

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

TRANSITO PRIETO, *Applicant*

vs.

**SYLMAR HEALTH & REHABILITATION CENTER,
INSURED BY CALIFORNIA HEALTHCARE INDUSTRY PROGRAM,
administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ12382729
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Partial Findings of Fact and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 24, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) while performing tasks consistent with occupational group number 460.

Defendant contends that the Minutes of Hearing and Summary of Evidence (MOH/SOE) dated June 21, 2022, were silent as to applicant's occupational group number and therefore the WCJ's finding of fact is without basis. In the alternative, defendant contends that the WCJ erred in finding that applicant was injured performing tasks consistent with occupational group number 460 because applicant asserted occupational group 340 and defendant asserted group 311.

We received an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's report, which we adopt and incorporate, and as discussed herein, we will deny reconsideration.

Preliminarily, we note that the WCJ issued an amended MOH/SOE on July 5, 2022, which lists occupational group number as an issue at trial, and that applicant claimed occupational group

number 340 and defendant claimed occupational group number 311. (Amended MOH/SOE, issued July 5, 2022, p. 2.) Thus, to the extent that defendant contends that the original MOH did not set forth the issues for trial, the Amended MOH remedied that error.

We note that the WCJ is not bound by the occupational group number put forth by applicant. The parties did indeed stipulate that applicant's job title was certified nurse assistant. (Pre-trial conference statement, p. 2; amended MOH/SOE, issued July 5, 2022, p. 2.) However, as the WCJ observes, a job title is just the starting point for determining the appropriate occupational group number.

While the parties may stipulate to the facts in controversy, the WCJ is not bound by the parties' stipulations and may make further inquiry into the matter "to enable it to determine the matter in controversy." (Lab. Code, § 5702; see also *Turner Gas Co. v. Workers' Comp. Appeals Bd. (Kinney)* (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253].) WCAB Rule 10835 provides that no finding shall be made contrary to a stipulation of the parties without giving the parties notice and an opportunity to be heard. (Cal. Code Regs., tit. 8, § 10835.) Here, although the parties stipulated as to applicant's job title, the occupational group number was a disputed issue at trial. Thus, the parties had both notice and the opportunity to be heard.

As held in *Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497 and *National Kinney v. Workers' Comp. Appeals Bd.* (1980) 113 Cal.App.3d 203, an injured worker is entitled to be rated for the occupation which carries the highest factor in the computation of disability. (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 505-506 [37 Cal.Comp.Cases 393]; *National Kinney v. Workers' Comp. Appeals Bd.* (1980) 113 Cal.App.3d 203, 215 [45 Cal.Comp.Cases 1266].) Here, as in *Holt v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 1257, there is evidence that applicant actually performed duties required of the more arduous occupation. (*Holt v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 1257, 1261-1262 [51 Cal.Comp.Cases 576].)

Applicant testified that his responsibilities included breaking up fights initiated by patients and restraining patients if they were aggressive. (MOH/SOE, June 21, 2022, 6:23-25; amended MOH/SOE, issued July 5, 2022, 7:17-19.) Moreover, applicant testified that he was assigned to an area with the most aggressive patients, but where no orderlies were assigned. (MOH/SOE, June 21, 2022, 7:2-5; amended MOH/SOE, issued July 5, 2022, 7:21-24.) The WCJ found applicant's testimony credible and we have given the WCJ's credibility determinations great

weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

Applicant's uncontroverted testimony that he was required to assist in the physical restraint of combative patients provides evidentiary support for the WCJ's finding that applicant performed duties consistent with occupational group number 460. (*Holt, supra.*)

Accordingly, we deny defendant's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 30, 2022

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

**TRANSITO PRIETO
LARSON, LARSON & DAUER
FLOYD, SKEREN, MANUKIAN, LANGEVIN
LAW OFFICES OF LOUIS BERMEO**

JB/abs

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

On June 24, 2022, the undersigned WCJ issued his Partial Findings of Fact & Order dated June 24, 2022, finding that the Applicant's occupational group number was 460 and that all the other issues were deferred pending further medical-legal reporting.

Aggrieved by the undersigned WCJ's decision, the Defendant filed its petition for reconsideration.

DISCUSSION

The Schedule for Rating Permanent Disabilities provide, pursuant to Labor Code § 4660(b), a list of occupations and occupational group numbers. The determination of the Applicant's occupational group number is important because, along with the age of the applicant at the time of injury, it will adjust the percentage of permanent disability that will be owed by a defendant to an applicant. [Labor Code § 4660.1; National Kinney of California v. Workers' Comp. Appeals Bd. (Casillas) (1980) 45 Cal. Comp. Cases 1266, 1270]

Although the job title is the starting point for determining the appropriate occupational group number, the actual physical demands of the work must be considered in order to determine the occupational group number that accurately describes an applicant's employment at the time of injury. [Hope v. Smart & Final (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 550, *10 (Appeals Board noteworthy panel decision)]

In this case, according to the Applicant's credible testimony, his job duties included managing mental patients where he will take their blood pressure, determining who eats and bathes, intervening and restraining patients if they are aggressive, and maintaining his workspace. [MOH/SOE, 06/21/2022, 6:23-25] He was assigned to an area with the most aggressive patients where there were no orderlies assigned. [MOH/SOE, 06/21/2022, 7:2-5]

Given that the Applicant was required to assist in the physical restraint of combative patients, he was analogized to performing the physical duties of an orderly, occupational group number: 460, pursuant to the Schedule for Rating Permanent Disabilities (January 2005), page 3-17.

Therefore, there is no reasonable basis to disturb the undersigned WCJ's decision regarding the Applicant's occupational group number.

RECOMMENDATION

The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated July 1, 2022, be denied.

Date: July 5, 2022

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE