

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

MAHEALANI MAHEALANI, *Applicant*

vs.

**CITY OF SAN JOSE, permissibly self-insured,
administered by INTERCARE, *Defendants***

**Adjudication Number: ADJ4250207 (SJO0267464)
San Jose District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision After Reconsideration.

Applicant and Defendant each seek reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on April 9, 2020, and served on April 15, 2020, wherein the WCJ found in pertinent part that defendant paid \$5,026.86 as temporary disability indemnity between February 29, 2004 and July 20, 2004; that permanent disability indemnity payments commenced the day after the last payment of temporary disability; and that applicant's prior counsel is entitled to attorney's fees based in an amount of \$6,472.50.

Applicant contends that she should receive a credit for attorney's fees previously awarded in three companion cases. Applicant also contends that a lien for attorneys' fees in the three companion cases should be paid from the award of attorneys' fees in the instant matter.

Defendant contends that the WCJ erred by not giving defendant a credit for temporary and permanent disability indemnity payments previously made. Defendant also contends that the WCJ did not use the correct start date when determining applicant's permanent total disability.

¹ As Commissioner Lowe, who previously served as a panelist in this matter, no longer serves on the Appeals Board, a new panel member has been assigned in her place.

We received an answer to applicant's Petition from applicant's prior counsel Borah and Shaffer.² We have not received an answer in response to defendant's petition.

The WCJ issued a Report and Recommendation on applicant's Petition for Reconsideration (Report) recommending that applicant's Petition be denied. The WCJ issued a Report and Recommendation on defendant's Petition for Reconsideration, recommending that the Petition be granted to amend the F&A to allow defendant credit for temporary disability and permanent disability indemnity payments previously made.

We have considered the allegations in the Petitions, the answer to applicant's Petition, and the contents of the Reports with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Report regarding applicant's Petition, which is adopted and incorporated herein, we do not disturb the WCJ's decision as to the issues raised by applicant with respect to the attorney's fee. Furthermore, for the reasons stated in the WCJ's Report regarding defendant's Petition, which is also adopted and incorporated herein, we will amend the F&A as follows to clarify that payments of permanent disability commence July 21, 2004, the day after the last payment of temporary disability benefits with credit to defendant for temporary and permanent disability indemnity payments previously made, to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute. Otherwise, we will affirm the F&A.

At the outset, we note that Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.³ Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, this decision is timely.

² Applicant filed the Petition in pro per, but was previously represented by Borah and Shaffer.

³ Governor Newsom's Executive Order N-68-20 may be accessed here: <https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf>. (See Evid. Code, § 452(c).)

Regarding credit for temporary and permanent disability indemnity payments previously made, we also note that the Appeals Board has held that “[c]onstruing sections 4650 and 4661 together, if a defendant paid permanent partial disability payments to an applicant who becomes permanently totally disabled, the defendant must retroactively adjust the permanent disability payments to the correct rate.” (*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 562 (Appeals Board en banc).) Upon an award of permanent disability, “the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee’s disability became permanent and stationary, whichever is earlier.” (Lab. Code, § 4650(b)(2); *Brower, supra*, at 561, fn. 9.)

Accordingly, we amend the F&A as follows to clarify that payments of permanent disability commence July 21, 2004, the day after the last payment of temporary disability benefits with credit to defendant for temporary and permanent disability indemnity payments previously made, to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute. Otherwise, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 15, 2020 Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

Finding 9. The injury has resulted in a 100% total permanent disability, payable at the rate of \$698.35 per week, commencing July 21, 2004, the day after the last payment of temporary disability, and to be augmented by the required Cost of Living Adjustment, for the remainder of applicant's lifetime, with credit to defendant for temporary and permanent disability indemnity payments previously made, to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, 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.

**MAHEALANI MAHEALANI
BORAH & SHAFER
RTGR LAW**

JB/abs

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

MAHEALANI MAHEALANI,

Applicant,

vs.

CITY OF SAN JOSE; INTERCARE
ROSEVILLE;

Defendants

Case No. ADJ4250207

**REPORT AND RECOMMENDATION
ON PETITION FOR
RECONSIDERATION**

I
INTRODUCTION

Applicant, Mahealani, born [], while employed on 02/26/2004, as a placement specialist, occupational group numbers 110/112, in San Jose, California, by The City of San Jose, sustained an injury arising out of and arising in the course of employment to the psyche, with neurological sequelae.

The Findings and Award in this case issued on 04/09/2020. The Petitioner is Applicant, a pro per injured worker, who has timely filed the verified Petition for Reconsideration on 04/14/2020. The Petition for Reconsideration is not legally defective. Former Applicant's Attorney (now lien claimant Brett Borah of Borah & Shaffer) has filed an Answer. There is no Answer from Defendant, but Defendant technically has no standing as to the issue presented.

Petitioner contends that the awarded attorney's fee in the amount of \$6,472.50 should be reduced by an amount of \$3,775.00 for attorney's fees already paid, and that the lien of yet another former attorney, Robert T. Bledsoe, be paid.

II
FACTS

Mahealani has only one name. We also use her first name as her last name as EAMS requires an entry in the last-name field.

Applicant Mahealani was employed by The City of San Jose as a placement specialist, and while so employed suffered several specific injuries. The injury at issue **herein** is a specific injury of 02/26/2004 to Applicant's psyche following a violent assault.

Applicant also had at least three (3) other specific injuries with The City of San Jose, including ADJ6554121 (DOI: 2005), ADJ171328 (DOI: 2005), and ADJ2689808 (DOI: 2007).

These will be referenced herein as the “three companion cases.” It appears that Mahealani was originally represented for these three companion cases by attorney Robert T. Bledsoe. At some point, Mahealani executed a Substitution of Attorney, and became represented by attorney Brett Borah in these three companion cases. Attorney Bledsoe filed a lien for attorney’s fees in the three companion cases.

Applicant also became represented by attorney Brett Borah in the specific injury herein. I have no evidence that Mr. Bledsoe ever represented Mahealani in **this** specific injury. There is no evidence of a lien for attorney’s fees in **this** case by Mr. Bledsoe.

On or about 04/23/2018 the parties in the three companion cases executed Stipulations with Request for Award for a combined 16% permanent disability. Attorney’s fees were awarded in the amount of \$3,775.00 in the three companion cases, and Mr. Borah was to resolve the lien of Mr. Bledsoe. Mahealani alleges that the lien of Mr. Bledsoe remains unresolved, but those three companion cases are not at issue herein. Mr. Bledsoe has his remedies to pursue his lien, and that lien is not at issue herein.

At the time of trial in **this** case, Mahealani was still represented by Mr. Borah. Mr. Borah alleged at trial that Applicant had a 100% total permanent disability.

Following trial, this Judge determined that the medical record required further development. As such, the submission was rescinded and the parties were directed to conduct additional discovery. Mahealani then dismissed Mr. Borah as her attorney of record, and concluded the matter in propia persona.

This Judge appointed Robert Weinmann, M.D., as a regular physician to conduct a neurological medical-legal evaluation.

Applicant was awarded 100% total permanent disability based on the neurological evidence in combination with the psychiatric evidence presented at trial. Based on the psychiatric evidence alone, Applicant would have been awarded a 40% permanent disability.

This Judge awarded Mr. Borah an attorney’s fee of \$6,472.50 based on the likely 40% award based on the case presented at trial, and not based on the ultimate 100% award as Mr. Borah did not develop that evidence.

Mahealani has filed a timely and verified Petition for Reconsideration alleging that she should receive a credit for the \$3,775.00 paid in the three companion cases as against the award of attorney's fees in this case. Mahealani also demands that the lien of Mr. Bledsoe in the three companion cases be paid.

Mr. Borah has filed a verified Answer.

III LEGAL ARGUMENTS

CREDIT FOR AWARD OF ATTORNEY'S FEES PAID IN COMPANION CASES

While the argument is quite understandable, Mahealani is in error in her belief that she is entitled to a credit for the award of attorney's fees in this case for attorney's fees paid in the three companion cases.

The Award which Mahealani references in ADJ6554121, ADJ171328 and ADJ2689808 did not include any settlement in this case herein of ADJ42502071. There is no indication that the parties ever intended for the attorney's fees in the companion cases to be considered as payment in this case. There is no legal authority for the proposition that attorney's fees paid in a companion case should be credited against an entirely separate case, and Mahealani offers no legal support for her proposition.

Further, the lien filed by Mr. Bledsoe in the three companion cases is not at issue herein. Mr. Bledsoe as a very experienced attorney in workers' compensation is certainly aware of the process for pursuing his lien. Mr. Bledsoe has been advised of the settlement in the three companion cases and has all remedies available to him. Mahealani has no standing to pursue the lien on behalf of Mr. Bledsoe and the lien in the three companion cases has no bearing on the award of attorney's fees in this case.

IV
RECOMMENDATION

I recommend that Defendant withhold the amount of \$6,472.50 from the accrued benefits due to Mahealani as she has been without indemnity for an extended period, and that the funds for attorney's fees be held by Defendant pending decision by the WCAB. In the interim, Defendant should begin payment of the award of permanent disability.

I also recommend that the Petition for Reconsideration be denied.

Date: 04/24/2020



ADORALIDA PADILLA
Workers' Compensation Judge

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

MAHEALANI MAHEALANI,

Applicant,

vs.

CITY OF SAN JOSE; INTERCARE
ROSEVILLE;

Defendants

Case No. ADJ4250207

**REPORT AND RECOMMENDATION
ON SECOND PETITION FOR
RECONSIDERATION**

I
INTRODUCTION

Applicant, Mahealani, born [], while employed on 02/26/2004, as a placement specialist, occupational group numbers 110/112, in San Jose, California, by The City of San Jose, sustained an injury arising out of and arising in the course of employment to the psyche, with neurological sequelae.

The Findings and Award in this case issued on 04/09/2020. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration on 04/29/2020. The Petition for Reconsideration is not legally defective. Applicant has not filed an Answer. It is noted that Applicant has previously filed her own Petition for Reconsideration, but on attorney's fee issues rather than on any of the issues raised herein by Defendant.

Petitioner contends that the Findings and Award [F&A] may be construed to award additional temporary disability indemnity even though the issue was not raised by either party or the Court at trial; that the F&A does not address the explicitly raised issue of credit for permanent disability advances; that the F&A did not address the explicitly raised issue of Defendant's entitlement to credit for temporary disability paid in other cases; and that the evidence does not support a permanent disability indemnity start date of 07/21/2004.

II.

FACTS

Let it be noted: Mahealani has only one name. We also use her first name as her last name as EAMS requires an entry in the last-name field.

Applicant Mahealani was employed by The City of San Jose as a placement specialist, and while so employed suffered several specific injuries. The injury herein is a specific injury of 02/26/2004 to Applicant's psyche following a violent assault.

The parties stipulated at trial that Defendants have paid the sum of \$5,026.86 as temporary disability indemnity for broken periods between 02/29/2004 and 07/20/2004, at the rate of \$651.63 per week.

As a compensable consequence to medical treatment, as a side effect of medication usage, Mahealani developed Tardive Dyskinesia which was not evaluated prior to the trial. This Judge rescinded submission of the matter, and ordered the record further developed.

Following further development of the medical record, it was determined that Applicant had suffered a total permanent disability.

The F&A issued on 04/09/2020 and was electronically served the same day.

Applicant filed a Petition for Reconsideration as to the award of attorney's fees, and a Report and Recommendation issued on 04/24/2020. Said Petition remains pending at the Board.

Defendant has filed a Petition for Reconsideration as to credit issues, temporary disability and the start date for permanent disability.

III.

LEGAL ARGUMENTS

1. **DEFENDANT ALLEGES THAT THE F&A MAY BE CONSTRUED TO AWARD ADDITIONAL TEMPORARY DISABILITY INDEMNITY EVEN THOUGH THE ISSUE WAS NOT RAISED BY EITHER PARTY OR THE COURT AT TRIAL**

Temporary disability was not raised at trial.

Temporary disability has not been awarded in the F&A. That is to say, there is not "additional" temporary disability awarded in the F&A. While there is language in the Award of "temporary disability as set forth in Findings Nos. 3 and 4" this language simply reflects the

temporary disability rate the parties **stipulated to at trial**, and acknowledges what has already been paid by Defendant **as stipulated to at trial**. There is no **additional** award of temporary disability. Defendant is interpreting the language much too broadly. There is no award of temporary disability over and above what the parties agreed has already been paid, and there is no claim for additional temporary disability which has been made by Applicant. There has been no denial of Defendant's due process rights.

2. **DEFENDANT ALLEGES THAT THE DECISION DOES NOT ADDRESS DEFENDANT'S ENTITLEMENT TO CREDIT FOR PERMANENT DISABILITY ADVANCES**

Defendant did offer a benefits printout, and said exhibit was admitted into evidence. There does not appear to be any dispute over the amount of permanent disability advances.

I regularly do not include language of "credit to Defendants for permanent disability advances, according to proof" when issuing an F&A. I generally defer credit issues for informal resolution by the parties. It is well-understood and established that Defendants are entitled to credit for advances whether it is specifically referenced by the Judge or not. Even the "form" Award page utilized in all agreed-upon Stipulations with Request for Award makes no mention of credit to Defendants; regardless, Defendants take credit in each and every case where advances are paid, even though the form Award makes no mention of it.

Defendant is reading the F&A much too narrowly whereas in the first issue raised Defendant was reading the F&A much too broadly.

I have no objection if the Board would like to issue a revised F&A which includes the language of "with credit to Defendants for permanent disability advances made, according to proof" but I find such language to be superfluous given the custom and practice of informal adjudication of credit issues (which have not been raised), and the benefits printout which was admitted into evidence and which has not been objected to as to accuracy. Credit issues are not "in controversy" in this case.

Under no circumstances can the F&A be construed to allow a double recovery to Applicant, and there is no evidence that Applicant denies having received advances. There is no prejudice to Defendants in the manner the F&A has been written (which, by the way, I have written my F&A's for nearly 19 years) but again, I have no objection to the Board issuing an amended Award if the Board deems such an amendment necessary.

3. **DEFENDANT ALLEGES THAT THIS JUDGE DID NOT ADDRESS THE ISSUE OF CREDIT AGAINST PERMANENT DISABILITY FOR OVERLAPPING PERIODS OF TEMPORARY DISABILITY PAID IN APPLICANT'S SEPARATE CASES**

On this issue, Defendant is correct. This Judge did not address this issue, and upon review of the MOH/SOE it is noted that Defendant did raise this as an issue.

Again, typically, this Judge leaves credit issues for informal resolution by the parties. There does not appear to be any dispute by Applicant that she did in fact receive payments from Defendants. There is no evidence that Applicant is claiming an entitlement to periods during which she has already been paid. The benefits printouts were offered and admitted without objection. Given the overlapping payments and the nature and extent of permanent disability, it would be a windfall to Applicant to receive both temporary disability indemnity and permanent disability indemnity for the same periods. It was always my intention to award proper credits to Defendants.

Applicant offered no evidence or legal authority for the proposition that Defendant should not receive a credit for payments made.

My Recommendation is that the Board issue an amended F&A reflecting credit to Defendant for payments made to Applicant, according to the evidence submitted by way of the benefits printouts, with jurisdiction reserved.

4. **DEFENDANT ALLEGES THAT THE EVIDENCE DOES NOT SUPPORT A PERMANENT DISABILITY START DATE OF 07/21/2004**

Here, I strongly disagree with Defendants.

It was stipulated to on the record that the last payment of temporary disability was made in this case on 07/20/2004.

The *en banc* decision in *Warren Brower v. David Jones Construction* (2014) 79 CCC 550 holds that when Applicant who is receiving permanent partial disability payments then becomes permanent and stationary and is determined to be permanently totally disabled, Defendant must pay permanent total disability retroactive to the date its statutory obligation to pay temporary disability terminated.

Applicant received a last payment of temporary disability in this case on 07/20/2004. That has been stipulated to by the parties. Applicant received permanent disability advances (as evidenced by the benefits printout and Defendant's demand in their Petition for Reconsideration

to explicitly receive credit for said payments). Applicant was then determined to be 100% totally permanently disabled. Pursuant to *Brower*, the payments of permanent disability begin after the last payment of temporary disability, which was, again, 07/20/2004. If Defendant made other payments subsequent to this date, then Defendant is entitled to a credit, as referenced herein-above. But the law is clear that the obligation to commence permanent disability pursuant to *Brower* would be 07/21/2004 in this case.

I have no evidence admitted on the issue of wages between the date of injury and the date of the trial. If Defendant is claiming a credit for wages earned during the period of permanent disability, either the issue needs to be returned to the trial evidence for receipt of actual evidence, or the parties will need to informally adjust this amount with WCAB jurisdiction reserved.

Defendant's reliance on the *Pedersen* case is misplaced, as that is first, a Board panel decision, and second, came before the en banc decision in *Brower*. *Brower* is controlling in this case.

IV **RECOMMENDATION**

I have no objection to the Board issuing a slightly amended F&A to explicitly allow Defendant credit for permanent disability paid, and credit for temporary disability paid to Applicant in companion cases for duplicate periods. There could even be language of informal adjudication of these credits with WCAB jurisdiction reserved. I apologize for not being more explicit in the F&A language.

However, the start date for permanent disability should not be disturbed. The *Brower* decision makes the start date clear, and Defendant is simply entitled to credit for payments made (or wages received) by Applicant during the period in question.

Date: 05/12/2020



ADORALIDA PADILLA
Workers' Compensation Judge