

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

LOUIS PELLATIRO, *Applicant*

vs.

**UNITED TECHONOLOGIES; NEW HAMPSHIRE INSURANCE,
*Administered By AIG CLAIMS, INC., Defendant***

**Adjudication Number: ADJ11175014
San Diego District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 2, 2021, wherein it was found that, while employed as a maintenance technician during a cumulative period ending on October 1, 2017, applicant sustained industrial injury to his back and feet, causing compensable permanent disability of 14%. The permanent disability award was based solely on applicant's back impairment, which was apportioned 50 percent to factors other than the industrial injury pursuant to Labor Code section 4663. It was also found that, "This injury caused temporary total disability beginning November 8, 2017 to and including July 1, 2019 payable at the rate of \$1,172.57 per week, less credit to employer for all sums previously paid. Pursuant to Labor Code § 4650(d), the amount of the arrearages, if any, shall be increased by ten percent." (Finding No. 3.) The decision also included a finding that, "At the time of injury, the applicant's earnings were \$1,986.05 per week, warranting indemnity rates of \$1,172.57 per week for temporary disability..." (Finding No. 2.) The temporary disability rate found by the WCJ corresponds to the maximum rate in 2017, as two-thirds of \$1,986.05 is actually \$1,324.03. As of 2021, \$1,324.03 is beneath the maximum temporary disability indemnity rate. (<https://dir.ca.gov/dwc/WorkersCompensationBenefits.htm>.) Finally, the decision included a finding that "Lien claimant Employment Development Department is entitled to reimbursement from the employer for the benefits it provided to employee for the inclusive dates November 8, 2017 through October 30, 2018." (Finding No. 7.)

Defendant contends that the WCJ erred in (1) finding industrial injury and in (2) finding EDD entitled to reimbursement for its lien, arguing that the EDD lien was resolved by stipulation and order of June 7, 2021. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

In the Report, the WCJ recommends that we affirm the finding of industrial injury, but that we grant reconsideration and amend the decision to delete any reference to repayment of the EDD lien and to amend the decision “to find that applicant was temporarily disabled for the period October 31, 2018 to July 1, 2019 (the period commencing after the closing date that EDD paid.)”

As explained below, we will affirm the finding of industrial injury. However, we will grant reconsideration and amend the WCJ’s decision to defer the issue of temporary disability and the EDD lien.

Applicant was evaluated for his back condition by qualified medical evaluator chiropractor Tami S. Auerbach, D.C. At her January 3, 2019 deposition, Dr. Auerbach testified that any back condition arising out of the cumulative trauma period was secondary to altered gait caused by applicant’s feet condition. Thus, industrial causation of the back condition was dependent upon industrial causation of the feet condition. (January 3, 2019 deposition at p. 27.) Dr. Auerbach testified, “We’ve had discussion here today about the fact that if the origin of his lower back problems [was] precipitated from his foot and ankle condition, that an opinion from [treating podiatrist Michael Quinn, DPM] or another podiatrist would be appropriate.” (January 3, 2019 deposition at p. 34.) “So until that determination is made, because Mr. Pellatiro informed me that the impetus for his back pain with regard to the [continuous trauma claim] was his limping from his problems with his [feet] – it’s like a ‘if that, but for.’” (January 3, 2019 deposition at p. 40.)

Applicant was evaluated by qualified medical evaluator podiatrist Nicholas N. DeSantis, DPM on March 27, 2019. Dr. DeSantis issued a report of his evaluation on April 6, 2019. In the April 6, 2019 report, Dr. DeSantis wrote, “This evaluator feels, with reasonable medical probability, that this patient’s right foot pain is a result of both a local foot strain, or plantar fasciitis, and also a component of radiculopathy.... This evaluator feels that any foot strain, or sprain to the right foot, or any plantar fasciitis, was caused by mechanism of injury from working hard on unyielding surfaces, and performing his daily job duties as a mechanic. This evaluator feels that any foot strain or plantar fasciitis has healed.” (April 6, 2019 report at pp. 19-20.)

After reviewing Dr. DeSantis's report, Dr. Auerbach concluded that since Dr. DeSantis found the feet condition industrial, the back condition was also industrial. (June 1, 2019 report at p. 2.) Dr. Auerbach reiterated in a July 10, 2019 report that "Dr. DeSantis did find that Mr. Pellatiro sustained injury AOE/COE to his feet as a result of the CT-10/1/2017." (July 10, 2019 report at p. 4.) Thus, it remained Dr. Auerbach's "opinion that within reasonable medical probability Mr. Louis Pellatiro sustained injury arising out of and occurring in the course of employment with UTC Aerospace Systems as alleged." (July 10, 2019 report at p. 4.)

Dr. DeSantis was deposed on October 28, 2019. While Dr. DeSantis was unable to say that he saw evidence of past plantar fasciitis in his 2019 physical examination of the applicant, he testified as follows: "I am unable to say whether he had plantar fasciitis in the beginning or not, but the treating physicians and Dr. Quinn is an excellent physician. If they called it plantar fasciitis at that time, I would stay with that and when they come into the doctor's office and their foot hurts, you are going to treat them.... I would just say he had plantar fasciitis based on the treating doctors before him." (October 28, 2019 deposition at pp. 22-23.) Dr. DeSantis testified "[Dr.] Quinn diagnosed it as plantar fasciitis. Based on his work history, what he does for a living for so many years, it's reasonable to think that the guy has arch pain." (October 28, 2019 deposition at p. 23.) Dr. DeSantis testified that he was unable to say "with reasonable medical *probability*" that applicant did not have plantar fasciitis. (October 28, 2019 deposition at p. 24 [emphasis added].) Dr. DeSantis then admitted that he could not "say to any medical *certainty* that [applicant] ever had plantar fasciitis in 2017 or 2018." (October 28, 2019 deposition at p. 24 [emphasis added].)

Dr. Auerbach testified at a second deposition that she reviewed Dr. DeSantis testimony and understood it to mean that Dr. DeSantis "found injury to the foot, but that there were no residuals." (December 16, 2019 deposition at p. 59.)

We agree with Dr. Auerbach and the WCJ that Dr. DeSantis found that applicant had an industrial condition in his feet, and that Dr. Auerbach's analysis thus constitutes substantial evidence of industrial back injury and disability. Dr. DeSantis wrote in his report, "with reasonable medical probability, that this patient's right foot pain is a result of both a local foot strain, or plantar fasciitis, and also a component of radiculopathy." (April 6, 2019 report at pp. 19-20.) Dr. DeSantis never contradicted this initial opinion. At his deposition he expressly stated that he was unable to state with "reasonable medical probability" that there was no plantar fasciitis. (October 28, 2019 deposition at p. 24) Only when asked by the defense attorney whether there was "certainty" that

applicant had plantar fasciitis, an incorrect legal standard, Dr. DeSantis testified that he agreed there was no certainty. The proper standard in workers' compensation proceedings is reasonable medical probability. (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660].) Certainty is not the correct standard and Dr. DeSantis's testimony that certainty did not exist is irrelevant. In any case, we note that Dr. Quinn diagnosed applicant with plantar fasciitis, and Dr. Auerbach was free to rely upon Dr. Quinn's contemporaneous reporting of applicant's condition.

Thus, the WCJ correctly found industrial injury and resultant disability.

However, we will grant reconsideration because, as admitted by the WCJ, he did not account for the prior stipulation and order with regard to the EDD lien in making his findings. The WCJ recommends in the Report that we amend the decision "to find that applicant was temporarily disabled for the period October 31, 2018 to July 1, 2019." (Report at p. 4.) However, the proper disposition is to find the entire period of industrial temporary disability, and deduct amounts paid by EDD from defendant's temporary disability indemnity liability to the applicant. Additionally, we note that the WCJ's findings regarding temporary disability appear to not take into account the provisions of Labor Code section 4661.5. Finally, while the WCJ finds that the amount of temporary disability indemnity arrearages shall be increased by ten percent "pursuant to the provisions of Labor Code § 4650(d)," "the section 4650(d) penalty [is] applicable only where liability for injury and disability benefits is not in dispute." (*Leinon v. Fishermen's Grotto* (2004) 69 Cal.Comp.Cases 995, 998 [Appeals Board en banc].) Accordingly, we will grant reconsideration, and defer the issues of temporary disability and the EDD lien so that the parties may be heard on these issues, and the WCJ may issue a proper temporary disability indemnity award.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award of November 2, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of November 2, 2021 is **AMENDED** as follows:

FINDINGS OF FACT

1. Louis Pellatiro while employed during the period October 1, 2016 through October 1, 2017, as a maintenance technician, Occupational Group No. 470, by United Technologies, then insured for workers' compensation by New Hampshire Insurance Company, sustained an injury arising out of and in the course of employment to his back and feet.
2. At the time of injury, the applicant's earnings were \$1,986.05 per week, warranting an indemnity rate of \$290.00 per week for permanent disability.
3. The issues of temporary disability and the EDD lien are deferred, with jurisdiction reserved.
4. This injury caused compensable permanent disability of 14%, in the amount of \$13,412.50, payable forthwith.
5. Applicant will require further medical treatment to cure or relieve from the effects of this injury to his back and feet.
6. The reasonable value of the services of applicant's attorney is \$2,011.88, 15 percent of the permanent disability indemnity awarded herein. The issue of attorneys' fees, if any, on any temporary disability indemnity recovery is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of LOUIS PELLATIRO, against NEW HAMPSHIRE INSURANCE COMPANY of:

A. Permanent disability indemnity in the accrued amount of \$13,412.50, less an attorneys' fee of \$2,011.88, payable to The House of Workers' Compensation, whose lien is hereby allowed.

B. All further medical treatment to cure or relieve from the effects of the industrial injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 24, 2022

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

**LOUIS PELLATIRO
THE HOUSE OF WORKERS' COMPENSATION
ENGLAND, PONTICELLO & ST. CLAIR**

DW/oo

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