

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

CHRISTOPHER DITTO, *Applicant*

vs.

**SANTIAGO COMMUNITIES, INC., and REPUBLIC INDEMNITY COMPANY OF
CALIFORNIA, *Defendants***

**Adjudication Number: ADJ11276804
San Bernardino District Office**

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

Applicant seeks reconsideration of the Amended Findings and Award, (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 8, 2020, wherein the WCJ found in pertinent part that applicant was temporarily totally disabled for the period from May 12, 2019, through July 31, 2019.

Applicant contends that his left shoulder injury was a compensable consequence of his September 28, 2017 left thumb injury, and that he is entitled to temporary disability indemnity benefits until reaching the 104 week maximum as of September 27, 2019.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the F&A to award applicant's attorney fees in an amount equal to 15% of the temporary disability indemnity awarded to applicant, and to otherwise deny the Petition. We received a Response (Answer) from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, 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&A except that we will amend the F&A to find that applicant was temporarily totally disabled for the period beginning October 30, 2017, to and including November 8, 2019, and that applicant has received temporary disability indemnity during the period from October 30, 2017, through May 11, 2019, (Finding of

Fact 4); and to find the value of applicant's attorney's services is equal to 15% of applicant's temporary disability indemnity (\$1844.00) (Finding of Fact 5); and we will amend the Award based thereon.

BACKGROUND

Applicant claimed injury to his neck, upper and lower back, bilateral shoulders, left wrist, left hand, and left thumb, when he had to stop a large reel of wire from rolling after it had fallen from a stand, while employed by defendant as a park maintenance worker/electrical worker on September 28, 2017. (see Application for Adjudication of Claim, ADJ11276804.) Applicant had previously claimed injury to the same body parts, when he fell from a ladder, while employed by defendant on March 22, 2017. (see Application for Adjudication of Claim, ADJ11276803.)

On January 15, 2019, applicant was evaluated by orthopedic agreed medical examiner (AME) Richard I. Woods, M.D. (Board Exh. X, Dr. Woods, January 25, 2019.) Dr. Woods examined applicant, took a history, and reviewed the medical record. The doctor noted that applicant's March 22, 2017 "fall off a ladder" injured multiple areas and that the September 28, 2017 injury "... aggravated his neck, left hand/thumb, thoracolumbar spine, and also his left elbow and forearm." (Board Exh. X, pp. 24 – 25.) Dr. Woods then said that applicant, "developed left shoulder adhesive capsulitis following the left wrist surgery" and that applicant had not reached maximum medical improvement (MMI). (Board Exh. X, p. 25.)

The parties proceeded to trial on October 9, 2019. They stipulated that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his, "... neck, upper and lower back, left wrist, left hand and thumb, left [sic] shoulder and right shoulder" on September 28, 2017, and that defendant was "unable to accommodate modified duties." (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 9, 2019, p. 2.) The issues submitted for decision included temporary disability: applicant claimed the period from May 12, 2019, through September 27, 2019; defendant claimed that the injury in this case (ADJ11276804) was "an exacerbation" of the injury in case number ADJ11276803, and since it paid temporary disability indemnity for 104 weeks in case number ADJ11276803, it had met the 104 week maximum, so it did not owe applicant any additional temporary disability indemnity benefits. (MOH/SOE, p. 3.)

On December 10, 2019, the WCJ issued an Order Vacating Submission. The parties were told to request a supplemental report from Dr. Woods to address the issue of whether the September 28, 2017 injury was a contributing factor regarding applicant's temporary disability status and also, whether applicant was temporarily totally disabled after May 11, 2019. (see Order Vacating Submission, December 10, 2019, p. 2.)

Applicant was re-evaluated by Dr. Woods on February 6, 2020. Dr. Woods concluded that:

Mr. Ditto reasonably reached Maximum Medical Improvement with regard to his left wrist/thumb on July 31, 2019, per his treating hand surgeon, Dr. Wongworawat. ¶ With regard to the remainder of his conditions, he reasonably reached a plateau on November 8, 2019, as per Amy Jo Reese, M.D. (Board Exh. X3, Dr. Woods, May 27, 2020, p. 20.)

In his report, Dr. Woods later stated:

At the time of that original injury, he did not have any bilateral shoulder injuries even though he believed he injured both shoulders. It was not until after the September 28, 2017, injury that shoulder complaints were first identified. Additionally, it appears that he actually developed left shoulder and left elbow pain after the September 28, 2017, injury and also later developed the left shoulder adhesive capsulitis following his wrist surgery. (Board Exh. X3, p. 24.)

On August 26, 2020, the WCJ issued a Notice of Intent to admit the May 27, 2020 report from Dr. Woods into evidence, and the matter was re-submitted for decision.

DISCUSSION

It has long been the law that the acceleration, aggravation or 'lighting up' of a preexisting condition "is an injury in the occupation causing the same." (*Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617 [1935 Cal. LEXIS 590]; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Reynolds Electrical & Engineering Co. v. Workers' Comp. Appeals Bd. (Buckner)* (1966) 65 Cal.2d 438 [31 Cal.Comp.Cases 421].) An aggravation of a pre-existing condition is an industrial injury, i.e. aggravation of a prior industrial injury constitutes a new injury. (*Argonaut Ins. Co. v. Industrial Acc. Comm. (Harries)* (1964) 231 Cal.App.2d 211 [29 Cal.Comp.Cases 279]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Clark)* (2017 W/D) 82 Cal.Comp.Cases 1404.)

In his initial report, Dr. Woods stated that applicant's September 28, 2017 injury aggravated his neck, left hand/thumb, thoracolumbar spine, and also his left elbow and forearm. (Board Exh. X, pp. 24 – 25.) Also, as noted above, at the trial, the parties stipulated that on September 28, 2017, applicant sustained injury AOE/COE to his left wrist, left hand and thumb, and his left and right shoulders. (MOH/SOE, p. 2.) Thus, there is no factual support for defendant's contention that the injury in this matter (ADJ11276804) was "an exacerbation" of applicant's injury in case number ADJ11276803.

Defendant paid applicant temporary disability indemnity from March 23, 2017, to September 7, 2017, and from October 30, 2017, to May 11, 2019. (see MOH/SOE, p. 2.) Clearly, the benefits paid through September 7, 2017, were not in any way related to the September 28, 2017 injury. However, review of the record indicates that both injuries were contributing causes to applicant's temporary disability status after October 30, 2017. Applicant was determined to have reached MMI status only as to his left wrist and thumb on July 31, 2019 (Board Exh. X-3, p. 20). He remained on modified duties for the remaining injured body parts, including his left shoulder, and reached MMI for that condition as of November 8, 2019. (Board Exh. X-3, pp. 20; 32-34 record review). Again, the parties stipulated that defendant could not accommodate the modified duties. (MOH/SOE, p. 2.) Based thereon, applicant remained temporarily totally disabled until November 8, 2019.

Labor Code section 4656 states in part:

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury. (Lab. Code, § 4656(c)(2).)

Labor Code section 4656(c)(2) does not toll the period during which a worker is entitled to temporary disability benefits based on another injury. Where independent injuries result in concurrent periods of temporary disability, the 104 week limitation runs concurrently. (*Foster v. Workers' Comp. Appeals Bd.*, (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466].) Defendant contends that as of May 11, 2019, it had paid applicant 104 weeks of temporary disability indemnity and is not required to make any additional payments. (Lab. Code, § 4656(c)(2).) However, as noted earlier, the benefits paid through September 7, 2017, were not in any way related to the September 28, 2017 injury. It appears that the temporary disability indemnity benefits

paid during the period from October 30, 2017, through May 11, 2019, were for concurrent periods of temporary disability caused by the two injuries. Applicant contends that he is entitled to additional temporary disability indemnity benefits to be paid through September 27, 2019, which equals 104 weeks from October 30, 2017, the date the payment of the temporary disability indemnity benefits, for the September 28, 2017 injury, began. Defendant is correct that it is not liable for more than 104 weeks of temporary disability benefits in case number ADJ11276803, nor is it liable for additional benefits accrued during the concurrent periods of temporary disability in both cases. Yet, since the September 28, 2017 injury is a separate and distinct injury, not an exacerbation of the earlier injury, and applicant did not reach MMI until November 8, 2019, there is no statutory or case law that renders applicant unentitled to temporary disability benefits for the period of 104 weeks from the date indemnity payments began. Thus, applicant is entitled to additional temporary disability indemnity benefits for the period from May 12, 2019, through September 27, 2019.

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to find that as a result of the September 28, 2017 injury applicant was temporarily totally disabled for the period beginning October 30, 2017, to and including November 8, 2019, and that applicant has received temporary disability indemnity during the period from October 30, 2017, through May 11, 2019, (Finding of Fact 4); and to find the value of applicant's attorney's services is \$1844.00, (Finding of Fact 5); and we amend the Award based thereon.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Amended Findings and Award issued by the WCJ on December 8, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 8, 2020 Amended Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The September 28, 2017 injury, caused temporary total disability, for the period beginning October 30, 2017, to and including November 8, 2019; applicant has received temporary disability indemnity during the period from October 30, 2017, through May 11, 2019.

5. Applicant's attorney has performed services with a reasonable value of \$1844.00, equal to 15% of the additional indemnity awarded to applicant herein.

AWARD

AWARD IS MADE in favor of Christopher Ditto and against Santiago Communities, Inc., and Republic Indemnity Company of California as follows:

(a) Temporary disability indemnity at the rate of \$614.78 per week, for the period from May 12, 2019, through September 27, 2019, in the total amount of \$12,295.60, payable forthwith, less attorney fees of \$1,844.00, payable to applicant's counsel.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 23, 2021

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

**CHRISTOPHER DITTO
LAW OFFICES OF LUCY BISHOP
LAW OFFICES OF DAVIDSON CZULEGER**

TLH/pc

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