WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA DE JESUS CARDENAS, ***Applicant***

vs.

ROY J. MAIER PRODUCTS; CIGA for FREMONT INDEMNITY COMPANY in liquidation, ***Defendants***

Adjudication Numbers: ADJ3937323 (VNO0237504), ADJ3028177 (VNO0237506)
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Amended Joint Findings and Award and Order (F&O) issued on July 3, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by defendant as a machine operator on March 18, 1991, applicant did not sustain a specific injury arising out of and occurring in the course of employment to her upper extremities (ADJ3937323); (2) while employed by defendant as a machine operator during the period of October 19, 1979 to June 18, 1991, applicant sustained a cumulative injury arising out of and occurring in the course of employment to her bilateral upper extremities, gastritis, irritable bowel syndrome, and psyche; (3) applicant's earnings at the time of injury were $252.08 per week producing a temporary disability rate of $168.05 per week and a permanent disability indemnity rate of $148.00 per week, and since more than two years have elapsed after the date of injury, any retroactive temporary total disability rates must be based not on rates in effect at the time of injury, but "shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Labor Code section 4453 in effect on the date each temporary total disability payment is made," meaning current payments must reflect both the present minimum temporary total disability rate of $242.86 and the present minimum wage of

$16.78 in Los Angeles, California pursuant Labor Code section 4661.5;[1] (4) the only pay stub in evidence shows that at the time of injury, applicant's hourly wage was $5.70, and the stipulated average weekly earnings at the time of injury reflect an average of 40 hours of regular wages, plus approximately 2 hours and 49 minutes of overtime; (5) had applicant's employment continued at the same hourly level of employment as at the time of injury, under current wage laws her average weekly wage would be at least $671.20 in regular wages for 40 hours at a minimum of $16.78 per hour, plus $70.90 for 2 hours 49 minutes of overtime at $25.17 per hour, for total weekly earnings that would be at least $742.10 based on the present minimum wage in Los Angeles; (6) any unpaid temporary total disability indemnity must be paid at the present rate of $494.73 per week (two-thirds of $742.10); (7) applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $494.73 per week, in the total sum of $232,593.78, less $8,216.00 paid by the California Employment Development Department (EDD) to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and less credit for all temporary disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity; (8) applicant's injury became permanent and stationary on March 22, 2000, and caused permanent disability of 53.3%, entitling applicant to 267.25 weeks of disability indemnity payable at the rate of $148.00 per week, now fully accrued in the total sum of $39,553.00, less credit for all permanent disability advanced by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire in the amount of $5,932.95, which is equal to 15% of the gross permanent disability indemnity; (9) applicant will require further medical treatment to cure or relieve from the effects of this injury; and(10) the reasonable value of the services and disbursements of applicant's attorney is $5,932.95, which is equal to 15% of the gross award of permanent disability indemnity, payable from the permanent disability award, plus 15% of the net retroactive temporary disability indemnity, to be adjusted and paid by defendants from the award of retroactive temporary disability.

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

The WCJ awarded applicant temporary disability benefits, permanent disability benefits, and future medical care in accordance with these findings and ordered that applicant take nothing on her specific injury claim (ADJ3937323).

Defendant contends that (1) the evidence fails to prove that applicant would have been earning $16.78 per hour and working full time plus overtime had she continued working after March 18, 1991; (2) there is no substantial medical evidence to support the finding of a temporary disability period from March 19, 1991 to Mach 22, 2000; (3) the award fails to specifically provide that only unpaid periods of temporary disability shall be paid at the increased section 4661.5 rate; and (4) the impairment assigned for GERD in the Opinion on Decision should be assigned to gastritis.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted solely for the purpose of amending the award in case number ADJ3028177 to specifically provide that only unpaid periods of temporary disability shall be paid at the increased section 4661.5 rate.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that any unpaid temporary disability indemnity must be paid at the present rate of $242.86; to find that applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90 (less specified offsets); and to amend the award so that it specifically provides that only unpaid periods of temporary disability shall be paid at the increased section 4661.5 rate.

FACTUAL BACKGROUND

In the Report, the WCJ states:

> A previous March 6, 2023 Joint Findings and Award and Order was rescinded on April 4, 2023 after defendant CIGA filed a petition for reconsideration, and issues were once again submitted for a new decision after issuance of a Joint Notice of Intention to Submit Issues for Decision dated May 11, 2023, to which no objection was received. The new decision herein is the same as the prior decision, except for: (1) the exclusion of hypertension from the finding of parts of body injured; (2) an increase in the amount of the temporary disability award to reflect an increase in the minimum hourly wage in Los Angeles effective July 1, 2023; and (3) removal of the

portion of the findings and award that required CIGA to pay the Employment Development Department (EDD) for reimbursement of benefits and interest.

. . .

Based on the stipulations of the parties at trial, it was found that applicant Ms. Maria De Jesus Cardenas was employed during the period of October 19, 1979 to June 18, 1991 as a Machine Operator, at Sun Valley, California, by Roy J. Maier Products, whose workers' compensation insurance carrier was Fremont Indemnity Company, which is now in liquidation. Based on the Schedule for Rating Permanent Disabilities issued in July 1988, which is the applicable schedule for this injury, it was found that applicant's Occupational Group Number is 11, which corresponds to a machine or hand cutter of various materials. Based on the findings of Agreed Medical Evaluators (AMEs) Mark Mandel, M.D., Gerald Markovitz, M.D., Brian Jacks, M.D., and Mitchell Silverman, M.D., all of whose opinions are entitled to great weight for their presumed expertise and neutrality as medical experts jointly selected by the parties, it was found that applicant sustained a cumulative injury arising out of and occurring in the course of employment to her bilateral upper extremities, gastritis (GERD), irritable bowel syndrome (IBS), and psyche, arising out of and occurring in the course of her employment by Roy J. Maier Products.

Based on the parties' stipulations, it was found that applicant's earnings at the time of injury were $252.08 per week producing a temporary disability rate of $168.05 per week and a permanent disability indemnity rate of $148.00 per week. However, since it is presently more than two years after the date of injury, it was found that under California Labor Code § 4661.5, any retroactive temporary total disability rates must be based not on rates in effect at the time of injury, but instead "shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made," meaning current payments must reflect both the present minimum temporary total disability rate of $242.86 and the present minimum wage of $16.78 in Los Angeles, California, based on which unpaid retroactive temporary disability should be awarded at the increased rate of $494.73 per week. This was calculated by using the only pay stub in evidence, on pages 4 and 5 of Applicant's 2, as an apparent enclosure to a letter dated March 26, 2009 (also included, perhaps inadvertently, at p. 12 of Applicant's 1). This pay stub shows that for the pay period ending March 12, 1991 (i.e., at the time of injury), applicant's hourly wage, under the heading "Rate," was $5.70. Assuming this unrebutted record to be correct, the stipulated average weekly earnings of $252.08 at the time of injury must therefore reflect an average of 40 hours of regular wages ($228.00), plus approximately 2 hours and 49 minutes of overtime ($8.55 x 2.81667 hours, assuming overtime was correctly paid at 1.5 times the hourly rate for time in excess of 40 hours per week).

Based on §187.02(d) of the Los Angeles Municipal Code, it was found that if applicant's employment continued at the same hourly level of employment as at the time of injury, her average weekly wage would under current wage laws be at least $671.20 in regular wages for 40 hours at a minimum of $16.78 per hour, plus $70.90 for 2 hours 49 minutes of overtime at $25.17 per hour, for total weekly earnings that

would be at least $742.10 under the present minimum wage law in Los Angeles, where applicant's place of employment, Sun Valley, is located. Accordingly, it is found that under Labor Code§ 4453(c) as modified by § 4661.5, following the reasoning suggested in *Varas v. Teresa Lobatos* (2022) 50 CWCR 11 [ADJ2170203] (Appeals Board Panel Decision), and the rationale in *Hofmeister v. Workers' Compensation Appeals Bd*. (1984) 156 Cal.App.3d 848,852 [49 Cal. Comp. Cases 43 8], any unpaid temporary total disability indemnity must be paid at the adjusted present rate of $494.73 per week (two-thirds of $742.10).[2]

Based on the unrebutted AME opinions of Dr. Mandel in his report dated March 22, 2000, Court's WI, p. 10, paragraph 3, as affirmed by subsequent AME Dr. Silverman in his report dated May 23, 2016, Court's Z, at p. 107, first paragraph, it was found that applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $494.73 per week, in the total sum of $232,593.78, less $8,216.00 that was paid to applicant by the California Employment Development Department (EDD) from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and less credit for all temporary disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ13937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity.

Based on the unrebutted AME opinions of Dr. Mandel, Dr. Markovitz, Dr. Jacks, and Dr. Silverman, it was found that applicant's injury became permanent and stationary, and reached maximal medical improvement, on March 22, 2000 and caused permanent disability of 53.3%, entitling applicant to 267.25 weeks of disability indemnity payable at the rate of $148.00 per week, now fully accrued in the total sum of $39,553.00, less credit for all permanent disability advanced by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire in the amount of $5,932.95, which is equal to 15% of the gross permanent disability indemnity. The permanent disability (PD) was rated by the undersigned and combined on the Multiple Disabilities Table (MDT) using the schedule published in 1988 as follows:

55% (1.4-9-11E-8-8:3) 5% PD, psyche
6.5-10- l1F-10-10:3% PD, gastroesophageal reflux disease (GERD)
7.3- 15-l1F-15-16% PD, left upper extremity
7.3 -20-11F-20-21:2% PD, right upper extremity

[2] We note that the Report cites the Appeals Board panel decision *Varas v. Lobatos*, 2022 Cal. Wrk. Comp. P.D. LEXIS 388 (Cal. Workers' Comp. App. Bd. October 11, 2022) (*Varas I*). In that case, the panel returned the matter to the trial court to consider whether the applicant's temporary disability rate should be calculated based on the local minimum wage. After the trial court found that the rate should be based upon the local minimum wage, however, an Appeals Board panel overturned its decision because the evidence was insufficient to use a local minimum wage set in 2023 to calculate temporary disability benefits for an injury that occurred in 1992. (*Varas v. Teresa Lobatos, Allstate Insurance*, 2023 Cal. Wrk. Comp. P.D. LEXIS 146 (Cal. Workers' Comp. App. Bd. May 19, 2023) (*Varas II*).)

19.3 -10- l1F-10-10:3% PD, IBS
MDT 21:2 16 10:3 10:3 5 = 53.3%

Although the prior decision was amended to reflect the opinion of Mr. Markovitz that applicant's hypertension is nonindustrial, the rating remained the same as previously found because a prophylactic work restriction to avoid undue stress was assigned for both hypertension and gastroesophageal reflux disease, referred to as GERD in the findings, and only one or the other can be rated. Since hypertension was previously included in the rating, GERD was not. Now that hypertension is not included in the ratings, GERD takes its place with the same work restriction. The other four rating standards are based on the eight work functions for the psyche, no heavy lifting or very repetitive pushing, pulling, or grasping for the left shoulder and upper extremity, no very heavy lifting or work at or above shoulder with an estimated 37.5% loss of strength, dexterity, and manipulation, and a prophylactic restriction from vibratory tools for the right upper extremity, and required access to a restroom for IBS.

The apportionment opinions of Dr. Markovitz were not applied to the above rating strings because they are speculative and insufficiently explained, and therefore do not constitute substantial medical evidence. As explained by the Appeals Board's en banc opinion in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604:

> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, supra, 70 Cal.Comp.Cases 604 at 621.) Dr. Markovitz did not adequately explain how and why the injury is responsible for approximately 50% of the disability, as required by the example in *Escobedo* cited above. Dr. Markovitz only noted that there are both industrial and non-industrial causes, and he concludes that therefore apportionment must be 50% industrial and 50% nonindustrial. This reasoning is speculative, and without further explanation of how and why nonindustrial causes are causing approximately 50% of applicant's disability, as opposed to a higher or lower percentage, it was found that Dr. Markovitz's apportionment opinion fails the *Escobedo* test for substantial medical evidence.

Based on the unrebutted AME opinions of Dr. Mandel, Dr. Markovitz, Dr. Jacks, and Dr. Silverman, it was found that applicant will require further medical treatment to cure or relieve from the effects of this injury, with access to physicians and any future disputes about the exact scope of treatment to be determined in accordance with Labor Code§ 4610.

Based on California Insurance Code§ 1063.l(c)(4) and *CIGA v. Workers' Comp. Appeals Bd.* (*Karaiskos*) (2004) 117 Cal.App.4th 350, it was found that although the Employment Development Department (EDD) would normally be entitled to repayment from the award of temporary disability herein, plus interest, EDD is not entitled to any repayment from CIGA, nor is CIGA required to pay any overlapping benefits to applicant. For this reason, EDD benefits paid to applicant during the temporary disability period have been deducted from the award of temporary disability payable by CIGA, and EDD should not seek repayment from either CIGA or applicant, because there is no benefit awarded herein that overlaps with the benefits paid by EDD.

Based on the criteria for determining attorney fees set forth in California Labor Code Sections 4903 and 4906(d), California Code of Regulations, Title 8, Section 10844, and WCAB Policy and Procedure Manual Index No. 1.140, it was found that the reasonable value of the services and disbursements of applicant's attorney is $5,932.95, which is equal to 15% of the gross award of permanent disability indemnity, payable from the permanent disability award, plus 15% of the net retroactive temporary disability indemnity, to be adjusted and paid by defendants from the award of retroactive temporary disability, with the Board reserving jurisdiction in the event of any dispute.

. . .

Section 4661.5 provides as follows:

> Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more f om the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computing the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453.

Since it is presently more than two years after the date of injury, it was found based on California Labor Code § 4661.5 that any retroactive temporary total disability rates must be based not on the time of injury, but instead "shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made." This means that current payments must be no less than the present minimum temporary total disability rate under § 4453(a)(10), which, with State

Average Weekly Wage increases since 2006, is now $242.86, and the calculation of earnings should include the minimum wage in effect on the date of payment, not injury, which currently is $16.78 in Los Angeles, California, per § 187.02(d) of the Los Angeles Municipal Code.[fn]

. . .

The only pay stub placed into evidence was on pages 4 and 5 of Applicant's 2, as an apparent enclosure to a letter dated March 26, 2009 (also included, perhaps inadvertently, at p. 12 of Applicant's 1). This pay stub shows that for the pay period ending March 12, 1991 (i.e., at the time of injury), applicant's hourly wage, under the heading "Rate," was $5.70. Assuming this document to be correct, it was then inferred that the stipulated average weekly earnings of $252.08 at the time of injury must therefore reflect an average of 40 hours of regular wages ($228.00), plus approximately 2 hours and 49 minutes of overtime ($8.55 x 2.81667 hours, assuming overtime was correctly paid at 1.5 times the hourly rate for time in excess of 40 hours per week).

Based on §187.02(d) of the Los Angeles Municipal Code, it was found that if applicant's employment continued at the same hourly level of employment as at the time of injury, her average weekly wage would under current wage laws be at least $671.20 in regular wages for 40 hours at a minimum of $16.78 per hour, plus $70.90 for 2 hours 49 minutes of overtime at $25.17 per hour, for total weekly earnings that would be at least $742.10 under the present minimum wage law in Los Angeles, where applicant's place of employment, Sun Valley, is located. Accordingly, it is found that under Labor Code§ 4453(c) as modified by§ 4661.5, following the reasoning suggested in the *Varas* panel decision and the rationale in *Hofmeister*, any unpaid temporary total disability indemnity must be paid at the adjusted present rate of $494.73 per week (two-thirds of $742.10).

. . .

The Workers' Compensation Appeals Board (WCAB) has held, *en banc*, that "it is well established that any decision of the WCAB must be supported by substantial evidence." (*Escobedo v. Marshal1s* (2007) 70 Cal. Comp. Cases 604, 620, citing Labor Code §5952(d), *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal. Comp. Cases 310], *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312,317 [35 Cal. Comp. Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal. Comp. Cases 16].) "In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*Escobedo*, cited above, 70 Cal. Comp. Cases 604, 620, citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660], *Travelers Ins. Co. v. Industrial Acc. Com*. (*Odello*) (1949) 33 Cal.2d 685, 687-688 [14 Cal. Comp. Cases 54], *Rosas v. Workers' Comp. Appeals Bd*. (1993) 16 Cal. App.4th 1692, 1700-I 702, 1705 [58 Cal. Comp. Cases 3 I 3].) "Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls*, cited above, 70 Cal. Comp. Cases 604, 620, citing *Heggelin v. Workmen's Comp. Appeals Bd.*

(1971) 4 Cal.3d 162, 169 [36 Cal. Comp. Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal. Comp. Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd*., supra, 68 Cal.2d at p. 798.) "Further, a medical report is not substantial evidence unless it sets fo1th the reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo*, cited above, 70 Cal. Comp. Cases 604, 621, citing *Granado v. Workers' Comp. Appeals Bd*. (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding), *Zemke v. Workmen's Comp. Appeals Bd*., supra, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence), and *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

So, *Escobedo* summarizes a half-century of jurisprudence on the issue of what constitutes substantial medical evidence as follows: a doctor's report must provide reasoning, not merely conclusions, that are based on relevant facts, an adequate history and examination, correct legal theories, and based on reasonable medical probability, not guesswork. The reports on which the undersigned relied in this case met these basic criteria, assisted by the presumption that Agreed Medical Evaluators are mutually selected for their expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782.) Under Article XIV, Section 4 of the California State Constitution, the workers' compensation system is intended to operate "without incumbrance," so the requirements of substantial evidence are not intended to create insurmountable hurdles, nor is the standard of reasonable medical probability intended to be misconstrued as requiring certitude.

Given the great weight afforded to AME opinions based on their presumed expertise and neutrality, the following clear and unrebutted conclusion of Dr. Mandel was accepted as probable:

> " ... it seems reasonable to consider her to have been disabled from the time she stopped work ongoing until approximately six months after her shoulder surgery, which would be December of 1999. At that point in time, I would consider her to be partially disabled, capable of either returning to modified work if indeed such was possible, or entering a retraining program, and all disability would cease at the time of my assessment in late March of 2000, almost a year after her last surgical procedure."

(AME Dr. Mandel 3/22/2000, Court's W1, p. 10, paragraph 3.) The fact that applicant was apparently not working during or even after this entire period more strongly supports the inference that modified work was not available than the inference that it was, so it is accepted as probable that modified work was not

available, and temporary disability benefits are therefore payable for the entire period of temporary disability per Dr. Mandel, including the period of temporary partial disability. Defendants' argument to limit temporary disability periods to conform to gaps in documentation makes no sense, as it there is no explanation or even theory supported by substantial medical opinion to reasonably explain how or why applicant's disability ceased during the periods between these proposed gaps in disability. Taking such a position furthermore contradicts the opinions of the AME, Dr. Mandel, who describes a continuous period of disability, and not broken periods. There is no suggestion by the defendant that it failed to supply Dr. Mandel with relevant facts, an adequate history, or sufficient opportunity to examine Ms. Cardenas. Dr. Mandel docs provide reasoning in support of the dates that he identified as a period of temporary disability, and they do not appear to have been selected arbitrarily. Accordingly, there appears to be sufficient evidence in support of the finding that Ms. Cardenas was temporarily totally or partially disabled, with no provision of modified work, from the time she stopped work to late March of 2000, approximately a year after her last surgical procedure, and for the award of temporary disability benefits for this period.

. . .

Defendant's petition is quite correct in its position that retroactive temporary disability benefits at increased rates under Labor Code Section 4661.5 should only be awarded for unpaid periods of temporary disability.

Although this was certainly intended, it is not how the award was worded in case number ADJ3028177, so the petition for reconsideration should be granted for the purpose of further amending the award to make this point clear. A recommended amendment to the award in case number ADJ3028177 is provided at the end of this report . . .

The award should continue to indicate a credit for benefits paid by the California Employment Development Department (EDD) to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week EDD during the temporary disability period, but not a full credit for the periods paid, because EDD paid at a rate that was less than the stipulated original temporary disability rate of $168.05 per week.

. . .

Defendant is correct that the AME in internal medicine, Dr. Markovitz, uses the term "gastritis," and so do the Amended Findings of Fact (Amended Findings and Award 7/3/2023, p. 1, para. 2: " ... sustained a cumulative injury arising out of and occurring in the course of employment to her bilateral upper extremities, gastritis, irritable bowel syndrome, and psyche").

When discussing how permanent disability was rated, the opinion on decision refers to the gastritis as GERD, which is an abbreviation for gastroesophageal reflux disease. This was intended to refer to the same body part affected by gastritis, the upper gastrointestinal system. The "old schedule" prophylactic work restriction applied to this body part, to avoid undue stress, does not change based on whether

the opinion refers to the condition as "gastritis" or "GERD," and defendant's petition admits that it has no issue with the finding that Ms. Cardenas sustained 53:3% permanent disability.

Although there is undoubtedly some distinction between GERD and gastritis that could only be fully appreciated by a gastroenterologist, defendant's petition does not identify how this distinction makes a difference, particularly when the term "GERD" is only used in the opinion on decision, and not the findings of fact. It appears the findings and award would be totally unaffected by the proposed change in terminology in the opinion on decision. Accordingly, this point appears to be harmless error and should not require correction by formal amendment of the opinion on decision.

. . .

It is respectfully recommended that the petition for reconsideration be granted for the sole purpose of amending the award in case number ADJ3028177 to clarify that only unpaid periods of temporary disability are to be paid at increased rates under Labor Code Section 4661.5, as follows:

> **AWARD IS MADE** in Case Number ADJ3028177 in favor of MARIA DE JESUS CARDENAS against ROY J. MAIER PRODUCTS and CIGA for FREMONT INDEMNITY COMPANY IN LIQUIDATION of:
>
> a. Temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $494.73 per week, in the total sum of $232,593.78 less offset of $8,216.00 paid by the California Employment Development Department (EDD) to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and excluding all periods of temporary disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity;
>
> b. Permanent disability of 53.3%, entitling applicant to 267.25 weeks of disability indemnity payable at the rate of$148.00 per week, now fully accrued in the total sum of $39,553.00, less credit for all permanent disability advanced by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney fee payable to applicant's counsel of record Law Office of Philip J. McGuire in the amount of $5,932.95, which is equal to 15% of the gross permanent disability indemnity; and
>
> c. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

(Report, pp. 2-14.)

DISCUSSION

We turn first to defendant's contention that the evidence fails to prove that applicant would have been earning $16.78 per hour and working full time plus overtime had she continued working after March 18, 1991.

In *Gutierrez v. NB & T Indus*., 2019 Cal. Wrk. Comp. P.D. LEXIS 76 (Cal. Workers' Comp. App. Bd. February 21, 2019),[3] an Appeals Board panel rescinded the WCJ's finding that the applicant's earnings for purposes of calculating her temporary disability rate were $477.00 per week based upon application of the present minimum wage provided by the Los Angeles Municipal Code, effective July 1, 2018, and found that the applicant's earnings were $270.95 per week based on her actual wage at time of injury. The panel reasoned that because the local minimum wage was not in effect until five years after the applicant's last date of employment, and because there was no evidence that the applicant would have earned that wage had she continued working after the period of her temporary disability began, there was insufficient evidence for the WCJ to determine the applicant's earnings based upon the local minimum wage.

In this case, the record shows that (1) the date of applicant's cumulative injury ended on June 18, 1991; (2) the award of temporary disability is for the period of March 19, 1991 to March 22, 2000, and the parties stipulated that applicant's average weekly earnings at the time of injury were $252.08. (F&O; Report, p. 9.)

Here, similar to *Gutierrez*, the WCJ found that applicant's earnings for purposes of calculating her temporary disability rate were $742.10 based on the present local minimum wage. However, because the local minimum wage was not in effect until thirty-two years after applicant's last date of employment, and because there is no evidence that applicant would have earned that wage had she continued working after March 18, 1991, we conclude that there is inadequate

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

support for the finding that applicant's average weekly earnings for the purpose of calculating her temporary disability rate were $742.10 per week.

Having determined that the WCJ erroneously determined applicant's average weekly earnings for the purpose calculating her temporary disability rate based upon the present local minimum wage, we turn to the issue of how that rate should be calculated.

Here we observe that section 5702 provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.
> (§ 5702.)

Parties to workers' compensation cases may resolve an issue or the whole case by stipulation. (§ 5702; Cal. Code Regs, tit. 8 § 10835.) WCAB Rule 10835(a)(2) provides, "Findings, awards and orders may be based upon stipulations of parties in open court or upon written stipulation signed by the parties." (Cal. Code Regs., tit. 8 § 10835(a).)

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [92 Cal. Rptr. 2d 290, 65 Cal.Comp.Cases 1].) "Good cause" includes mutual mistake of fact, duress, fraud, undue influence, and procedural irregularities. (*Johnson v. Workmen's Comp. Appeals Bd*. (1970) 2 Cal. 3d 964, 975 [88 Cal. Rptr. 202, 471 P.2d 1002, 35 Cal.Comp.Cases 362]; *Santa Maria Bonita School District v. Workers' Comp. Appeals Bd*. (2002) 67 Cal.Comp.Cases 848, 850 (writ den.); *City of Beverly Hills v. Worker's Comp. Appeals Bd*. (*Dowdle*) (1997) 62 Cal.Comp.Cases 1691, 1692 (writ den.); *Smith v. Workers' Comp. Appeals Bd*. (1985) 168 Cal.App.3d 1160, 1170 [214 Cal. Rptr. 765, 50 Cal.Comp.Cases 311] (writ den.).)

In this case, the record shows that the parties stipulated that applicant's average weekly earnings at the time of injury were $252.08 per week. (Report, pp. 4, 13.) Consequently, the parties are bound by their stipulation and the calculation of the temporary disability rate must be based thereon without reference to paystub evidence found elsewhere in the record.

Here, because section 4661.5 requires that the calculation of retroactive temporary total disability rate be "in accordance with the temporary disability indemnity average weekly earnings

amount specified in section 4453 in effect on the date each temporary total disability payment is made," and because the present minimum temporary total disability rate is $242.86, we conclude that any unpaid temporary disability indemnity must be paid at the present minimum temporary total disability rate of $242.86 per week. (F&O, p. 2; Report, p. 4.)

Accordingly, we will amend the F&O to find that any unpaid temporary disability indemnity must be paid at the present rate of $242.86, and to find that applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90, less an offset of $8,216.00 paid by the EDD to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and less credit for all temporary disability indemnity including vocational rehabilitation temporary disability paid by defendant in both ADJ3937323 and ADJ3028177, and less a reasonable attorney's fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity.

We next address defendant's contention that there is no substantial medical evidence to support the finding of a period of temporary disability from March 19, 1991 to Mach 22, 2000. Here we agree with the WCJ that substantial medical evidence supports the finding that applicant was temporarily totally or partially disabled, with no provision of modified work, from the time she stopped work until late March 2000. (Report, pp. 10-12.) Accordingly, we discern no error in the finding that applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000.

We next address defendant's contention that the award fails to specifically provide that only unpaid periods of temporary disability be paid at the increased section 4661.5 rate.

In this regard, we accept the recommendation of the WCJ that the award should be amended to specifically provide that only unpaid periods of temporary disability are to be paid at the section 4661.5 rate. (Report, pp. 12-14.) Accordingly, we will amend the award to state that temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90, less an offset of $8,216.00 paid by the EDD to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and excluding all periods of temporary disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ3937323 and ADJ3028177, and less a

reasonable attorney fee's payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity.

Lastly, we address defendant's contention that the impairment assigned for GERD in the Opinion on Decision should be assigned to gastritis.

Here, we concur with the reasoning of the WCJ that it is unclear how, if it all, the substitution of "gastritis" for the term "GERD" would correct an error which aggrieves defendant. (Report, p. 13.) Accordingly, we decline to alter the language in the Opinion on Decision assigning impairment for GERD.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to find that any unpaid temporary disability indemnity must be paid at the present rate of $242.86; to find that applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90 (less specified offsets); and to amend the award so that it specifically provides that only unpaid periods of temporary disability shall be paid at the increased section 4661.5 rate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Amended Joint Findings and Award and Order issued on July 3, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Amended Joint Findings and Award and Order issued on July 3, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

***

FINDINGS OF FACT

(ADJ3028177)

***

3. Applicant's earnings at the time of injury were $252.08 per week producing a temporary disability rate of $168.05 per week and a permanent disability indemnity rate of $148.00 per week. Pursuant to Labor Code § 4661.5, the rate for payment of retroactive temporary total disability indemnity is at the present minimum temporary total disability rate of $242.86.

4. Applicant's injury caused temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90, less an offset of $8,216.00 paid by the EDD to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and less credit for all temporary disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney's fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity.

5. Applicant's injury became permanent and stationary, and reached maximal medical improvement, on March 22, 2000 and caused permanent disability of 53.3%, entitling applicant to 267.25 weeks of disability indemnity payable at the rate of $148.00 per week, now fully accrued in the total sum of $39,553.00, less credit for all permanent disability advanced by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney's fee payable to applicant's

counsel of record Law Office of Philip J. McGuire in the amount of $5,932.95, which is equal to 15% of the gross permanent disability indemnity.

6. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

7. The reasonable value of the services and disbursements of applicant's attorney is $5,932.95, which is equal to 15% of the gross award of permanent disability indemnity, payable from the permanent disability award, plus 15% of the net retroactive temporary disability indemnity, to be adjusted and paid by defendants from the award of retroactive temporary disability.

AWARD

(ADJ3028177)

AWARD IS MADE in Case Number ADJ3028177 in favor of MARIA DE JESUS CARDENAS against ROY J. MAIER PRODUCTS and CIGA for FREMONT INDEMNITY COMPANY IN LIQUIDATION of:

a. Temporary disability for the period of March 19, 1991 to March 22, 2000, for which indemnity is payable at the rate of $242.86 per week, in the total sum of $114,178.90 less an offset of $8,216.00 paid by the EDD to applicant from June 20, 1991 through June 17, 1992 at the rate of $158.00 per week, and excluding all periods of temporary

disability indemnity including vocational rehabilitation temporary disability paid by defendants in both ADJ3937323 and ADJ3028177, and less a reasonable attorney's fee payable to applicant's counsel of record Law Office of Philip J. McGuire equal to 15% of the net retroactive temporary disability indemnity;

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ NATALIE PALUGYAI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 22, 2023

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

MARIA DE JESUS CARDENAS
LAW OFFICE OF PHILIP J. MCGUIRE
MULLEN & FILIPPI

SRO/abs

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