

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

MARIA AVOLA, *Applicant*

vs.

SOUTHERN CALIFORNIA EDISON, permissibly self-insured, *Defendant*

**Adjudication Number: ADJ9313967
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

In the Findings and Award of March 11, 2020, the Workers' Compensation Judge ("WCJ") found that during the period February 10, 2009 to February 10, 2010, applicant, while employed as an IT specialist by Southern California Edison, sustained industrial injury to her psyche and internal systems, causing temporary disability from February 10, 2010 through October 3, 2017, entitling applicant to 104 weeks of temporary disability indemnity at the rate of \$986.69, less credit for long term disability ("LTD") payments made to applicant.

Applicant filed a petition for reconsideration of the WCJ's decision. Applicant contends that the WCJ erred in admitting into evidence and relying upon documents that were not properly authenticated, and that the WCJ's allowance of credit to defendant for LTD payments is not supported by substantial evidence.

Defendant filed an answer.

Applicant submitted a request to file a response (supplemental pleading) to defendant's answer. We reject the request because applicant did not attach the proposed supplemental pleading to her request, as required by WCAB Rule 10964(b). (Cal. Code Regs., tit. 8, § 10964(b).)

¹ Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated June 8, 2020. Commissioner Lowe is no longer a member of the Appeals Board. Accordingly, a new panel member has been substituted in her place.

The WCJ submitted a Report and Recommendation (“Report”). We adopt and incorporate the Report to the extent set forth in the attachment to this opinion. We do not adopt or incorporate the remainder of the Report.

At the outset, we observe that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers’ compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers’ Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices’ closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.³ Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices’ closure was tolled until April 13, 2020.

Turning to the merits of applicant’s contentions, we agree that defendant’s actual LTD benefits policy, not just the “disability program overview” dated July 21, 2010 (defense exhibit B), must be admitted into evidence and considered by the WCJ in issuing a new decision. Therefore, we will rescind the WCJ’s decision and return this matter to the trial level for further proceedings as directed in this opinion, and for a new decision by the WCJ.

The Board previously issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration in this matter on January 3, 2020. In that decision, the Board rescinded the Findings and Award issued by the WCJ on October 30, 2019 and returned the matter to the trial level “to allow the WCJ to enter the LTD policy into the record and to determine whether the benefits paid pursuant to the LTD policy were intended to replace workers’ compensation

² The March 16, 2020 DWC Newline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

³ The April 3, 2020 DWC Newline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

benefits, pursuant to Labor Code section 4903.1(a)(3)(A).” (Board decision dated January 3, 2020, at 2:26-3:2.) However, the next entry in the EAMS record following the Board’s decision - the Minutes of Hearing of February 5, 2020 - show only that the WCJ granted the parties’ joint request for an order taking the matter off calendar (“OTOC”) and then submitted the matter for decision. Even though the matter had already been submitted for decision on February 5, 2020, the WCJ admitted into evidence defense exhibit B (a 29-page “disability program *overview*”) and defense exhibit C (printout of benefits) later, when the WCJ issued his Findings and Award and Opinion on Decision on March 11, 2020.

In addition to violating applicant’s right to due process by admitting additional evidence (defense exhibits B and C) after the matter had already been submitted, and without providing applicant an opportunity to object, it appears the WCJ overlooked the essence of the Board’s decision of January 3, 2020. To reiterate, in said decision the Board returned this case to the WCJ “to enter the LTD *policy* into the record and to determine whether the benefits paid pursuant to the LTD policy were intended to replace workers’ compensation benefits, pursuant to Labor Code section 4903.1(a)(3)(A).” (Italics added.)

Under Labor Code section 5309(b), this Appeals Board has authority to “direct and order” the WCJ “[t]o hold hearings and *ascertain facts necessary to enable the appeals board to determine any proceeding* or to make any order, decision, or award that the appeals board is authorized to make under Divisions 4 or 5, *or necessary for the information of the appeals board.*” (Italics added.)

In this case, we deem it necessary to invoke section 5309(b) to direct the WCJ to admit into evidence and consider the full, complete and actual LTD policy at issue herein - not just a summary, abstract, likeness, etc., of said policy. Accordingly, we will again rescind the WCJ’s decision and return this matter to the trial level with directions to the WCJ to admit into evidence and consider the full and complete LTD policy at issue, and for a new decision by the WCJ.

We express no final opinion on the merits of defendant’s claim for credit for LTD payments or on the applicability of Labor Code section 4661.5. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of March 11, 2020 is **RESCINDED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that **DEFENDANT IS ORDERED TO PRODUCE** and **THE WCJ IS DIRECTED TO ADMIT INTO EVIDENCE AND CONSIDER** a full and complete copy of the LTD policy at issue in this case.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with the Board's prior decision of January 3, 2020, and consistent with this opinion and the directions and orders set forth herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 13, 2023

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

**MARIA AVOLA
GRAIWER & KAPLAN
ROSSI LAW GROUP**

JTL/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

PROCEDURAL HISTORY

This matter was originally tried on September 4, 2019. At this trial the court found the Applicant born [] was employed by the insured Southern California Edison, self-insured, from 1977-February 10, 2010 as an IT specialist (Occupational Group number 111) sustained injury to her psyche and internal system.

At this trial the parties stipulated to average weekly wage of \$1,971.52 per week warranting indemnity rates of \$986.69 for Temporary Total Disability (TTD) and \$230.00 for Permanent Disability (Minutes of Hearing page 2 admitted fact number 3).

A decision was submitted on this matter on October 30, 2019. The determination was based upon Applicant's credible testimony and the unrebutted medical report(s) of Dr. Patrick Link M.D., dated January 9, 2019 and the PQME report of Dr. Jeffrey Caren dated January 9, 2019 it was found the Applicant sustained injury to her psyche and her internal system as a result of her employment with Southern California Edison.

The Applicant [pursued a claim for] TTD from February 10, 2010 until the P & S date pursuant to Dr. Link of October 3, 2017. The court found statutorily the Applicant is limited to 104 weeks of TTD at the rate of \$986.69. Further, the court found the defendant would not be liable for TTD benefit as the Applicant received compensation in lieu of TTD in the form of Long Term Disability through the employer for at least 104 weeks from 2010-2014 which was the functional equivalent to TTD payments.

Based on the reporting of Dr. Link, it was found the Applicant is entitled to TTD benefits for 104 weeks at the rate of \$986.69.

The court found the Applicant was entitled to 104 weeks of TTD payment at the rate of \$986.69 less credit for payments made by the Long Term Disability Program of the employer related to TTD only.

The Applicant filed a timely verified Petition for Reconsideration on the issues of credit for Temporary Total disability credit from Short/Long Term Disability benefit as provided by the employer, the admissibility of the policy and the employer's right to credit for payments made.

On November 11, 2019 the case was remanded to the WCJ in regard to the admission of the Long Term Disability policy from the employer and the subsequently the issue of credit for Total Temporary Disability paid.

This matter was [submitted for decision on] credit for payments made pursuant to [the LTD] policy with a decision issued on March 11, [2020] with...a finding the Applicant was entitled to 104 weeks of TTD payment at the rate of \$986.69 less credit for payments made by the Long Term Disability Program of the employer related to TTD only.

Subsequently the Applicant filed a timely verified Petition for Reconsideration on the issues of credit for Temporary Total disability credit from Short/Long Term Disability benefit as provided by the employer, the admissibility of the policy and the employer's right to credit for payments made.

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Date: 4/24/2020

Jay Downey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE