WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHELLE LINZY, *Applicant*

vs.

ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, PSI, *Defendants*

Adjudication Number: ADJ15977843
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued by a workers' compensation administration law judge (WCJ) on September 20, 2024. The WCJ found in pertinent part that applicant's average weekly wage (AWW) were determined pursuant to Labor Code[1] section 4453, subdivision (c)(4) (section 4453(c)(4)) and that the payment of temporary disability (TD) was unreasonably delayed and/or refused thereby entitling applicant to a 25% penalty pursuant to section 5814 on the amount of any additional TD due and owing under the F&A. The WCJ awarded applicant in pertinent part an AWW of $2,554.64 and a 25% penalty ON TD pursuant to section 5814 as per the findings of fact.

Defendant contends that the WCJ failed to conduct the proper analysis to determine whether applicant's AWW should be calculated under section 4553(c)(4) or section 4553, subdivision (c)(1) (section 4553(c)(1)) pursuant to *Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal. App. 4th 1348, 1362 [62 CCC 1649], and that there is a legitimate dispute in this matter as to whether the AWW should have been calculated under section 4553(c)(1). Further, defendant contends that it calculated applicant's AWW and length of TD in good faith given that 1) it could not have been anticipated that applicant's rolled ankle allegedly resulted in avascular necrosis; 2) even the diagnosis of the Qualified Medical Evaluator Babak Alavynejad, D.P.M., (QME Alavynejad) of avascular necrosis on October 12, 2023 was not

[1] All further references are to the Labor Code unless otherwise noted.

definitive; 3) there was no way for defendant to know that the normal duration of a disability associated with a rolled ankle might be extended by further diagnosis at the time it calculated the AWW for temporary disability benefits to begin on January 1, 2022; and 4) assuming arguendo defendant could have somehow anticipated a longer period of TD in January 2022, even though the step increase in salary was expected, there was no reasonable anticipation at that time of any specific negotiated salary increase and certainly not the actual increase that was awarded given the prior average negotiated salary increase had only been 2.76%. Finally, defendant contends that the WCJ failed to provide sufficient explanation why a section 5814 penalty was awarded for unreasonable delay and/or refusal to pay TD at the rate determined after trial in this matter.

Applicant filed an Answer to Defendant's Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report). The WCJ recommended that the petition be denied.

We have reviewed the record in this case, the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons set forth in the Report (except for those portions marked with strikethrough) and for the reasons set forth below, we grant reconsideration. It is our decision after reconsideration to rescind Finding of Fact no. 5 and Award c. related to the section 5814 penalty, but otherwise affirm the WCJ's decision.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 24, 2024, and 60 days from the date of transmission is Saturday, December 21, 2024. The next business day that is 60 days from the date of transmission is Monday, December 23, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, December 23, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 24, 2024, and the case was transmitted to the Appeals Board on October 24, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 24, 2024.

II.

The WCJ imposed a section 5814 penalty on the TD awarded in the F&A. Section 5814 states:

> When payment of compensation has been *unreasonably delayed or refused*, either prior to or subsequent to the issuance of an award, the amount of the

[2] WCAB Rule 10600(b) states that, "Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day." (Cal. Code Regs., tit. 8, § 10600(b).)

> payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less. *In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.*

(Lab. Code, § 5814(a), italics added.)

> "The penalty for unreasonable delay in the payment of compensation is designed to *help an employee obtain promptly the cure or relief he is entitled to* under the law, and to *compel his employer to provide this cure or relief* in timely fashion." (citations)

(*Bauer v. Worker's Comp. Appeals Bd.* (1979) 94 Cal.App.3d 250, 258, italics added.)

Although the burden of proof is on defendant, the Appeals Board must determine the question of whether a delay is unreasonable based "on the totality of the circumstances presented" and cannot issue a strict liability finding. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Souza)* (1999) 69 Cal.App.4th 726, 731 [69 Cal.Comp.Cases 726]; *Kauffman v. Workers' Comp. Appeals Bd*. (1969) 273 Cal.App.2d 829, 835, fn. 1 ["question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts."].) The Appeals Board must "strike 'a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties.'" (*Souza, supra*, 69 Cal.App.4th at p. 731, citing *Gallamore v. Workers' Comp. Appeals Bd.* (1979) 23 Cal. 3d 815, 828.)

The WCJ awarded a 25% penalty pursuant to section 5814 against defendant based on the conclusions that defendant unreasonably used applicant's actual earnings at the time of the January 2022 injury to calculate TD benefits, rather than her earning capacity; and, that this was an unreasonable act because defendant both ignored an anticipated negotiated salary increase and unreasonably delayed applicant's medical treatment. (Report, pp. 3-5.) However, a WCJ's decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc)); and, must be supported by substantial evidence (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). We do not find substantial evidence on the current record to sustain the

award of a section 5814 penalty against defendant under the totality of the circumstances presented in this matter.

First, and based on applicant's testimony which the WCJ found to be credible, it was reasonable to conclude that at the time of injury in January 2022, applicant could reasonably anticipate a negotiated salary increase (in addition to what defendant concedes would be a certain step salary increase), either at the time of the next contract or retroactive to the start of the new contract. (Report, p. 4.) Certainly, there is no dispute that when contract negotiations were concluded in October 2022, the pay increase was indeed applied retroactively to June 2022. (*Id.*, at p. 5.) On the other hand, however, defendant produced evidence that prior negotiated salary increases since applicant's employment began in 2015 averaged 2.76%, which was less than half of applicant's post-injury negotiated contract increase, and included two years with no negotiated salary increase. (Minutes of Hearing and Summary of Evidence, April 9, 2024, p. 6.) Therefore, defendant had a colorable argument that it could not reasonably anticipate what the increase would be for the 2022-2023 school year, and certainly not that the increase would be 7% which was more than twice the 2.76% average.

Next, the WCJ acknowledges that "it is difficult to analyze the anticipated duration of disability due to the lack of medical documentation..." and attributes the delay in treatment and the attendant lack of medical documentation to defendant. (Report, pp. 3-4). It appears that the further diagnosis of avascular necrosis and osteochondral lesion of the talus appears to have been finally made in 2024. (See Report, p. 3; Petition for Reconsideration, p. 5; App. Exh. 5, Reports of PTP Samuel Adams, M.D., Duke Ortho, from 1-2-24 to 6-24-24; Def. Exhs. YY, ZZ, Reports of QME Alavynejad, April 19, 2023 and October 12, 2023.) The WCJ determined that the delay was unreasonable and supported the imposition of a section 5814 penalty.

We find no substantial evidence in the record to support attribution of the delay in applicant's medical treatment to defendant. Defendant claims the requested medical treatment *was* authorized and produced utilization review certifications (UR certifications) dated March 15 and 18, 2022 for a cam boot, physical therapy and an MRI; however, defendant also failed to produce proofs of service to the UR certifications. (Report, p. 3; see Def. Exhs. C, D.) Applicant credibly testified that treatment was neither approved nor disapproved for approximately eight (8) months, which might support attribution of the delay in treatment to defendant; however, there is nothing in the record to explain why neither the applicant (and/or her attorney) nor the treating physician

followed up on the requests for medical treatment – *for eight (8) months*. Certainly, if applicant participated in the delay in her treatment, it would not "accomplish a fair balance and substantial justice between the parties" to impose a 25% penalty on defendant for its alleged part in the delay. (Lab. Code, § 5814; see *Souza, supra,* 69 Cal.App.4th at p. 731.) Regardless, and given the strict rules governing requests for authorization of treatment and utilization review, there is no substantial evidence in the record to determine who or what caused the delay in applicant's treatment.

Accordingly, we cannot agree with the WCJ's conclusion that there is substantial evidence to support a finding that defendant acted unreasonably to delay or to refuse to pay applicant's TD payments. We therefore grant reconsideration and as our decision after reconsideration, we rescind the WCJ's finding of fact that defendant unreasonably delayed and/or refused the payment of applicant's TD (Finding of Fact no. 5), and the award of the section 5814 penalty based on that finding of fact (Award c.).

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by a workers' compensation administration law judge is **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by a workers' compensation administration law judge is **AFFIRMED** except that Finding of Fact no. 5 ["5. The payment of temporary disability has been unreasonably delayed and/or refused. The applicant is entitled to a 25% penalty per Labor Code §5814 on the amount of any additional temporary disability that is due and owing as a result of this Award."] and Award c. ["The applicant is entitled to a 25% penalty per Labor Code §5814 as per Findings of Fact No. 5, above."] are **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 11, 2024

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

MICHELLE LINZY
LAW OFFICES OF JOHN M. URBAN
O'CONNOR TELEZINSKI

AJF/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

CASE NUMBER: ADJ15977843

MICHELLE LINZY -vs.- ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT

ADMINSURE ONTARIO;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Robin A. Brown

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

The applicant sustained an admitted injury to her ankle and claims to have sustained psychiatric/psyche injury while working as a guidance counselor for the Antelope Valley Union High School District on January 11, 2022.

The undersigned proceeded to trial regarding the limited issues of earnings, attorney fees, alleged late penalties per Labor Code §4650, and alleged bad faith delay in temporary total disability payment penalties per Labor Code §5814.

The undersigned issued the Findings and Award and Opinion on Decision dated September 19, 2024, finding that the applicant's average weekly earnings were $2,554.64 per week based upon the applicant's average weekly earnings capacity as per Labor Code §4453(c)(4). The undersigned further found that the applicant is entitled to a 10% late penalty per Labor Code §4650 on the amount of any additional temporary disability that is due and owing, and that the payment of temporary disability was unreasonably delayed and/or refused entitling the applicant to a 25%

penalty per Labor Code §5814 on the amount of any additional temporary disability that is due and owing.

The Defendant filed a timely unverified Petition for Reconsideration dated October 10, 2024 asserting that: the decision of the WCJ is not justified because the requisite two-level analysis was not fully performed; the decision of the WCJ to include a negotiated salary increase agreed upon in October of 2022 is not justified; and that the WCJ's decision to award a 25% penalty for unreasonable delay and/or refusal is not justified by the evidence.

II.

DISCUSSION

The Court of Appeal *in Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen),* held as follows:

Where a dispute arises between the employer and injured worker, the Board must make a two-level analysis to determine what temporary disability benefits are due. First, it must determine the anticipated duration of the disability based upon the nature of the injury sustained and the normal duration of the disability associated with that injury. Second, the Board must consider whether, barring the injury, anything would have occurred during the anticipated duration of the disability that would have affected the injured worker's earning capacity in a manner that makes it unreasonable or unfair to use actual wages to calculate temporary disability benefits. In doing so, the Board should consider only those factors existing at the time of injury or those that could reasonably be anticipated at that time. Where there is specific demonstrable evidence that such factors exist which would have affected an injured worker's earning capacity other than in a de minimis manner, the Board should consider those factors to calculate one sum that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability.

(Grossmont Hosp. v. Workers' Comp. Appeals Bd., 59 Cal. App. 4th 1348, 1363)

DURATION OF TEMPORARY DISABILITY

The undersigned found the applicant to be a credible witness at trial. The applicant testified at trial that she went to Antelope Valley Hospital Emergency Room and followed up with Dr. Lavi after that. However, she also testified at trial that they put in for treatment, but it was not approved or disapproved for approximately eight months, so she received no treatment. (MOH, 7/18/2024, pg.

7, lines 1-12). The defendant did not provide substantial evidence to the contrary, as indicated below.

At trial, the defendant submitted the UR certification for a cam boot for the right ankle and physical therapy dated March 15, 2022. However, it does not include any proof of service or indication that it was ever served upon anyone. (Defendant's Exhibit C)

At trial, the defendant submitted the UR certification for an MRI of the foot dated March 18, 2022. However, it does not include any proof of service or indication that it was ever served upon anyone. (Defendant's Exhibit D)

At trial, the defendant submitted a Treatment Authorization indicating that evaluation and treatment of the right ankle was authorized and indicates that the decision date is April 20, 2022. However, there is no evidence that it was served upon the doctor. There is no proof of service for the authorization, and the document vaguely indicates that it was cc'd to two attorneys without any indication detailing how or where the attorneys were served. (Defendant's Exhibit E)

In the opinion of the undersigned, it is difficult to analyze the anticipated duration of disability due to the lack of medical documentation resulting from the petitioner's apparent failure to timely authorize the evaluation and treatment of the applicant's injury.

Ultimately, the applicant was diagnosed with avascular necrosis of the talus, osteochondral lesion of the talus, superficial peroneal nerve injury, ankle ligament injury, and peroneal tendinitis. (Applicant's Exhibit 5).

It is noted that Labor Code §4656(c)(2) allows aggregate disability payments for up to 104 weeks within a period of five years from the date of injury.

~~Accordingly, based upon the diagnosed avascular necrosis of the talus, osteochondral lesion of the talus, superficial peroneal nerve injury, ankle ligament injury, and peroneal tendinitis and~~

Labor Code §4656(c)(2), in the opinion of the undersigned, it was reasonably foreseeable at the time of injury that the applicant's period of temporary disability may have lasted up to 104 weeks.

EARNINGS

As per Labor Code §4553(c)(1), (2), and (3), an injured worker's average weekly wages are based upon an employee's prior actual earnings. However, Labor Code §4453(c)(4) indicates that where the foregoing methods at arriving at the average weekly earnings cannot be fairly applied, the average weekly earnings shall be taken at 100% of the sum which reasonably represents the average weekly earning capacity of the injured worker.

The Court of Appeal held in Grossmont Hospital:

The essence of the employer's analysis is to determine whether there are factors that within the anticipated duration of the temporary disability would increase or decrease the earnings the worker would have received absent the injury. If such factors exist and their impact is significant enough that it is unreasonable or unfair to use actual earnings at the time of injury to calculate temporary disability benefits, earning capacity should be used to calculate benefits. However, if no such factors exist or their impact on earning capacity is de minimis, the employer may use actual earnings in calculating benefits.

(Grossmont Hosp. v. Workers' Comp. Appeals Bd., 59 Cal. App. 4th 1348, 1362-1363)

The testimony provided at trial from both the applicant and the defense witness Trixie Flores indicated that salary negotiations start around July at the beginning of each school year and are completed around November or December. After the conclusion of the negotiations, the salary increase is always applied retroactively to the beginning of the school year on July 1.

The salary increase at issue became effective on July 1, 2022 (Joint Exhibit QQ), which was during the duration of applicant's disability. The applicant provided testimony at trial that she received yearly salary increases as part of collective bargaining. ~~Accordingly, it was reasonably anticipated at the time of injury that the applicant would receive a yearly salary increase that would be reactively applied to July 1.~~

Defense witness Trixie Flores testified that the applicant received a 7% salary increase. (MOH 4/9/24, pg. 6, lines 17-18). The undersigned finds that this salary increase is significant and is not a de minimis increase.

Ms. Flores testified at trial that she is part of the salary negotiations as a representative of the Antelope Valley Union School District, and that she participates in those agreements. (MOH, 9/3/2024, pg. 4, lines 8-10)

~~In the opinion of the undersigned, it was reasonably foreseeable that there are annual salary negotiations/increases, and the negotiated salaries are always applied retroactively to July 1. Accordingly, a wage increase was reasonably anticipated at the time of the applicant's injury.~~

There is specific demonstrable evidence that factors exist which would have affected the applicant's earning capacity in a significant manner. During the school year 2022/2023, the applicant's salary was substantially increased retroactively as of July 1, 2022 to $132,841.49 per year. (Joint Exhibit QQ). Therefore, the applicant would have received the wage increase under collective bargaining had the applicant not been injured.

~~In the opinion of the undersigned, it would be unreasonable and/or unfair to use the applicant's actual earnings at the time of injury to calculate temporary disability benefits, and that earning capacity should be used to calculate benefits.~~

Based upon the applicant's credible testimony and the defendant's Offer of Employment 2022/2023 dated January 18, 2023 (Joint Exhibit QQ), it is found that applicant's earning capacity as per Labor Code §4453(c)(4) was $132,841.49 per year. The annual salary divided by 52 weeks per year would result in an average weekly wage of $2,554.64.

As per the stipulation of the parties, the average weekly earnings are to be calculated and effective as of January 11, 2022.

PENALTIES

As the temporary total disability was not timely paid, the applicant is entitled to 10% increase per Labor Code §4650(d) on the amount of any additional temporary disability that is due and owing as a result of the Findings and Award..

~~When the payment or furnishing of any compensation benefit has been unreasonably delayed or refused the award is increased per Labor Code §5814. The standard is whether there is genuine doubt from a medical or legal standpoint as to liability for benefits, and the burden is on the defendant to show substantial evidence of the basis for doubt.~~

~~Based upon the foregoing, in the opinion of the undersigned, the payment of temporary disability has been unreasonably delayed and/or refused, and the applicant is entitled to a 25% penalty per Labor Code §5814 on the amount of any additional temporary disability that is due and owing as a result of the Findings and Award.~~

~~With regard to the Petitioner's assertion that the undersigned did not thoroughly discuss the reasons for the undersigned's decisions, pursuant to *Smales v. WCAB (1980) 45 CCC 1026*, this Report and Recommendation cures that defect.~~

III.

RECOMMENDATION

Therefore, it is respectfully recommended that the Petition for Reconsideration be denied.

DATE: October 24, 2024

Robin A. Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE