

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

LAURENCE WELLS, *Applicant*

vs.

**COUNTY OF LOS ANGELES - HIGH DESERT HOSPITAL;
Permissibly Self-Insured, adjusted by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ10775002
Los Angeles District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of November 23, 2020.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 23, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 23, 2020 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The issues of earnings and temporary disability are deferred.

* * *

8. Attorney fees are deferred.

AWARD IS MADE in favor of **LAURENCE WELLS** and against **COUNTY OF LOS ANGELES**, as follows

1. All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 16, 2021

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

**LAURENCE WELLS
LAW OFFICES OF CARMEN ULIBARRI
LAW OFFICES OF MICHAEL P. MANSFIELD**

PAG/pc

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
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Defendant, the LOS ANGELES COUNTY HIGH DESERT HOSPITAL, by and its attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 23 November 2020. In it defendant argues two points: That the undersigned used the wrong benefit rate and that insufficient evidence exists to support the period of temporary total disability (TTD) awarded.

To date, no Answer to the Petition has been received.

It is recommended that reconsideration be granted based on the clerical error involving the benefit rate and granted to develop the record on the appropriate period of TTD.

II.

FACTS

Applicant, LAURENCE WELLS, age 58 on the date of injury, while employed by the COUNTY OF LOS ANGELES, legally uninsured and adjusted by SEDGWICK CMS sustained injury arising out of and in the course of employment during the period of continuous trauma from 18 March 1996 to 10 February 2017.

Injury was admitted in this case but for some reason, the parties chose neither to fill out paragraph 4 of the Pretrial Conference Statement nor to provide benefit printouts or earnings information. Despite this, the parties chose to go to trial on the issues of permanent and temporary disability.

This case involves an industrial mold exposure case where the applicant worked at a location with a leaky roof. He was exposed to mold, rat and bird feces. As a result, he developed bronchitis on multiple occasions over the period from 1998 to sometime in 2005. Also in 2005, he developed a non-industrial benign thymoma that was surgically removed in May 2005. The QME report of Dr. Meth was the only narrative report (Defense Exhibit "B") and was supplemented by a deposition of the doctor (Defense Exhibit "A.") The report and the deposition read together conclude that the lung problems were industrial but found zero permanent disability.

On the issue of TD, the doctor said the applicant was TTD for "about two

months." In his depo, the doctor stated that the TD periods before 2014 were industrial but he did not state what those periods were by date. AA translated this to 11 April 2005 to 11 June 2005 in the Stipulations and Issues.

At trial, defendant offered the report of Dr. Robert Meth into evidence and applicant objected based on lack of substantial evidence. While Dr. Meth's report could be better, it was substantial on the issue of causation. Furthermore, the report included a lengthy records review over the history of the case. The actual records were not offered into evidence but there are numerous references to bronchitis in 2005 and treatment with antibiotics discussed by Dr. Meth. At the end of his report, he concludes that there were "about two months" of TTD. At his deposition (p.11) he states that periods of TTD before 2014 can be attributed to the industrial injury but that periods of TTD after 2014 are not industrial.

III.

DISCUSSION

The role of a workers compensation judge, like that of any trial judge is twofold: He or she is both a fact-finder and a dispute resolver. In some cases, particularly those with imperfect evidence, the trial judge has to decide which of these two duties is paramount. In most cases, the most efficient approach is to use the imperfect evidence to craft a decision that is based on the available evidence while not engaging in surmise or speculation. Thus, if the exact dates are unavailable to the judge, the judge may use an estimate provided by one of the witnesses, here the expert testimony of Dr. Meth in his report. If the parties are satisfied with the decision, then it stands and the dispute is resolved.

If, however, one or more of the parties is not satisfied with the decision, the trier of fact may develop the record. McDuffie vs. L.A.M.T.A. (en banc, 2002) 67 CCC 138. Such development must start with supplemental reports, followed by a deposition of the doctor, followed by the trial judge strongly urging an agreed medical evaluator (AME.) Only when all of these steps are complete may the trial judge appoint a regular physician under Labor Code section 5701. See Tyler vs. WCAB (1997) 56 Cal.App 4111 389; 62 CCC 924.

Here the undersigned attempted to resolve the dispute by using Dr. Meth's estimates of periods of TTD. This is admittedly problematic for many reasons. First, the estimated periods may be inaccurate. Second, the periods may overlap with periods of work. Third, the periods may overlap with periods where benefits were provide.

However, the parties chose not to fill out paragraph 4 of the benefits paid section of the Pretrial Conference Statement and so one may argue that the defendant waived the exact period in dispute in an effort to focus on the issue of

the benefit rate. Defendant did have two exhibits that were wage statements that were withdrawn from evidence before trial began (Exhibits C and D) but they were wage statements for the years 2017 and 2014 and so do not assist in determining the period of TTD even if they were offered into evidence.

In any event, it is now clear that defendant does not waive these defenses and a more precise adjudication of the exact periods of TTD in question needs to occur. Therefore, the attorneys should be ordered to assemble the medical reports for Dr. Meth's review so that he may determine the exact dates of TTD in a supplemental report pursuant to McDuffie, supra. Also, those specific documents that bear on the issue of the TTD period in dispute should be provided to the trial of fact including wage statements from 2005, earnings records of 2005 and medical reports discussing TTD from that year.

Lastly, defendant correctly points to a clerical error in the decision on the benefit rate. The TTD benefit rate should indeed be changed to \$1,096.54 and the attorney's fee adjusted accordingly after further development of the record.

Lastly, the undersigned would have rescinded the Findings and Award under Rule 10961 but the press of business here required an extension from the Board so that use of this rule became unavailable.

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be granted and the matter returned to the WCJ for correction of the earnings figure and development of the record on the issue of periods of TTD to be awarded.

Date: January 08, 2021
ROGER A. TOLMAN, JR.
Workers' Compensation Judge