

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

LAURIE BRAATEN, *Applicant*

vs.

**AMERICAN AIRLINES; AMERICAN HOME ASSURANCE COMPANY,
administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ14201376
Oxnard District Office**

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

Applicant and defendant each seek reconsideration, and defendant alternatively requests removal, of the September 29, 2023 Findings and Award and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained industrial injury to her left lower extremity and injury in the form of complex regional pain syndrome (CRPS), while employed as a flight attendant on March 12, 2020. As relevant here, the WCJ also found that the injury herein caused temporary disability (TD) from March 13, 2020 through December 31, 2020; that applicant is not entitled to additional TD; that the Employment Development Department (EDD) is entitled to payment by defendant for benefits it paid between January 8, 2021 through August 14, 2021, totaling \$12,470.00; and that defendant is entitled to credit against permanent disability (PD) for overpayment of TD from December 15, 2020 through December 31, 2020.

Applicant contends that the WCJ should have relied on the opinion of primary treating physician (PTP) Elisabeth Kalve, M.D., to find applicant entitled to temporary disability from March 13, 2020 to November 15, 2021. Applicant also contends that the WCJ erred in allowing defendant to take credit against permanent disability for overpayment of temporary disability.

Defendant contends that the WCJ erred in finding it liable to reimburse EDD based on conversations defense counsel had with an EDD representative.

Based on our review of the record and for the reasons stated in the WCJ's Report, which we adopt and incorporate, except as noted below, we will grant applicant's and defendant's Petitions for Reconsideration, amend the WCJ's decision to defer the issues of credit for overpayment of TD and EDD's entitlement to reimbursement, and otherwise affirm the WCJ's decision.

The WCJ's recommendation, at the end of the report, that we deny applicant's Petition for Reconsideration conflicts with the recommendation, under the second point of the Discussion, that we grant reconsideration on that issue for further development of the record. For the reasons stated below, we agree with the latter recommendation and do not adopt or incorporate the former.

We are not persuaded that the record supports the allowance of a credit for overpayment of TD. The WCJ relies on the December 15, 2020 pain management panel qualified medical examination report of Lawrence Miller, M.D., to allow the credit. Dr. Miller found applicant to have reached maximum medical improvement. (Dr. Miller's 12/15/20 report, at p. 13, defendant's Exhibit D.) However, the signature page of Dr. Miller's December 15, 2020 report is undated, the attached proof of service is undated and unsigned, and what appears to be a facsimile stamp at the bottom of each page of the report states "12/31/2020 12:00:00 AM." Thus, there does not appear to be evidence that the report was transmitted prior to December 31, 2020. In addition, EDD began to pay benefits on January 8, 2021 (Minutes of Hearing and Summary of Evidence (MOH/SOE) 8/16/23, at p 3:9-11), presumably based on the certification of her treating physician.

Upon this matter's return, the WCJ should conduct further proceedings as the WCJ determines necessary to develop the record on the deferred issues and then issue a new decision consistent with this opinion.

Finally, we note that the WCJ's decision included final finding and that the issues raised in the defendant's petition pertain to final findings. Therefore, the proper remedy is reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's and defendant's Petitions for Reconsideration of the September 29, 2023 Findings and Award and Order are **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 29, 2023 Findings and Award and Order is **AFFIRMED, EXCEPT as AMENDED** below, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

FINDINGS OF FACT

....

9. The issue of EDD's entitlement to reimbursement is deferred.

10. The issue of defendant's entitlement to credit is deferred.

....

ORDER

IT IS FURTHER ORDERED that the issue of EDD's entitlement to reimbursement is **DEFERRED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 18, 2023

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

**LAURIE BRAATEN
ROSE, KLEIN & MARIAS
CALIFORNIA SELF INSURANCE LAW**

PAG/cs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

The Workers' Compensation Judge ("WCJ") issued an Opinion on Decision and Findings, Award and Order, on September 28, 2023. Both defendant and applicant filed timely and verified Petitions for Reconsideration/Removal on the following grounds pursuant to Labor Code § 5903 / Rule 10843:

1. That by the Order, Decision or Award made and filed by the appeals board or workers' compensation judge, the appeals board acted without or in excess of its powers;
2. That the findings of the Workers' Compensation judge are not supported by substantial evidence;
3. That the findings of fact are not supported by the decision of the workers' compensation judge.

Neither party responded to the other sides' respective Petitions.

I.

CONTENTIONS:

Applicant argues that the workers' compensation judges' decision that the applicant was not entitled to further TTD pursuant to the Panel QME's findings, and that defendant was entitled to a credit for overpayment of TTD was in error. Petition for Reconsideration (applicant), October 18, 2023, pages 1-2, lines 27-28, lines 1-2. Defendant argues that by the workers' compensation judges' order that defendant reimburse EDD for PD benefits paid, would be a "windfall for benefits they are not entitled to based on communications defendants had with a representative of EDD." Petition for Reconsideration And/Or Removal, October 19, 2023, page 4 (not numbered in petition), lines 1-4.

II.

FACTS:

The claim herein involves an admitted specific injury that occurred on March 12, 2020, while the applicant worked as a flight attendant for defendant, to her left foot. The applicant initially treated with Dr. Shalom, and then Dr. Kalve, and was seen by the Panel QME Dr. Miller.

Parties stipulated at trial that defendant provided TTD benefits from March 13, 2020 through December 31, 2020, and PD benefits from January 1, 2021 through October 28, 2021. Minutes of Hearing and Summary of Evidence, August 16, 2023, page 2, lines 13-18.

The matter proceeded to trial on a total of 8 issues: parts of body injured in the form of Complex Regional Pain Syndrome, (hereinafter “CRPS”), TTD from March 13, 2020 through November 15, 2021, the P&S date, PD, need for further medical treatment, EDD’s lien in the amount of \$26,200.00, attorney fees, and TD overpayment claimed by defendant. Minutes of Hearing and Summary of Evidence, August 16, 2023, page 3, lines 1-13. There was no appearance on behalf of EDD, and no evidence submitted on their behalf.

The applicant was sworn in at trial, which was held live in the courtroom, and testified regarding the treatment she had undergone, and her symptoms related to CRPS. Defendant did not call any witnesses.

The Panel QME, Dr. Miller examined the applicant on December 15, 2020 (Defense Exhibit D), and was also cross-examined on June 30, 2021 (Defense Exhibit E).

Both Dr. Miller and Dr. Kalve, the applicant’s PTP, found that the applicant’s admitted injury to her left foot had resulted in her developing “Complex Regional Pain Syndrome,” or “CRPS.” Applicant’s Exhibit 4, page 6, and Defense Exhibit D, page 12. Further, they both provided the applicant with the same level of PD, which the parties stipulated at trial rated out to 19% PD. Minutes of Hearing and Summary of Evidence, August 16, 2023, page 2, lines 21-22.

However, both doctors disagreed on when the applicant reached P&S status. Specifically, Dr. Kalve found that the applicant could return to “full capacity” on November 1, 2021 (Applicant’s Exhibit 3), while Dr. Miller found that the applicant had become P&S when he examined her on December 15, 2020 (Defense Exhibit E, page 13).

Based on the reporting by both doctors, and additional pain consultations wherein the applicant was diagnosed with CRPS, the undersigned judge issued an Opinion on Decision and Findings, Award and Order, that the applicant had sustained injury in the form of CRPS. Further, and relevant to both parties’ Petitions for Reconsideration, that the applicant had reached Permanent and Stationary status on December 15, 2020, pursuant to the Panel QME’s reporting, that EDD was to be reimbursed \$12,470.00 for benefits issued from January 8, 2021 through August 14, 2021, when the applicant was P&S, and defendant had issued PD benefits, and that defendant was entitled to a credit for overpayment of TTD from December 15, 2020 through December 31, 2020. Findings, Award and Order, September 28, 2023, page 2.

Applicant filed a “Petition for Reconsideration” on October 18, 2023, arguing that the applicant was entitled to further TTD based on the findings of Dr. Kalve, and the applicant’s testimony.

Defendant then filed a “Petition for Reconsideration/and or Removal” on October 19, 2023, arguing that EDD was not entitled to reimbursement, based on “communications defendants had with a representative of EDD.” Petition for Reconsideration and/or Removal, (defendant) page 4, lines 1-4.

III.

DISCUSSION:

1. PANEL QME FINDINGS BY DR. MILLER CONSTITUTE SUBSTANTIAL MEDICAL EVIDENCE:

Applicant argues that the undersigned judge “relies solely on the findings of the Qualified Medical Evaluator, Dr. Miller. She quoted from Dr. Miller’s deposition in which she found Applicant should be declared Permanent and Stationary as of December 15, 2020, despite the fact that Applicant’s treatment was delayed by the carrier and by Utilization Review denials. The medical evidence by the treating physicians and applicant’s credible testimony demonstrate that when she was able to self-secure treatment consistently, she improved to a level where she was able to resume her employment.” Petition for Reconsideration (applicant), pages 3-4, lines 24-28 and lines 1-3.

Applicant argues that throughout Dr. Kalve’s reporting, she “not only indicated how she strongly disagreed with Dr. Miller’s opinion on Applicant’s temporary disability status, but provided in detail the reason why Applicant was temporarily disabled until she was released to return to full duties on November 16, 2021.” Petition for Reconsideration (applicant) page 4, lines 13-16. Further, that the applicant “faced many obstacles in obtaining effective medical care for her serious industrial injury...”. Id. at page 5, lines 25-26.

In his initial evaluation of the applicant, the Panel QME Dr. Miller reviewed extensive medical records, which began on March 13, 2020 (a day after her date of injury of March 12, 2020), through November 6, 2020. Defense Exhibit D, pages 5-12. Dr. Kalve did not provide a review of these records in the reports submitted at trial.

The records reviewed by Dr. Miller show that the applicant was initially treated with a boot, placed off work, advised to rest and ice, and practice home exercises. Defense Exhibit D, pages 6-8. This treatment was provided consistently from March 16, 2020 through June 5, 2020, when recommendation was made she see a podiatrist. Id. at pages 6-8. During this period of time, the

applicant was treated by Dr. Jonathan Shalom. Dr. Shalom does not report delays or denials for treatment in his reports.

The applicant appears to have then changed doctors, and was first examined by Dr. Kalve on July 22, 2020. In said exam, Dr. Kalve recommended she be seen by a podiatrist, and that she undergo “acupuncture therapy 2x3 weeks.” Defense Exhibit D, page 8. On July 30, 2020, the applicant was seen by Alejandro Katz, L.Ac. for acupuncture. Id. at page 9. There is a medical report from “Healthchoice Management” indicating the applicant had completed her recommended 6 sessions of acupuncture from July 30, through August 20, 2020. Id. at page 9.

In the midst of her 6 acupuncture sessions, Dr. Kalve requested additional acupuncture in her August 12, 2020 report, indicating that the applicant had completed her fourth session, and also requested physical therapy “2x6 weeks.” Id. at page 9.

In her September 2, 2020 report, Dr. Kalve reports that the applicant was “disappointed that additional sessions were denied,” of acupuncture, but that she would be attending her first physical therapy session. Id. at page 9. Thus, the applicant had completed the requested 6 sessions of acupuncture by Dr. Kalve, and was beginning the requested PT by Dr. Kalve, that had been authorized.

In a September 18, 2020 report, Dr. Kalve indicates that “additional” PT was being requested, but no amount was listed in the report. Further, no information is provided as to whether the applicant had already completed her 12 sessions of authorized PT at that time.

In October 9, 2020, Dr. Kalve reports that the applicant finished her 12 PT sessions, and under “Plan,” indicated that the applicant was referred to pain management, and that “Additional PT has been appealed.” Defense Exhibit D, page 11. No information is provided as to why it was denied.

In a November 6, 2020 report, Dr. Kalve reports that “acupuncture and PT are recommended,” but no amounts are outlined. Defense Exhibit E, page 11.

In all of Dr. Kalve’s reports, as listed in Dr. Miller’s record review, in his December 15, 2020 report, the applicant is not found TTD, but rather was provided with modified duties. While it appears some of the recommended PT and acupuncture treatment was denied or modified, it appears that Dr. Kalve was prematurely requesting additional treatment before the applicant had completed the authorized sessions. This is noted in her August 12, 2020 and September 18, 2020 reports. Further, despite arguing that there were delays, applicant did not submit any communication from UR in order to determine if there were in fact delays.

At trial, the applicant testified that from “March through July, she didn’t receive active treatment. The applicant had an adjustor at that time and tried to communicate with them...the applicant confirmed that she did not have care for fourth months. She then went to Dr. Kalve through Kaiser On-the-Job.” Minutes of Hearing and Summary of Evidence, August 16, 2023, page 5, lines 14-17.

Pursuant to the medical reports reviewed and listed by Dr. Miller, the applicant underwent 3 x-rays in March of 2020, an MRI in April of 2020, and 2 additional x-rays in July of 2020. Defense Exhibit D, page 1. The medical reports begin on March 16, 2020, three days after her date of injury on March 12, 2020, when she is given a boot, and taken off work. Id. at page 6. She is examined again on March 23, and March 30, at which time she is still in a boot, due to her foot being swollen and bruised. Id. at page 6. The applicant begins to improve in an April 17, 2020 report, and is advised to refrain from the walking boot. Id. at page 7. The applicant is provided with work restrictions in a June 19, 2020 report by Dr. Shalom, and that she was pending a podiatrist referral. Id. at page 8.

Thus, the applicant was provided with medical treatment between March and July, when she treated with Dr. Shalom. She was also provided with medical treatment during the time she treated with Dr. Kalve, although some of the treatment had been modified. Otherwise, there was no evidence of “obstacles,” or delays to medical treatment.

As previously indicated, the applicant was examined by the Panel QME on December 15, 2020, where in addition to conducting an extensive medical review, he also provided a detailed explanation as to why she had CRPS. Specifically, he found that the applicant “remains symptomatic, additional medical care is indicated. Unfortunately, she has likely reached maximum medical improvement.” Defense Exhibit D, page 13. Under future medical care, Dr. Miller provided the applicant with physical therapy and acupuncture amongst other treatment. Id. at page 14.

Dr. Miller subsequently issued a supplemental report, pursuant to applicant’s attorney’s request he review Dr. Kalve’s reporting, and that she had disagreed with his P&S date. Defense Exhibit A, page 2. Dr. Miller provided the following analysis:

“It is my opinion, though, that it has been now more than a year from the initial accident and her pain complaints are stable and expected to be chronic. The supportive care outlined is not likely to significantly change her permanent impairment and disability. It is therefore

my opinion that she is permanent and stationary with a chronic pain condition that will require potential lifelong treatment to help alleviate pain and suffering.

Id. at page 2.

Applicant's attorney also cross-examined Dr. Miller regarding his P&S findings at his cross-examination on June 30, 2021, Defense Exhibit E. When applicant's attorney asked the PQME if the applicant should be given the benefit of the doubt "to see if she is going to have further improvement from the treatment that you are also recommending" the PQME responded as follows:

"I think that she should be provided with future treatment, and I outlined in my report. I do not think, though, her condition will change significantly. I think she has a chronic, life-long condition. I think, therefore, that she is MMI from the date I provided; that she should be provided with further palliative treatment, but I do not believe that her condition would significantly change. *I would also note that her primary treating doctor, who has disagreed with my dates, never put her on total temporary disability and continued her with the same job restrictions that I outlined, and, therefore, I so believe that I was correct.*"

Defense Exhibit E, page 17, lines 19-25, page 18, lines 1-6. (*emphasis added*).

The above findings are found to constitute substantial medical evidence, because Dr. Miller is outlining the fact that the applicant's condition itself is "chronic," and that treatment via PT and acupuncture are "palliative," and part of her future medical care. The PT and acupuncture treatments are not treatment that will "significantly change" her condition, and thus support a TTD finding.

Applicant referred to a panel decision, *Miller v. Contra Costa County*, 46 CWCR 188, as support for finding that Dr. Kalve's findings are "substantial evidence." Petition for Reconsideration, page 6, lines 24-25, page 7, lines 1-4. In *Miller*, the applicant's treating physician, like Dr. Kalve herein, found that the applicant was TTD following an epidural steroid injection, in contrast to the Panel QME, who had found that the applicant had been P&S. *Miller*, 46 CWCR 188. The panel concluded that the applicant's testimony was "deemed credible by the trier of fact, and the evidence submitted in the form of medical reports from the treaters, supported the claimed TD period despite the QME's determination." *Miller*, 46 CWCR 188. Further, that the WCJ was "permitted to follow the opinions of one physician over contrary opinions, without some preferential hierarchy involved." *Miller*, 46 CWCR 188.

In the case herein, the Panel QME Dr. Miller's findings were more detailed and complete, and thus constituted substantial medical evidence supporting that the applicant was not TTD beyond the P&S date of December 15, 2020. Dr. Kalve issued a formal Permanent and Stationary report on April 8, 2022, (Applicant's Exhibit 1) several months after finding that the applicant could return to her usual and customary duties in November of 2021, and did not address TTD at all. Thus, Dr. Kalve's findings do not constitute substantial medical evidence. Further, the applicant's testimony that she faced "obstacles," "was unable to obtain active treatment," and that her treatment was "unreasonably delayed," is not found to be credible based on the medical reports of Dr. Shalom and Dr. Kalve.

2. WCAB SHOULD GRANT RECONSIDERATION FOR WCJ TO ADDRESS OVERPAYMENT OF TTD AND ADDITIONAL EVIDENCE PROVIDED BY DEFENDANT POST-TRIAL REGARDING EDD'S LIEN:

In the Findings, Award and Order issued on September 28, 2023, the undersigned judge awarded EDD to be reimbursed in the amount of \$12,470.00, for the period paid from January 8, 2021 through August 14, 2021. Further, that the defendant be credited for a TTD overpayment for the period from December 15, 2020 through December 31, 2020.

Applicant's Petition for Reconsideration also raised an objection against the credit awarded to defendant for the TTD overpayment. Specifically, applicant argues that "there is no overpayment of Temporary Disability," and that it would be "unfair to deduct any of this alleged overpayment from Applicant's Permanent Disability," and that this judge "does not give any explanation as to why she is allowing for credit from alleged Temporary Disability overpayment..." Petition for Reconsideration, page 7, lines 6, 22-23, 19-20.

Defendant raised the overpayment of TTD at trial, specifically, that they overpaid TTD from December 15, 2020 through December 31, 2020. Minutes of Hearing and Summary of Evidence, August 16, 2023, page 3, lines 12-13. Given that the undersigned found that the applicant became P&S on December 15, 2020, there appears to be an overpayment based on the benefits issued by defendant. It appears that the overpayment may have occurred because the parties had not received the Panel QME's report of December 15, 2020. Thus, it may be unfair to award the credit to defendant, however, the undersigned recommends reconsideration be granted to obtain more information from the parties, and determine if in fact defendant would be entitled to same.

Defendant filed a “Petition for Reconsideration and/or Removal,” on October 19, 2023, on the finding and Order that EDD be reimbursed. Specifically, at trial, the parties listed as an issue a lien from EDD, with a balance of \$26,200.00, for benefits paid to the applicant from January 8, 2021 through August 14, 2021, at the weekly rate of \$655.00. Minutes of Hearing and Summary of Evidence, August 16, 2023, page 3, lines 9-10. Pursuant to EAMS, EDD filed and served their opening lien on March 11, 2021 on defendant.

Given that this judge found that the applicant was Permanent and Stationary on December 15, 2020, and pursuant to the stipulations at trial, defendant issued PD benefits from January 1, 2021 through October 28, 2021 to the applicant, it was found that EDD was entitled to reimbursement. This was based on that there had been no evidence submitted by defendant that they had advised EDD that they were issuing PD benefits during the time EDD issued their benefits.

Accordingly, it was found that defendant was liable to EDD for the duplicative period paid, at the weekly rate of \$290.00, when the applicant was receiving PD benefits. Specifically, EDD paid the applicant for 43 weeks, which when multiplied by the PD rate of \$290.00, results in \$12,470.00 owed to EDD by defendant, including interest.

Defendant argues in their “Petition for Reconsideration and/or Removal,” that the EDD representative Mr. Bill Helrigel, contacted defense counsel, Mr. Ali Vassigh, on October 6, regarding the Findings, Award and Order that had issued, and advised that no money was owed to EDD, because they had been paying a “differential” during the time period in question. “Petition for Reconsideration and/or Removal,” page 4, lines 5-9. Defendant had a second conversation with a different representative from EDD, Mr. Jose Ramos, on October 19, 2023, who confirmed same, and that they were withdrawing their lien. Id. at page 4, lines 10-14. Mr. Ramos sent defendant an email confirming the withdrawal, which was attached to the petition. Both of these communications with EDD occurred several days after the Opinion and Decision and Findings, Award and Order issued on September 28, 2023.

First, it should be noted that defendant did not need to label their Petition as both one for “Reconsideration and/or Removal.” The Findings, Award and Order issued on September 28, 2023 was a final order, for which a Petition for Reconsideration would be the proper filing.

Second, it is unclear why defendant did not contact EDD prior to the trial in order to determine if in fact the lien was going to be pursued, or if there were any issues regarding same. Parties simply listed the lien, its balance and periods paid, without any additional information to the undersigned

judge. Accordingly, based on the limited information provided to this judge, it was found that EDD should be reimbursed.

Given that the conversations and information provided by EDD to the defendant were after both the trial and when the “Findings, Award and Order” issued, it is recommended the reconsideration be granted, so that the undersigned can review same and issue an amended Findings and Award.

RECOMMENDATION:

It is recommended that the Petition for Reconsideration filed by applicant regarding additional TTD be denied. It is further recommended that Reconsideration be granted on the issues of TTD overpayment and EDD’s lien, so that the WCJ can reconsider same and issue an Amended Findings and Award.

DATE: November 1, 2023

/S/SANDRA ROSENFELD

Sandra Rosenfeld

WORKERS' COMPENSATION JUDGE