

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

**FIDELINA MONTER, *Applicant***

**vs.**

**RANDSTAD NORTH AMERICA, INC., and  
ACE AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13283932**

**Stockton District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 30, 2022, wherein the WCJ found that as a result of the June 5, 2019, injury applicant sustained 7% permanent disability, that defendant was entitled to a \$2,316.07 temporary disability indemnity overpayment credit, and that a reasonable attorney fee was \$913.50.

Applicant contends that the report from orthopedic agreed medical examiner (AME) Glynn E. Garland, M.D., does not constitute substantial evidence on the issue of apportionment and therefore applicant's disability should be rated at 14%; and that defendant is not entitled to take credit for the temporary disability indemnity overpayment against the permanent disability indemnity owed to applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and we will affirm the F&O except that we will amend the F&O to find that applicant's injury caused 14% permanent disability (Finding of Fact 1); that defendant is not entitled to a credit for

the temporary disability indemnity overpayment (Finding of Fact 2); that a reasonable attorney fee is \$2000.00 (Finding of Fact 3); and to include an Award of benefits based thereon.

## **BACKGROUND**

Applicant claimed injury to her lower back while employed by defendant as a packer on June 5, 2019.

On January 26, 2022, orthopedic AME Dr. Garland evaluated applicant. Dr. Garland examined applicant, took a history, and reviewed the medical record. The doctor diagnosed applicant as having anterolisthesis (vertebral slippage/displacement) of L5 on S1 with radicular pain in her left leg. He said that applicant's condition had reached maximum medical improvement (MMI) and he assigned 8% whole person impairment. ((Joint Exh. 100, Dr. Garland, January 26, 2022, pp. 8 – 9.) Regarding apportionment, Dr. Garland stated:

[I]t is my opinion that, based on the complete clinical picture, including the history provided by the applicant, my examination of her, the review of available medical records and diagnostic studies and, in the absence of substantial evidence to the contrary, that 50% of the permanent impairment/disability is a direct result of the specific industrial injury and 50% of the impairment/disability is due to factors before the industrial injury such as lumbarization of the first sacral segment. The percentages are based on reasonable medical probability.

(Joint Exh. 100, pp. 9 – 10.)

The parties proceeded to trial on December 1, 2022. The issues submitted for decision included permanent disability/apportionment and the overpayment of temporary disability benefits. (Minutes of Hearing and Summary of Evidence, (MOH/SOE) December 1, 2022, p. 2.)

## **DISCUSSION**

Any award, order, or decision of the Appeals Board. must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

In order to constitute substantial evidence addressing the issue of apportionment, the medical opinion must identify the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other

factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Also, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Id.* at 621)

Here, as quoted above, Dr. Garland stated that 50% of applicant's permanent disability was a direct result of the June 5, 2019, injury and 50% of her disability was "due to factors before the industrial injury such as lumbarization of the first sacral segment." (Joint Exh. 100, p. 10.) Although Dr. Garland indicated 50% of applicant's disability was due to pre-existing factors, he did not explain the nature of those factors. Also, he did not explain how and why those factors were causing permanent disability at the time of the evaluation, nor did he explain how and why those factors are responsible for 50% of applicant's disability. Based thereon, his report does not constitute substantial evidence regarding apportionment (*Escobedo v. Marshalls, supra*) and it cannot be the basis for apportioning applicant's disability to non-industrial factors. (*Lamb v. Workmen's Comp. Appeals Bd., supra; Garza v. Workmen's Comp. Appeals Bd., supra*.) Thus, applicant's disability caused by her industrial injury is rated as follows:

15.03.01.00 - 8 - [1 .4] - 11 - 360G - 13 - 14% PD

Regarding the temporary disability indemnity overpayment, the Appeals Board has the discretion to allow a credit for overpaid compensation against an award of different species of compensation. (Lab. Code § 4909; *Genlyte Group v. Workers' Comp. Appeals Bd. (Zavala)* (2008) 158 Cal. App. 4th 705 [73 Cal.Comp.Cases 6].) That discretion must weigh the equities and consider whether granting such a credit will result in an undue burden and hardship to the injured worker. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) The Second District Court of Appeal explained that:

[T]emporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. (Citation.) In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. (Citation.) Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. (Citation.) Thus, in many instances the allowance of credit for a temporary disability overpayment against permanent disability indemnity can be disruptive and in some instances totally destructive of the purpose of permanent disability indemnity.

(*Id.* at 836-837 (citations omitted).)

Dr. Garland determined that applicant had reached MMI status, but he also said she could not return to her pre-injury job because of her constant pain, and he noted that she had not returned to work since January 9, 2020. (Joint Exh. 100, p. 3.) The temporary disability benefits at issue were paid for approximately seven weeks for a total amount of \$2,316.07. (MOH/SOE, p. 2.) There is no evidence in the trial record indicating that applicant has been able to return to any type of employment since her last day of work for defendant. The overpayment was not the result of any error or misconduct by either party. However, under the circumstances of this matter, a \$2,316.07 reduction of the permanent disability benefits awarded to applicant would be a significant “burden and hardship” and would not be an equitable result. Therefore, we will not grant defendant credit for the overpayment.

Accordingly, we grant reconsideration, and affirm the F&O except that we amend the F&O to find that applicant’s injury caused 14% permanent disability; that defendant is not entitled to a credit for the temporary disability indemnity overpayment; and that a reasonable attorney fee is \$2000.00; the Award of benefits is based thereon.

For the foregoing reasons,

**IT IS ORDERED** that applicant’s Petition for Reconsideration of the Findings of Fact and Orders issued by the WCJ on December 30, 2022, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the December 30, 2022, Findings of Fact and Orders is **AFFIRMED**, except that it is **AMENDED** as follows:

## **FINDINGS OF FACT**

1. Applicant sustained injury arising out of and occurring in the course of employment to her back on June 5, 2019; the injury caused 14% permanent disability equaling \$13,412.50, payable for 46.25 weeks at \$290.00 per week plus interest, less Attorney fees as awarded herein.
2. Defendant is not entitled to a credit for the temporary disability indemnity overpayment against the permanent disability indemnity awarded herein.
3. A reasonable Attorney fee is \$2,000.00.

**AWARD**

**AWARD IS MADE** in favor of FIDELINA MONTER and against RANDSTAD NORTH AMERICA, INC., and ACE AMERICAN INSURANCE COMPANY as follows:

(a) Permanent disability indemnity in the total amount of \$ \$13,412.50, plus interest as provided by law, payable forthwith less credit for any permanent disability indemnity previously paid, and less attorney fees in the amount of \$2,000.00, payable to applicant's counsel.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 21, 2023**

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

**FIDELINA MONTER  
OCCUPATIONAL INJURY LAW CENTER  
LLARENA, MURDOCK, LOPEZ & AZIZAD, APC**

**TLH/mc**

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