

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

KATHERINE ANN BURTON, *Applicant*

MOTEL 6; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ9022023
Salinas District Office**

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

Applicant and applicant's counsel seek reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of March 23, 2022, wherein it was found that, while employed on April 15, 2013 as a housekeeper, applicant sustained industrial injury to her lumbar spine, thoracic spine, left wrist, left hand, gastrointestinal system, and in the forms of xerostomia and opioid induced endocrinopathy causing permanent disability of 80%.¹

Applicant contends that the WCJ's permanent disability finding in error, arguing that the lumbar spine permanent disability should have incorporated qualified medical evaluator chiropractor Demeil Betoushana, D.C. range of motion impairment findings, the left wrist impairment should have taken into account Dr. Betoushana's lifting impairment findings, and the WCJ should have added applicant's dental and internal permanent disability to the orthopedic permanent disability rather than combine them utilizing the combined values chart (2005 Schedule for Rating Permanent Disabilities at pp. 8-1 - 8-3). Applicant also contends that the WCJ incorrectly calculated the applicant's life pension rate. Additionally, applicant contends that the decision should have contained an express finding deferring the issue of penalties. Finally, applicant's counsel argues that the calculation to determine the attorney's fee utilized the incorrect start date for permanent disability indemnity and that the attorney's fee should have been based on the gross permanent disability indemnity awarded to the applicant rather than the present value of the permanent disability award.

¹ We note that the instant case was the subject of an Opinion and Order Granting Reconsideration and Decision After Reconsideration of July 14, 2014. Since the issuance of that decision, Chairwoman Ronnie G. Caplane and the late Commissioner Frank M. Brass are no longer with the Appeals Board. They have been replaced by Commissioner José H. Razo and Deputy Commissioner Anne Schmitz.

We have not received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We note that there is an error in the calculation of permanent disability in the WCJ's decision. The WCJ awards 80% permanent disability, with the following calculation of permanent disability appearing on page 8 of the Opinion on Decision:

35C23=64+9=73C13=77C9=79C6=80 [Emphasis added.]

However, 35% permanent disability (for the lumbar spine) and 23% permanent disability (for the thoracic spine) combine to produce 50% permanent disability, not the 64% found by the WCJ. The correct calculation utilizing the WCJ's findings should have been 69% permanent disability, calculated as follows:

35c23=50+9=59c13=64c9=67c6=69

As explained below, we will grant reconsideration and amend the WCJ's decision to find permanent disability of 78%. Unfortunately, although we agree that the WCJ erred in not utilizing the range of motion impairment rating for the lumbar spine and not including the loss of lifting capacity rating to the left wrist, because of the computational error referenced above, the permanent disability award is less than the WCJ's award.

Preliminarily, we note that the Appeals Board has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Defendant's Petition was timely filed. However, the Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, therefore, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition for reconsideration. (See *ShIPLEY v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the Petition for Reconsideration on June 21, 2022, making this decision timely.

We find that the WCJ erred in rating applicant's lumbar spine permanent disability at 35%. The WCJ wrote in the Report, "Dr. Betoushana noted in deposition while there was an argument for ROM rating, he felt the DEU rating with an add on for pain most appropriate." (Report at p. 7.) To the contrary, we have reviewed Dr. Betoushana's reports and deposition testimony (October

26, 2020 at pp. 5-6), and Dr. Betoushana opines that the most accurate rating for applicant's lumbar spine impairment includes a rating for loss of range of motion, an add-on for pain, and a rating for loss of lifting capacity. (See also June 16, 2021 report at p. 3.) We thus find 41% lumbar spine permanent disability.

We also find that applicant's left wrist permanent disability should include the loss of lifting capacity found by Dr. Betoushana. In his June 16, 2021 report, Dr. Betoushana thoroughly explains why a 9% WPI rating most accurately reflects applicant's left wrist impairment. (June 16, 2021 report at pp. 1-2.) Accordingly, we find that applicant's left wrist permanent disability is 15%.

However, we affirm the WCJ's decision to combine the orthopedic permanent disability and the internal medicine and dental permanent disabilities utilizing the Combined Values Chart rather than add them. In *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.), we held that adding, rather than combining, two different impairments better reflected a worker's impairment when substantial medical evidence supported the notion that the two impairments had a synergistic effect where, in effect, the resultant impairment was more than the sum of the two impairments. In *Kite*, the evaluator explained why the disparate impairments were not actually disparate, and the impairments in question were all under the physician's expertise.² In contrast, here specialists are suggesting that we add impairments found by them in their own specialty to impairments in completely different body systems found by a different specialist. The specialists did not give any compelling reason why the impairments should be added, and questions beyond applicant's impairment in the specialists' specific fields, including applicant's overall impairment or the operation of the CVC, are beyond the specialists' expertise. (*Applied Materials v. Workers' Comp. Appeals Bd. (D.C.)* (2021) 64 Cal.App.5th 1042, 1097 [86 Cal.Comp.Cases 331].)

Accordingly, we find permanent disability of 78% calculated as follows:

$$41 + 23 = 55 + 15 = 70 + 13 = 75 + 9 = 77 + 6 = 78$$

We will amend the decision to reflect that applicant's life pension rate is \$64.50 per week, subject to adjustment pursuant to Labor Code section 4659(c). The WCJ is correct that attorney's

² Similarly, in this case Dr. Betoushana opined that applicant's disparate spine and left wrist disabilities should be added rather than combined utilizing the CVC. Dr. Betoushana's opinions in this regard were accepted by the WCJ, and the overall permanent disability was arrived at by adding the left wrist disability to the combined lumbar and thoracic spine disabilities.

fees should be based on the present value of applicant's permanent disability and life pension awards. (Lab. Code, § 5101.) In determining the present value of the awards, the proper permanent disability start date and the proper life pension rate should be utilized.

Finally, we will amend the decision to reflect that the issue of penalties is expressly deferred.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of March 23, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of March 23, 2022 is **AMENDED** as follows:

FINDINGS OF FACT

1. KATHERINE ANN BURTON, while employed on 04-15-2013 as a housekeeper, occupational group 340 at Salinas, California, by MOTEL 6, whose workers' compensation insurance carrier was LIBERTY MUTUAL INSURANCE COMPANY, sustained injury arising out of and occurring in the course of employment to her lumbar spine, thoracic spine, left wrist, left hand, xerostomia, gastrointestinal and opioid induced endocrinopathy.

2. Applicant's earnings at the time of injury were \$215.00 per week producing a temporary disability rate of minimum in effect at time monies are paid and a permanent disability indemnity rate of \$160.00 per week.

3. The injury resulted in temporary disability for the period April 17, 2013 through May 6, 2013 and July 22, 2013 through August 17, 2017 payable at the rate of minimum at the time of award per week, less credit for all benefits paid on account thereof, subject to the 104 week limitation of Labor Code Section 4656(c)(2).

4. Applicant's injury caused permanent disability of 78%, entitling applicant to 561.25 weeks of disability indemnity payable at the rate of \$160.00 per week in the total sum of \$89,800.00, followed by a life pension at rate of \$64.50 per week, subject to adjustment pursuant to Labor Code 4659(c), less credit for all sums paid on account thereof, less attorney's fees of 15% of the present value of the permanent disability and life pension awards to be commuted horizontally from permanent disability and in accord with the uniform increasing reduction method from the life pension.

5. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

6. The reasonable value of the services and disbursements of applicant's attorney 15% of remaining temporary disability to be paid, 15% of the present value of the award of permanent disability indemnity awarded herein and 15% of the present value of the life pension awarded herein, including a reasonable estimate of the Labor Code section 4659(c) increases assuming a 3 percent annual increase. The exact calculation of attorneys' fees is to be adjusted by the parties with WCAB jurisdiction reserved in the event of any dispute.

7. Any issue of Labor Code section 5814 penalties is expressly excluded from this decision, and is deferred with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of KATHERINE ANN BURTON against LIBERTY MUTUAL INSURANCE COMPANY of:

- a. Temporary disability indemnity in accord with paragraph 3 above;
- b. Permanent disability in accord with paragraph 4 above, less attorney's fees in accord with paragraphs 4 and 6;
- c. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2022

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

**KATHERINE ANN BURTON
SPRENKLE, GEORGARIOU & DILLES
STANDER REUBENS**

DW/oo

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