & Award issued by the WCJ on July 21, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 3, 2022

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

RICHARD NEILL
GAYLORD NANTAIS
LAUGHLIN FALBO

TLH/mc

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 OF WORKERS'S COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

NATIONAL LIABILITY & FIRE INSURANCE COMPANY, administered by NORTH AMERICAN RISK SERVICES, hereinafter "Petitioner", through its legal representative, filed a timely and verified Petition for Reconsideration to the July 21, 2022, Amended Findings of Fact & Award which found 1) that applicant's industrial injury caused 38% PD under the 2017 PDRS; 2) that the EDD had furnished benefits and a credit for benefits paid during the TTD period would be allowed; 3) that applicant was entitled to 104 weeks of retroactive TTD; 4) that applicant's average weekly wage warranted adjustment pursuant to Labor Code §4661.5 due to the delay in benefit; 5) that a statutory automatic penalty of 10% applied under Labor Code §4650(d) to both the delayed TTD at the uncontested rate and the PD thereafter that Petitioner also failed to commence.

Petitioner asserts that the Court acted in excess of its powers and the evidence does not justify the Findings of Fact. Essentially, Petitioner contends that 1) the Court erred in determining that the average weekly wage should be increased to minimum wage rates in effect at the time the benefits were due; 2) that the Court should allow Petitioner's witnesses, whom Petitioner declined to bring forth on the second day of Trial, to testify after submission; 3) that the applicant was not entitled to retroactive TTD; 4) that the "lien of the EDD," currently unfiled, should be denied or dismissed; 5) that the penalty should not apply. This Court relies upon the reasoning and analysis set forth in its July 21, 2022, Opinion and Decision but also sets forth supplemental analysis herein.

The Court raises *sua sponte* the violations of 8 Cal. Code Regs. §10945(c), and Labor Code§5902. Copies of documents that have been received in evidence or that have been made part of the adjudication file must not be attached as exhibits to Petitions for Reconsideration. Documents attached in violation of this rule may be detached from the petition and discarded. Subsection (c)(2) states that a document that is not part of the adjudication file shall not be attached to or filed with a Petition for Reconsideration or answer. A party may be sanctioned under Labor Code §5813 for violating this rule. See *Daniels v. Piedmont Engineers,* 2011 Cal. Wrk. Comp. P.D. LEXIS 14.

II FACTS

By stipulation of the parties, while the applicant was employed with defendant LUCKY'S GLASS, LLC during the period of May 25, 2017, through November 9, 2017, as a window/door installer/glazier he sustained an admitted injury to his lumbar spine, right shoulder and cervical spine. His last day worked was November 9, 2017. At the time, he earned $11.00 per hour, a rate slightly higher than minimum wage in 2017. The applicant confirmed he had no pay increases during his **[**the**]** length of his employment beginning in 2013. (SOE 4/7/22, 5:7-8). He also confirmed he received no information from the employer that any wage increases would be forthcoming. (SOE 5/26/22, 2:8-13).

Dr. Mealer (PTP) placed the applicant on TTD towards the end of 2017. Petitioner did not commence TD at that time. During the course of litigation, the parties elected Dr. Georgis, PQME, and Petitioner offered his reports into evidence. The parties further stipulated that the QME reports rated at 38 percent. The State enacted mandatory minimum wage laws in 2017 that became effective in 2018. Labor Code §1182.12(b)(2)(A) and (E). The reports of Dr. Mealer (PTP) deemed applicant TTD as of December 5, 2017. (Exhibit E, p.2). At the time of the QME exam, Dr. Georgis confirmed that applicant was not yet MMI, and did not reach MMI until November 6, 2020. (Exhibit F, Exhibit 18). Petitioner did not seek clarification from the QME regarding the TTD period. Petitioner did not pay TD benefits at this time either.

On the first day of Trial, the Court confirmed with Petitioner's counsel that no benefits had been paid to date despite 1) the injury eventually being admitted, and 2) that only Dr. Georgis' uncontested medical evidence was being submitted by the carrier as evidence. Nearly five years had lapsed between the applicant's TTD start date and the first day of Trial. Though PD was also uncontested, and the parties stipulated to the rating, no PDAs had been issued to

the applicant. The parties stipulated that the applicant had received compensation from the EDD from February 14, 2018 through August 15, 2018, at $257.00 per week. The Court verified that no lien was filed at the time of Trial, and no lien is currently filed.

Petitioner's counsel reserved the right to call its witnesses at the end of the first day of Trial. The Trial was continued to complete witness testimony, including that of the applicant. No additional witnesses were produced by Petitioner on day two of Trial. Petitioner's counsel effectively withdrew its witnesses and stated that these witnesses would not provide any additional information to contradict the sworn testimony of the applicant at Trial, and the parties agreed to submit.

Procedurally, the Court revised its original Findings and Opinion on Decision to extend its penalty finding to not only TTD at the uncontested rate but also uncontested PD and amended this oversight pursuant to 8 Cal. Code Regs. §10961(c). That it did not initiate further proceedings under subsection (b) is not a denial of Due Process to either party, as the parties are clearly able to file a Petition for Reconsideration.

III
DISCUSSION

In review of Petitioner's arguments, the Court notes there is a distinct lack of reference to case law in support of Petitioner's interpretation of the relevant statutes. The Court addresses these arguments in order.

A. The Court found the average weekly earnings adjustment appropriate as a matter of fact and law.

Contrary to Petitioner's argument, the Court did not need an economist or union witness to testify in order to apply Labor Code §4661.5. Respondent is correct in that the applicant is entitled to disability benefits paid based on the earning capacity at the time of payment when

there has been a delay between the legal obligation to pay and the actual payment. *Goytia v. Workers Comp. App. Bd.* (1972) 1 Cal. 3d 889, 895. The statute specifically applies to payments made "two years or more" from the date of injury and the computation is based on average weekly earnings under Labor Code §4453 that is "in effect" on the date payment is made (2022). Given the State mandate on minimum wage, and also considering the applicant has demonstrated his ability to earn minimum wage with a subsequent employer exhibiting his more recent earning capacity, the Court found the increase appropriate.

The Court also relied on the precedent set forth by the Court of Appeals in that where there is a delay in benefits, for whatever reason, the Court may increase the TTD rate at the time of the Award based solely on the statutory language of Labor Code §4661.5, especially in consideration of inflation rates. This interpretation is consistent with Labor Code §3202. *Hofmeister v. Workers' Comp. Appeals Bd.* (1984) 156 Cal.App.3d 848, 853. In this, the Court did not act in excess of its powers, nor did it misinterpret the facts in evidence.

B. Petitioner cannot present witnesses to testify after submission at Trial.

Petitioner has not raised any statutory authority or legal precedence in support of this argument. The Court only notes that no witnesses were present at the time of Trial, and when the Court inquired, Petitioner's counsel indicated that its witnesses would not have contradicted the applicant's sworn testimony, if they took the stand. An attorney's statements on what (s)he believes a witness would say is not evidence, nor may Petitioner seek to reopen the record as an afterthought after submission once it realized the Court would not find in its favor. The Court does not find merit in the argument.

C. Where defendant has not presented any evidence to the contrary, the Court found retroactive temporary disability.

The Court defers to its reasoning set forth in its Opinion regarding the unrebutted opinions of Dr. Mealer and Dr. Georgis. The Court further notes that defendant offered the reports of Dr. Georgis and relied on no other medical evidence to contradict the medical opinions on TTD, or make any attempt to challenge, clarify or narrow the QME's opinions with a cross-examination. The Court found the opinions of Dr. Mealer and Dr. Georgis to be substantial and unrebutted.

D. The Court cannot deny or dismiss a lien that is not yet filed.

The Court has no jurisdiction over the EDD if it does not file a lien. In effect, the EDD cannot take action in the case until it becomes a party. The Court based its findings on the parties' stipulation in that both counsels had verified a period of EDD disability payment as well as the rate. The Court considered these stipulated facts and allowed a reduction in benefits to avoid duplication of benefits. The Court has no power over a non-party to a case. The Court retains jurisdiction over any liens in the future pursuant to Labor Code §133, and Labor Code §5300.

E. The penalty was appropriate.

The evidence does not reflect there exists *any* rebuttal, let alone substantial evidence, contradicting the PTP or QME's opinions regarding compensability and TD status. From the acceptance of the claim after the QME's findings on AOE/COE to the time of Trial, the parties disputed the rate at which retroactive TTD was owed, but <u>not</u> that it was owed. Based on the average weekly earnings at the time of injury, or $422.35 per week, and further considering that there is 104 weeks of undisputed retroactive TTD, defendant should have at

least paid indemnity at the *uncontested* rate of $281.57 per week. The Court granted the penalty on TTD based on the uncontested rate and applicant's original earnings.

Permanent disability, established by the QME, was also not in dispute by the time of the MMI report and yet, inexplicably, no advances were paid. The Court notes that defendant originally denied the claim based on a lack of substantial medical evidence but again, a denial is not an indefinite "free pass" to not pay compensation when there is no dispute once the medical evidence comes in. (Exhibit A). Defendant made no offer of proof that they were still denying TD and PD, and if they had, it would have been a baseless denial considering Petitioner took no action to obtain contrary evidence after the MMI report of Dr. Georgis was served May 1, 2021. (Exhibit F)

IV
RECOMMENDATION

Based on the lack of citation to cases supporting Petitioner's reasoning and arguments, as well as the lack of evidence and legal foundation in support of its points made in the Petition, the Court recommends that its Amended Findings of Fact and Award remain undisturbed.

DATE: August 16, 2022

Julie Feng
WORKERS' COMPENSATION JUDGE

Served on parties as listed on the attached
Proof of Service.
DATE: 08.16.2022