WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANA GUZMAN, *Applicant*

vs.

ADAMS & BROOKS, INC.;
ZURICH INSURANCE COMPANY,
ADMINISTERED BY GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ8364344
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the October 5, 2021 Joint Findings, Award and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on April 1, 2012, sustained industrial injury to her right shoulder and upper gastrointestinal system. The WCJ found that defendant was not entitled to credit for alleged overpayment of temporary disability between February 20, 2014 and July 23, 2014.

Defendant's Petition for Reconsideration (Petition) contends that the Agreed Medical Evaluators (AMEs) have determined applicant sustained no temporary disability, entitling defendant to credit for temporary disability sums previously paid.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the October 5, 2021 F&A, and substitute new Findings of Fact and Award.

FACTS

Applicant claimed injury to her right shoulder and upper gastrointestinal system while employed as a production worker by defendant Adams & Brooks, Inc. on April 1, 2012. Defendant admits injury to the right shoulder and gastrointestinal system.

Defendant originally denied liability for applicant's claimed injury, however, and on February 20, 2014, the parties proceeded to trial on the issue of injury arising out of and in the course of employment (AOE/COE). The parties reached an accord and entered into the following stipulation in lieu of trial:

> Defendant agrees to assume liability for treatment for the shoulders only with all other body parts and issues deferred. T.T.D. will be picked up as of 2-20-14, less 15% for attorney fees. Parties agree that T.T.D. may terminate when applicant is MMI/P&S or employed without the filing of a petition to terminate. Applicant agree to return to the employer[']s MPN for treatment and testing within 14 days of receipt of MPN list.

The stipulation was reviewed and approved by a WCJ. (Stipulation and Order, dated February 20, 2014.)

Applicant designated Kevin Pelton, M.D., as her primary treating physician, who declared applicant permanent and stationary on July 7, 2014. (Petition, at 3:1; Applicant's Answer to Petition for Reconsideration, dated December 30, 2020, at 2:9.) Defendant paid temporary disability from February 20, 2014 to July 23, 2014. (March 4, 2020 Minutes of Hearing and Summary of Evidence, at 2:25.)

The parties subsequently selected AMEs Steven Silbart, M.D., in orthopedic medicine, Burton Sobelman, D.D.S., in dentistry, and Jeffrey Hirsch, M.D., in internal medicine. However, none of the three AMEs identified any periods of temporary disability arising out of applicant's industrial injury. (Ex. BB, report of Steven Silbart, M.D., dated February 8, 2016, at p. 2; Ex. CC, report of Burton Sobelman, D.D.S., dated September 12, 2018, at p. 20; Ex. DD, report of Jeffrey Hirsch, M.D., dated June 20, 2017, at p. 20.)

On March 4, 2020, the parties proceeded to trial, with defendant claiming entitlement to overpayment of temporary disability based on the AME reports.

On November 23, 2020, the WCJ issued her decision, finding in pertinent part, that applicant was temporarily totally disabled from February 20, 2014 to July 7, 2014, and that defendant was entitled to a credit against temporary or permanent disability for TTD paid from

July 8, 2014 to July 23, 2014. (November 23, 2020 Finding and Award, Finding of Fact No. 4.) The WCJ relied on the contemporaneous reporting of primary treating physician Dr. Pelton to determine that applicant was entitled to temporary disability until being declared permanent and stationary on July 7, 2014. (Opinion on Decision, dated November 23, 2020, at p. 5.)

On December 17, 2020, defendant filed a Petition for Reconsideration, averring entitlement to reimbursement for all temporary disability paid to applicant, based on the opinions of the AME Dr. Silbart. (Petition for Reconsideration, dated December 16, 2020, at 11:2.)

On February 16, 2021, we granted reconsideration, noting the "WCJ's finding of TD from February 20, 2014, to July 7, 2014, is based on PTP Dr. Pelton's medical reports, which have not been submitted as evidence." As a result, we were unable to consider the merits of the Finding and Award because our decisions "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Accordingly, we rescinded the November 23, 2020 Finding and Award in its entirety and returned the matter to the WCJ for further proceedings. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Opinion and Order), dated February 16, 2021, at p. 3.)

On August 3, 2021, the parties proceeded to trial, and submitted the matter for decision without offering additional evidence or testimony. (August 3, 2021 Minutes of Hearing (Further), at 2:2.)

On October 5, 2021, the WCJ issued the F&A, determining that "[b]ased on the parties' Stipulation and Order of February 20, 2014, Defendant is not entitled to a credit in the amount of the temporary disability paid to the applicant from February 20, 2014 to July 23, 2014, or the attorney fee deducted therefrom." (F&A, Findings of Fact No. 2.) The WCJ based her award on the parties' February 20, 2014 Stipulation and Order, noting that the stipulation "does not provide that it may be voided by later determinations of a medical examiner, and does not reserve rights to a later credit or reimbursement," and that "[d]efendants have not offered any evidence of good cause to set aside the Order. No Petition for Reconsideration was filed." (Opinion on Decision, dated October 5, 2021, at p. 1.)

Defendant's Petition contends that notwithstanding the parties' prior stipulation, the award of temporary disability must be supported by substantial evidence. (Petition, at 8:20.) Defendant avers the AME opinions support a finding of no periods of temporary disability, and the record

does not support a departure from those opinions. (Report, at 10:1.) Defendant further contends its prior stipulation to provide temporary disability does not waive or preclude credit for overpayment. (Petition, at 11:15.) Finally, the Petition contends we have previously considered the February 20, 2014 Stipulation and Order as part of our February 16, 2021 Opinion and Order. (Petition, at 13:16.)

The WCJ's Report responds:

> The WCJ is required by the Opinion and Order Granting and Decision After Reconsideration to "determine whether the admitted evidence in the record of proceedings is substantial evidence to support a finding of TD from February 20, 2014 to July 7, 2014". After a fresh review of the entire record, and all evidence admitted as of the time of issuance of the October 5, 2021 Findings, Award and Order the undersigned found the Stipulation and Order dated February 20, 2014, Exhibit 4, to be substantial evidence to support the finding of temporary total disability. This WCJ does not find that the presence of the AME report must inevitably lead to a finding under it for the temporary disability issue before us as Petitioner contends. The report must be taken in context. Instead, the undersigned considered two key facts: the petitioners did not object under Labor Code section 4062 at any time and the parties voluntarily entered into a Stipulation which resulted in an Order. (Report, at p. 6.)

DISCUSSION

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice..." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the WCJ issued the F&A on October 5, 2021 and defendant filed a timely petition on October 22, 2021. Thereafter, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely petition

and that the Appeals Board's failure to act on that petition was in error, we find that our time to act on defendant's petition was tolled.

Labor Code section 5702[1] provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

Generally, stipulations are binding upon the parties. "Unless the trial court, in its discretion, permits a party to withdraw from a stipulation [citations], it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted." (*Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419].)

Stipulations are designed to expedite trials and hearings and their use in workers' compensation cases should be encouraged. If one party could, as a matter of right, withdraw from a stipulation at any time before it was acted upon by the WCJ or the WCAB, other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for the parties to gather and present evidence on issues thought to have been laid to rest by the stipulation. (*Robinson v. Workers' Comp. Appeals Bd.*, *supra*, 194 Cal.App.3d 784, 791.)

Here, applicant and defendant entered into a stipulation on February 20, 2014 to commence payment of temporary disability indemnity until such time as applicant was "MMI/P&S or employed." (February 20, 2014 Stipulation and Order.) Defendant now contends that evidence adduced subsequent to the stipulation provides a basis for the assertion of a credit that would defeat all or part of the stipulated temporary disability, and that because the stipulation was silent as to its credit rights, it did not relinquish them.

However, in *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1]), the Court of Appeal observed:

> It is also true, "The pleadings in a workers' compensation proceeding are deemed amended to conform to the stipulations and statement of issues agreed to by the parties for the record. The pleadings will also be deemed amended to conform to proof if it appears that the parties considered the matter at issue. [Citations.]

[1] All further statutory references are to the Labor Code unless otherwise stated.

> Pursuant to Labor Code Sec. 5502(d) and W.C.A.B. Rule 10353, stipulations and issues are framed at the mandatory settlement conference (MSC) for later trial at a regular hearing. Discovery closes on the date of the MSC." (2 Herlick, Cal. Workers' Compensation Law (5th ed. 1998) Commencement of Proceedings, § 15.36, p. 15-65.0 (Herlick).) *But the converse is not true; stipulations are not "deemed amended" to conform to proof, vel non, because the point of a stipulation is to obviate the need for proof.* (*Id*., at 1119-1120 (emphasis added).)

Thus, the purpose of the February 20, 2014 Stipulation and Order was, *inter alia*, to resolve the issue of applicant's entitlement to temporary disability. Defendant may not attack the basis of the stipulation solely by evidence adduced thereafter. If defendant wished to reserve its right to seek a credit for the monies it paid pursuant to an approved stipulation, defendant should have asserted that right at the time that it entered into the stipulation. Although defendant couches its efforts to be relieved of the stipulation as outside the terms of the stipulation by terming its request as "a credit," the monies at issue are the very same temporary disability benefits that defendant already paid. While a party may always seek relief from a stipulation "entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation," we discern no such circumstances in the present matter. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 865-866 [44 Cal.Comp.Cases 798].)

Additionally, the WCJ observes that the record reflects no timely objection to the temporary disability findings of applicant's primary treating physician. (Report, at p. 8.) In *J.C. Penney Co. v. Workers' Compensation Appeals Bd. (Edwards)* (2009) 74 Cal.Comp.Cases 826, 831-832 [2009 Cal. Wrk. Comp. LEXIS 201], the dispute involved the time in which a party may lodge an objection under section 4062. The Court of Appeal observed that "[t]he evident purpose of the time limits in section 4062 is to induce both employer and employee to declare promptly medical determination disputes and expeditiously resolve them through the prescribed mechanisms." (*Id*. at 831.) Accordingly, where a party fails to raise a timely dispute to a medical determination governed by section 4062, "they may not attack that determination thereafter." (*Id*. at 832.) Here, as in *Edwards, supra*, the record reflects no timely objection to the temporary

disability findings of the primary treating physician, thus precluding defendant's subsequent challenge.[2] *(Ibid.)*

Defendant further contends that we previously considered the February 20, 2014 Stipulation and Order in our February 16, 2021 Opinion on Decision. (Petition, at 13:13.) The WCJ's November 23, 2020 Findings, Award and Order was based in part on the findings of primary treating physician Kevin Pelton, M.D. (Opinion on Decision, dated November 23, 2020, p. 5.) However, our decision to return the matter to the trial level was premised on the fact that none of the reports of Dr. Pelton had been moved into evidence. (Opinion and Order, dated February 16, 2021, at p. 3.) We observed that pursuant to *Hamilton, supra,* 66 Cal.Comp.Cases 473, the WCJ's decision must be based on admitted evidence in the record. (*Id*. at 476.) We thus returned the matter to the trial level with instructions that the WCJ "determine whether the *admitted evidence* in the record of proceedings is substantial evidence to support a finding of TD from February 20, 2014 to July 7, 2014." (*Ibid., emphasis added.*) Accordingly, we find no merit to the contention that we have implicitly decided this issue in our February 16, 2021 Opinion and Order.

However, while we agree with the WCJ's determination regarding temporary disability, we further note that Findings of Fact No. 3 states that "All other prior Joint Findings of Fact remain in full force and effect." (Findings of Fact No. 3.) The Award further states that the "Award made in favor of applicant Ana Guzman against defendant Adams & Brooks, Inc., remains in full force and effect as stated in the Joint Findings, Award and Order of November 23, 2020," except as it relates to defendant's assertion of entitlement to credit.

Upon the timely filing of a Petition for Reconsideration, section 5907 grants the Workers' Compensation Appeals Board the authority to "affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge." (Lab. Code § 5907.) The grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125

[2] Defendant's Petition cites to various exhibits attached to its October 2, 2020 Trial Brief, including an alleged objection to "all medical reports that contained an inaccurate history." (Petition, at 2:20.) However, none of these letters have been moved into evidence. Further, the parties declined to move additional evidence into the record at the time of the August 3, 2021 submission for decision. (Minutes of Hearing, dated August 3, 2021, at 2:2.)

Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223, 238, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35] (Appeals Bd. en banc).)

In our February 16, 2021 Opinion and Order, we rescinded the November 23, 2020 Findings, Award and Order, and returned the matter to the trial level for further proceeding and decision. (Opinion and Order, dated February 16, 2021, p. 4.) The effect of our rescission of the November 23, 2020 Finding, Award and Order was to render the decision void, as if it had never issued. (See *City of Los Angeles v. Workers' Comp. Appeals Bd. (Benavidez)* (2007) 72 Cal.Comp.Cases 842 [2007 Cal. Wrk. Comp. LEXIS 152] (writ den.); *Mid-Peninsula Flooring v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 963 [2006 Cal. Wrk. Comp. LEXIS 228] (writ den.).) Consequently, there was no decision to remain in full force and effect at the time of the WCJ's October 5, 2021 F&A.

Accordingly, we will rescind the October 5, 2021 F&A, and substitute new findings of fact and award that reflect the November 23, 2020 Findings of Fact, except as to the issue of temporary disability credit, where we will substitute the WCJ's findings as set forth in the October 5, 2021 F&A.

In summary, we agree with the WCJ that the February 20, 2014 Stipulation and Order supports the award of temporary disability and that defendant is not entitled to credit for temporary disability sums paid. However, because our February 16, 2021 Opinion and Order rescinded the November 3, 2020 Joint Findings of Fact, Award and Order, the prior findings of fact and award is no longer of any force or effect. Accordingly, we will rescind the October 5, 2021 F&A and substitute new findings of fact and award.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings, Award and Order, dated October 5, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings of Fact, Award and Order, dated October 5, 2021, is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

JOINT FINDINGS OF FACT

1. Applicant Ana Guzman sustained injury to her right shoulder and upper gastrointestinal system arising out of and occurring in the course of her employment on April 1, 2012. The applicant failed to prove injury to other parts of body including cervical spine, lumbar spine, left shoulder, dental, headaches, and psyche.
2. Applicant reached Maximum Medical Improvement June 20, 2017.
3. Applicant's earnings were $319.99 per week warranting indemnity rates of $213.33 per week for permanent disability and $213.33 per week for temporary disability.
4. Applicant was temporarily totally disabled due to the injury to her right shoulder and upper gastrointestinal system from February 20, 2014 to July 7, 2014, inclusive.
5. Based on the parties' Stipulation and Order of February 20, 2014, defendant is not entitled to a credit in the amount of the temporary disability paid to the applicant from February 20, 2014 to July 23, 2014, or the attorney fee deducted therefrom.
6. The injury caused permanent disability of 25% equal to 100.75 weeks of indemnity, warranting payment at the rate of $213.33 per week in the total sum of $21,492.99, payable beginning June 20, 2017, less attorneys' fees, less sums previously paid, and less credit as appropriate.
7. Applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury herein to her right shoulder upper and upper gastrointestinal system.
8. Applicant is entitled to reimbursement of self-procured medical treatment payable by Defendant pursuant to the Official Medical Fee Schedule in an exact amount to be adjusted by and between the parties, with the WCAB retaining jurisdiction in the event of a dispute.
9. Applicant is entitled to reimbursement of medical-legal costs payable by defendant pursuant to the Title 8, Cal. Code of Regulations, in an exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.
10. The reasonable value of services rendered by applicant's attorney is $3,854.68 which shall be commuted from the final weekly payments of the award to the extent necessary to pay as one lump sum, less sums previously paid, to be held in trust by defendant pending division of the fee between current and former applicant's counsel.

AWARD

AWARD IS MADE in favor of **ANA GUZMAN** against **ADAMS & BROOKS, INC.,** as follows:

a. Permanent disability of 25%, entitling applicant to 100.75 weeks of disability indemnity at the rate of $213.33, in the total sum of $21,492.99, less credit to defendant for all sums heretofore paid on account thereof, and less $3,223.95 payable as attorney fees to be commuted from the far end of the award;

b. Temporary disability entitling applicant to 19.71 weeks at the rate of $213.33 in the sum of $4,205.64, less credit to defendant for all sums heretofore paid on account thereof, and less $630.73 payable to applicant's counsel as attorney fees to be commuted from the far end of the award and held in trust by defendant until division of the fee;

c. Reimbursement of self-procured medical treatment in an amount to be adjusted by the parties;

d. Reimbursement of medical-legal costs in an amount to be adjusted by the parties; and

e. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

ORDER

f. Defendant is ordered to hold all attorneys' fees in trust pending receipt of a fully executed agreement by all counsel for Applicant or an Order regarding the divisions of fees. Jurisdiction is reserved over the issue of division of attorneys' fees. Any Order or Agreement shall consider attorneys' fees which may have been previously paid or withheld pursuant to the Stipulation and Order of February 20, 2014.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2022

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

ANA GUZMAN
SOLOV & TEITELL
GURVITZ & MARLOWE

SAR/abs

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