

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

JOSE PEREZ, *Applicant*

vs.

**VILLA PARK LANDSCAPE;
CALIFORNIA INSURANCE COMPANY,
ADMINISTERED BY APPLIED RISK SERVICES, *Defendants***

**Adjudication Number: ADJ12340832
Santa Ana District Office**

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant seeks reconsideration of the August 3, 2021 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a tree trimmer on April 2, 2019, sustained industrial injury to his back, but not to his head or right elbow; that applicant was entitled to temporary and permanent disability; and defendant was entitled to a credit for temporary disability overpayment.

Applicant filed a cover sheet identifying the filed document as a petition for reconsideration and a "Notice of Appeal" form that does not offer specific grounds for reconsideration of the WCJ's decision.

We received an Answer from the defendant. 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A, except that we will defer the issue of the credit for temporary disability overpayment. (Finding of Fact no. 7, Award "a," Further Award.)

FACTS

Applicant claimed injury to his back, head, and right elbow while employed as a tree trimmer by defendant Villa Park Landscape, then insured by California Insurance Company, adjusted by Applied Risk Services (defendant) on April 2, 2019.

On April 2, 2019, applicant was treated for his injuries at the Orange County Global Medical Center, where a possible L1 anterior vertebral body compression fracture was identified. (Ex. 16, Records of Orange County Global Medical Center, dated April 2, 2019.)

On August 14, 2019, applicant, who was represented at the time, attended an Agreed Medical Examination (AME) with David Wood, M.D. Dr. Wood diagnosed an L1 compression fracture, with ongoing discomfort in the back, and continued applicant on temporary partial disability pending additional treatment and a return appointment in six months. (Ex. 10, Report of AME David Wood, M.D., dated August 14, 2019, p.9.) Dr. Wood noted that at the return appointment, he would either return applicant to full duties, or “in all likelihood, determine [applicant] cannot return to that arduous work that he was in.” (*Ibid.*)

On August 19, 2019, applicant’s treating physician Alexander Richter, M.D., noted that applicant possibly also sustained a subacute compression fracture at T12, and that applicant needed ongoing physical therapy. (Ex. 12, report of Alexander Richter, M.D., dated August 19, 2019, with attached lumbar spine MRI studies, dated August 30, 2019 and May 22, 2019, P. 5.) Dr. Richter requested further MRI studies of the mid and low back. Applicant continued to receive physical therapy through September 2019. (Ex. 6, Physical Therapy Report of Ann Padua, dated September 17, 2019.) On September 23, 2019, applicant reported to his treating physician Dr. Richter that the back pain in the thoracolumbar region was constant, and was exacerbated with activity. (Ex. 13, Report of Alexander Richter, M.D., dated September 23, 2019, p.3.)

On October 29, 2019, primary treating physician (PTP) Dr. Glousman reevaluated applicant, and declared him permanent and stationary. Dr. Glousman assigned permanent work restrictions, whole person impairment, and indicated that there was need for future medical care. (Ex. 2, Report of Ronald Glousman, M.D., dated October 29, 2019, p.5.)

On November 14, 2019, defendant issued a “Notice Regarding Permanent Disability Benefits Permanent Disability Advice,” indicating that permanent disability advances were commencing based on the reporting of Dr. Glousman. (Ex. 7, Notice re Permanent Disability Benefits, dated, dated November 14, 2019.)

On December 23, 2019, treating physician Dr. Richter noted applicant's ongoing symptoms, and indicated a repeat MRI study would be requested. (Ex. 15, Report of Alexander Richter, M.D., dated December 23, 2019.)

On December 25, 2019, applicant sought treatment at the Emergency Department of the Orange County Global Medical Center, where a Toradol injection was administered. (Ex. 11, Records of Orange County Global Medical Center, dated December 25, 2019).

On January 8, 2020, AME Dr. Wood reevaluated applicant and therein opined:

Mr. Perez returns to this office reporting no significant change since last being seen. The MRI report dated 05/22/19 shows a 30% compression fracture of L1 and a minimal compression fracture of 15% of T12. I agree with those findings, a 15% compression fracture of T12 and a 30% compression fracture of L1. Dr. Glousman released him from care in October 2019. He is permanent and stationary at this time. He reasonably was temporarily totally disabled for the reported period of about 6 months after the injury, then worked with restrictions for about two months which was also reasonable. He went back off work after two months because his employer could no longer accommodate his work restrictions. He has been temporarily totally disabled up until October 30, 2019, when Dr. Glousman released her [sic] from care because of that he remains PERMANENT AND STATIONARY. (Ex. 9, Report of AME David Wood, M.D., dated January 8, 2020, p.11.)

Applicant continued to seek medical treatment for his injury, and on February 3, 2020, reported ongoing pain in the low back to treating physician Dr. Richter. (Ex. 14, report of Alexander Richter, M.D., dated February 3, 2020.) On March 23, 2020, defendant filed a petition seeking credit for temporary disability overpayment, averring it had mistakenly restarted temporary total disability (TTD) benefits on December 23, 2019, which ran through January 30, 2020, in the gross amount of \$2,946.68. (Petition for Credit, dated March 23, 2020, at 2:3.)

On May 19, 2020, applicant dismissed his attorney, and elected to proceed *in propria persona*. (Notice of Dismissal of Attorney, dated May 19, 2020.)

On July 7, 2021, the parties proceeded to trial. The issues framed, in pertinent part, included applicant's disagreement with the ratings of the primary treating physician and the AME, and defendant's petition for credit for overpayment of TTD. (July 7, 2021 Minutes, at 4:3.) Applicant testified to his ongoing symptoms and treatment following the October 29, 2019 report of Dr. Glousman, and to his concerns regarding the adequacy of both the PTP and AME reporting. (July 7, 2021 Minutes, at pp.6-7.) While defendant continued to assert its right to a credit, it did not

submit evidence at trial with respect to the claimed temporary disability overpayment and no testimony was proffered by a witness for defendant as to the reason for the claimed overpayment.

On August 3, 2021, the WCJ issued the F&A, which found applicant sustained injury with resulting permanent disability in accordance with the reporting of AME Dr. Wood. (August 3, 2021 F&A, Findings of Fact No. 4.) The WCJ further allowed defendant credit for TTD overpayment as against permanent disability indemnity. (August 3, 2021 F&A, Finding of Fact No. 7.) In his Opinion, the WCJ explained that:

Insofar as applicant was paid temporary total disability until 1/30/2020, but became permanent and stationary 10/29/2019, Defendants are entitled to a credit for overpayment of temporary disability indemnity in the amount of \$2,946.68 over the claimed period 12/23/19-1/30/20. (Opinion on Decision, pp. 13-14.)

On August 25, 2021, applicant filed a cover sheet identifying a petition for reconsideration and a “Notice of Appeal,” on DLSE Form 537, indicating applicant’s appeal of the “the Order, Decision or award of the Labor Commissioner in State Case Number ADJ12340832,” dated August 3, 2021. The document attaches a copy of the August 3, 2021 F&A, but does not specify any grounds for the appeal.

On September 3, 2021, defendant filed its answer, averring applicant had filed a notice of appeal, but no actual appeal, despite having filed a procedurally correct petition for reconsideration in the past. (Answer, at 3:3.) Defendant further noted no basis for appeal had been advanced in the petition. (*Id.* at 3:20.)

In his September 2, 2021 Report, the WCJ reviewed the procedural history prior to the July 7, 2021 trial, including the court’s efforts to elucidate applicant’s concerns and to provide due process to applicant, but did not refer to the credit awarded to defendant. (Report, at p.3.) However, the WCJ further observed that in the absence of a colorable assertion of error, and in light of skeletal filing that failed to state specific statutory grounds for review, the petition should be denied. (Report, at pp.3-4.) The Report does not address defendant’s claim for credit for temporary disability overpayment.

DISCUSSION

We begin by pointing out that other than the Notice of Appeal form, applicant has not filed a substantive petition for reconsideration, or any other document that identifies the underlying grounds for an appeal. Labor Code section 5902 requires a party seeking reconsideration to set

forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board.”¹ (Lab. Code § 5902.) The statute also requires that the petition contain a general statement of any evidence or other matters which the party seeking reconsideration relies upon. Section 5903 provides:

At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds *and no other*:

- (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
- (b) That the order, decision, or award was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order, decision, or award.

(Lab. Code § 5903, *emphasis added*.)

In addition, WCAB Rule 10945 provides that a petitioner seeking reconsideration is to state each contention clearly and separately, and to set forth all the material evidence relevant to the point or points at issue. (Cal. Code Regs., tit. 8, § 10945.) WCAB Rule 10972 provides that “[a] petition for reconsideration, removal or disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved.” (Cal. Code Regs., tit. 8, § 10972.) Here, the Notice of Appeal offers no grounds for why the August 3, 2021 F&A is unjust or unlawful, and contains no general statement of the evidence or reference to the evidentiary record. In short, applicant’s petition is “skeletal,” and is subject to dismissal pursuant to WCAB Rule 10972.

However, the filing of a petition for reconsideration gives the Appeals Board the authority to address all issues, including those not specifically raised. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223, 229, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35] (Appeals Board en banc); Lab. Code, §§ 111(a), 5300, 5301; 5309, 5310, 5906, 5908.) As a result, a grant of reconsideration

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

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]; *State Comp. Ins. Fund v. Ind. Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) In other words, 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. (*Id.*; e.g., also, *Tate v. Ind. Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Ind. Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].)

Irrespective of the fact that applicant’s petition for reconsideration is defective, we have independently reviewed the record in this matter, and we observe that the award of credit to the defendant for temporary disability overpayment requires further explanation.

Defendant seeks credit for temporary disability indemnity it alleges was paid by mistake from December 23, 2019 through January 30, 2020 in the amount of \$2,946.68. (Petition for Credit, dated March 23, 2020.) Yet, defendant submitted no evidence at trial with respect to the claimed credit. In the F&A, the WCJ awarded defendant the requested credit as against accrued permanent disability. (August 3, 2021 F&A, Findings of Fact No. 7.) Yet, the WCJ did not refer to any evidence or provide an explanation as to why the credit was appropriate other than to state that defendant was “entitled to” it.

Under section 4909, the Appeals Board may take into account an overpayment of temporary disability in fixing the amount of compensation to be paid. (Lab. Code, §4909.) In *Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd.* (1996) 14 Cal.4th 76 [61 Cal.Comp.Cases 1360], the Supreme Court stated:

The purpose of [section 4909], is to encourage prompt and voluntary payment of workers’ compensation benefits and to protect employers that mistakenly make payments for nonindustrial conditions. Section 4909 provides for a credit in two situations. First, credit will be given where wages or other payments in excess of compensation liability are paid, and such payments are clearly intended by the employer and the employee as an advance on compensation to become due. Second, in the absence of an agreement, the Workers’ Compensation Appeals Board has discretion to allow credit where the employer voluntarily made payments described in the statute.” (*Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd., supra*, at 86.)

In determining whether a credit should be allowed, the Appeals Board must decide whether allowing a credit for temporary disability overpayment against permanent disability indemnity is disruptive to, or destructive of, the purpose of permanent disability. The court of appeal in *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 829 [45 Cal.Comp.Cases 1106] observed:

It must be remembered that temporary 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. [Citations.] 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. [Citations.] Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. [Citations.] 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. (*Maples, supra*, at 836-837.)

An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) A decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton, supra*, at pp. 475-476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Thus, the decision to allow the defendant's petition for credit for its overpayment of temporary disability indemnity as against permanent disability requires further explanation, including consideration of the legal and equitable principles set forth in *Maples, supra*, 111

Cal.App.3d 827, 838-839. Accordingly, upon return to the trial level, we recommend that the WCJ conduct further proceedings on the issue of defendant's petition for credit, including creating a record and admitting evidence, in order to determine whether the credit should be awarded to defendant for its overpayment.

We acknowledge the effort by the WCJ throughout these proceedings to provide due process to the parties and to ascertain the arguments advanced in order to create a complete record. However, in keeping with the principles outlined in *Maples, supra*, and *Hamilton, supra*, we are unable to determine whether the credit was appropriately awarded in the absence of any evidence or explanation about the basis for the decision.

Accordingly, we affirm the F&A, except that we defer the issue of whether defendant was entitled to the credit for temporary disability overpayments. (Finding of Fact 7, Award "a," and Further Award.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 3, 2021 Findings of Fact & Findings and Award is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

7. The issue of whether defendants are entitled to a credit for overpayment of temporary disability indemnity in the amount of \$2,946.68 over the period 12/23/19-1/30/20 is deferred.

AWARD

AWARD IS MADE in favor of Jose Perez against Villa Park Landscape of:

- a. Permanent disability of 33 percent, equivalent to 152 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$44,080, less credit for permanent disability advances already made to be adjusted by the parties, less the sum of \$2,946.68 for indemnity overpayment to be held in trust by defendants pending determination of the issue of whether defendant is entitled to a credit for temporary disability indemnity, and less the sum of \$6,612 commuted from the far end of the award, to be held in trust by defendants as a fund from which reasonable attorney fees may be paid pending subsequent fee proceedings and further order of the court;
- b. Future medical treatment reasonably required to cure or relieve the effects of the injury herein.

FURTHER AWARD

- c. The issue of whether defendant is entitled to an award of credit for overpayment of temporary disability indemnity in the amount of \$2,946.68, to be applied against defendant's obligation for permanent disability, is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 14, 2022

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

**JOSE PEREZ, IN PRO PER
LAW OFFICES OF JOANN SHEPPARD**

SAR/abs

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