

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

TERRY MURPHY, *Applicant*

vs.

**GREEN 16 LLC;
AMERICAN CASUALTY COMPANY, ADMIN. BY CNA CLAIMS PLUS, *Defendants***

**Adjudication Number: ADJ11812549
Long Beach District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted¹ reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Removal. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks removal in response to the September 16, 2020 Amended Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant's admitted industrial injury of May 25, 2018 caused temporary partial disability (TPD) from April 25, 2019 to January 30, 2020; that the record required development to set the corresponding indemnity rates; and that defendant was entitled to credit for overpayment of TPD prior to June 27, 2018, in the amount of \$717.68.

Defendant contends the dollar value of its credit was incorrectly calculated, and that the record does not support the award of TPD from April 25, 2019 to January 30, 2020.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied, but also that the matter be returned to the trial judge for consideration of whether there is good cause to set aside the award to recalculate the amount of credit.

¹ Commissioner Sweeney, who was a member of the panel that granted reconsideration in this matter, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

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 affirm the decision, except that we will amend Finding of Fact No. 3, to reflect that the issue of credit against future temporary disability indemnity payments is deferred.

FACTS

Applicant claimed injury to the head, back, hip and right knee while employed as a truck driver by defendant Green 16, LLC, on May 25, 2018. Defendant admits injury to the head and back, but disputes injury to the hip and right knee.

Applicant has obtained treatment from multiple physicians for his injuries, including Walter Werchan, M.D., and Terence MacConnell, M.D. The parties have also selected Saeed T. Nick, M.D., to act as Qualified Medical Evaluator (QME) in neurology, and Lawrence S. Barnett, M.D., as the QME in orthopedic medicine.

The parties proceeded to Expedited Hearing on July 29, 2020, framing issues of earnings, and entitlement to temporary disability from June 4, 2018 to June 6, 2018, and April 25, 2019 to January 30, 2020. (Expedited Minutes of Hearing and Summary of Evidence (Minutes), July 29, 2020, at p. 2:16.) Defendant further raised the issue of entitlement to credit for disability paid while applicant was working, and whether applicant was entitled to benefits after the end of the agreed period of employment.

On September 16, 2020, the WCJ issued his F&O, determining in relevant part that applicant was TPD from April 25, 2019 to January 30, 2020, and that defendant was entitled to credit for overpayment of TPD prior to June 27, 2018 in the amount of \$717.68. (Findings of Fact Nos. 2 and 3.) The WCJ further determined that the record required development as to the amount owed for the established period of TPD. (Finding of Fact No. 4.)

Defendant avers that applicant worked in broken periods during the time he was receiving temporary disability, and that defendant should be credited for at least two weeks of temporary disability overpayment. Defendant further avers that the record does not support the award of TPD from April 25, 2019 to January 30, 2020.

The WCJ's Report observes that the only medical reporting in evidence is that of QME Dr. Nick, and treating physician Dr. Werchan, and that the opinions of the QME and the testimony of applicant were undisputed. (Report, at p. 3.) The WCJ recommends we deny removal of the

matter, but that “it is apparent that there may be an error in calculation of the credit for defendant,” and that we return the matter to the trial level for a determination of whether there is good cause to set aside the credit determination. (Report, at p. 4.)

DISCUSSION

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, defendant’s Petition seeks removal of the matter to the WCAB. However, the F&O determines a substantive right of the parties, i.e., defendant’s right to a discretionary credit pursuant to Labor Code section 4909, and further determines applicant’s earning capacity, and is thus a final order. We will treat the Petition as one seeking reconsideration, accordingly. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650].)

Defendant seeks credit for the time applicant worked during the stipulated period defendant paid temporary disability. (Petition, at 3:5.) Defendant contends the timesheets in evidence at Exhibit B reflect earnings of \$3,759.15 during a two week period commencing June 15, 2018, and that defendant is entitled to at least two weeks of disability benefits as a result. (*Id.* at 3:12.)

The WCJ's Report observes that there may be error in the calculation of the defendant's credit for temporary partial disability, and requests that we return the matter to the trial level for consideration of whether there is good cause to set aside the credit determination. (Report, at p. 9.) We also observe that the WCJ has deferred the issue of the amounts owed during the period of temporary partial disability. (Finding of Fact No. 4.) Given the potential need to recalculate the amount of the credit, coupled with the need for development of the record on the issue of the monetary indemnity owed, we will amend Finding of Fact No. 3, which fixes defendant's credit rights, to defer the issue pending development of the record.

Defendant further avers the record does not support the award of TPD from April 25, 2019 to January 30, 2020, because there are no contemporaneous treatment records identifying TPD or interim reports from applicant's treating physicians. (Petition, at 4:7.)

The February 28, 2020 report of neurology QME Dr. Nick determined that applicant had not yet reached maximum medical improvement, and that applicant continued to experience headache, dizziness, and cognitive impairment resulting from the May 25, 2018 injury. (Ex. 1, Report of Saeed T. Nick, M.D., February 28, 2020, at p. 66.) The report identified work restrictions of no lifting greater than 25 pounds, no overhead work, no working in heights or climbing, with orthopedic restrictions deferred to the appropriate specialists. (*Ibid.*) Dr. Nick noted that applicant's symptoms were consistent with post-concussion syndrome, and that applicant's symptoms had not improved significant since the crash. (*Id.* at p. 65.)

Following an inquiry by the parties as to the periods of temporary disability, Dr. Nick issued a supplemental report of June 12, 2020, confirming that applicant "needed to be on partial temporary disability since the date of injury until the day of examination on January 30, 2020." (Ex. 2, Report of Saeed T. Nick, M.D., June 12, 2020, at p. 1.) Defendant did not thereafter depose the QME, and interposed no witnesses or medical reporting at trial to challenge the QME's determinations regarding periods of TPD.

Applicant's July 29, 2020 testimony is also germane. Applicant testified that in addition to his orthopedic complaints, he continued to have "a head problem which causes him dizziness; and when he is jostled, he loses his focus." (Minutes, at 4:12.)

Accordingly, we agree with the WCJ's determination that based on the unchallenged reporting of the QME, as well as applicant's credible testimony, applicant was temporarily partially disabled from April 25, 2019 to January 30, 2020. (Finding of Fact No. 2.)

In summary, we note that the WCJ has indicated that recalculation of the amount of credit for temporary disability overpayment may be necessary, and has further ordered development of the record regarding the amounts owed for temporary partial disability during April 24, 2019 to January 30, 2020. We will amend Finding of Fact No. 3, which otherwise fixes the credit amount, to defer the issue. However, we decline to disturb the WCJ's determination that applicant is entitled to temporary partial disability from April 25, 2019 to January 30, 2020, as the determination is supported by substantial medical evidence.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 16, 2020 Amended Findings and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * * * *

3. The issue of whether defendant is entitled to a credit against future temporary disability indemnity payments is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 2023

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

**TERRY MURPHY
LAW OFFICES OF FRED L. FONG
LAW OFFICE OF ERIC ANDERSON**

SAR/abs

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