

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

**MARK PONCE, *Applicant***

**vs.**

**GAMA CONTRACTING SERVICES; STATE COMPENSATION INSURANCE FUND;  
RESOURCE ENVIRONMENTAL, INC.; GREAT DIVIDE INSURANCE COMPANY,  
*Defendants***

**Adjudication Number: ADJ14852118  
Long Beach District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's Findings & Award & Order of April 16, 2025, wherein it was found that while employed during a cumulative period ending November 15, 2019 as a laborer, applicant sustained industrial injury to his back causing temporary disability for the period November 16, 2019 to June 17, 2022, permanent disability of 21%, and the need for further medical treatment. Applicant had received disability benefits from the State of California, Employment Development Department (EDD) corresponding to the period November 16, 2019 to November 14, 2020. In the decision, the WCJ found that EDD was entitled to recover its lien at the temporary disability indemnity rate. With regard to attorneys' fees, it was found that "The reasonable value of the services and disbursements of the applicant's attorney is \$3,501.75 for permanent disability and attorney fees of 15% of the temporary total disability."

Defendant contends that the WCJ erred in awarding temporary disability for the period November 16, 2019 to June 17, 2022 (a period of 135 weeks) in violation of Labor Code section 4656(c)(2) which limits temporary disability indemnity in most cases to 104 compensable weeks. Defendant also sought clarification of the award of attorney's fees on temporary disability indemnity. As noted above, the WCJ awarded "attorney fees of 15% of the temporary total disability." It was unclear whether an attorney's fee was payable on defendant's entire temporary

disability indemnity liability or on applicant's net recovery after deduction of the EDD lien. Applicant filed an Answer where he stated that he understood that temporary disability indemnity was only payable for 104 weeks and that attorney's fees were payable only on his net recovery after payment of the lien. Applicant wrote in the Answer that the "Findings and Award as clear and do not need to be amended."

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report). Although the Report is not a model of clarity, the WCJ appears to be saying that defendant's temporary disability indemnity liability is not capped at 104 weeks because there was no evidence that defendant paid the EDD lien which would have partially discharged its temporary disability obligations. The Report appears to not consider the fact that defendant was ordered to pay the lien in the decision. Additionally, for the first time, the WCJ states that EDD's recovery on its lien claim is to be reduced by attorney's fees payable to applicant's counsel pursuant to Labor Code section 4903.2, which was not previously listed as an issue. Applicant, who had previously stated that it was clear that attorney's fees were not due on lien claimant's recovery and that temporary disability liability was capped at 104 weeks, withdrew his Answer.

As stated below, we will grant reconsideration and amend the WCJ's decision to defer the issues of temporary disability, EDD lien, permanent disability, attorney's fees, and Labor Code section 5412 date of injury.

Preliminarily, we note that 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 May 15, 2025 and 60 days from the date of transmission is July 14, 2025. This decision is issued by or on July 14, 2025, so 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 May 15, 2025, and the case was transmitted to the Appeals Board on May 15, 2025. 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 May 15, 2025.

Turning to the merits, first addressing the issues raised by defendant in its Petition<sup>1</sup>, the WCJ erred in her apparent finding that defendant had liability for more than 104 weeks of temporary disability indemnity. Labor Code section 4656(c)(2) plainly states, “Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from

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<sup>1</sup> While we discuss issues not raised by defendant in its Petition, “it is settled law that a grant of reconsideration has the effect of causing ‘the whole subject matter [to be] reopened for further consideration and determination’ (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of ‘[throwing] the entire record open for review.’ (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. [Citations.]” (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [Appeals Bd. en banc].)

the date of injury.” Here, the WCJ’s award of 135 weeks of temporary disability payments (payable either directly to the applicant or in satisfaction of the EDD lien) clearly ran afoul of Labor Code section 4656(c)(2).

However, in the further proceedings, in addition to Labor Code section 4656(c)(2), the parties and the WCJ should reanalyze the entire issue of temporary disability. Although the WCJ found temporary disability commencing on November 16, 2019, we find no medical evidence that applicant was temporarily disabled on that date. The evidentiary record contains only a single page of a medical record from November 14, 2019 which does not mention temporary disability status or the need for any modified duties. The first medical evidence in the record of temporary total or partial disability is the November 15, 2021 report of primary treating physician Alex H. Etemad, M.D. who opined that applicant was unable to lift more than 15 pounds. The WCJ found applicant temporarily disabled during this period pursuant to the “odd lot” doctrine:

Under the “odd lot” doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages. [Citation.] This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. [Citations]

(*General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375].)

However, it is unclear from the record whether defendant was ever apprised of the work restrictions or was given an opportunity to offer modified work. The parties and the WCJ should analyze whether under the facts of this case, defendant had an obligation to offer modified work. (See, e.g., *Vittone v. Workers’ Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 [writ den.]); *Haile v. Workers’ Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 832, 835 [writ den.]; *Lee v. Coca-Cola Bottling Co.* (2009) 2009 Wrk. Comp. P.D. LEXIS 311, \*8 [Appeals Bd. panel.] It is unclear from the current record what was communicated to the employer at the time applicant initially stopped going to work and when Dr. Etemad placed applicant on temporary partial disability two years later.

With regard to attorney’s fees, defendant sought clarification since it was unclear whether the WCJ was awarding fees only on applicant’s net recovery of temporary disability or on the entire award of temporary disability inclusive of amounts payable to EDD. In the Report, for the

first time, the WCJ invoked Labor Code section 4903.2 to state that she intended to impose an attorney's fee on the entire award of temporary disability indemnity, and that EDD's recovery should be reduced by the attorney's fee. Labor Code section 4903.2 states:

Where a lien claimant is reimbursed pursuant to subdivision (f) or (g) of Section 4903 or Section 4903.1, for benefits paid or services provided, the appeals board may award an attorney's fee to the applicant's attorney out of the lien claimant's recovery if the appeals board determines that all of the following occurred:

- (a) The lien claimant received notice of all hearings following the filing of the lien and received notice of intent to award the applicant's attorney a fee.
- (b) An attorney or other representative of the lien claimant did not participate in the proceedings before the appeals board with respect to the lien claim.
- (c) There were bona fide issues respecting compensability, or respecting allowability of the lien, such that the services of an attorney were reasonably required to effectuate recovery on the claim of lien and were instrumental in effecting the recovery.
- (d) The case was not disposed of by compromise and release.

The amount of the attorney's fee out of the lien claimant's recovery shall be based on the extent of applicant's attorney's efforts on behalf of the lien claimant. The ratio of the amount of the attorney's fee awarded against the lien claimant's recovery to that recovery shall not exceed the ratio of the amount of the attorney's fee awarded against the applicant's award to that award.

In the further proceedings, if the WCJ still contemplates reducing EDD's recovery and issuing attorney's fees under Labor Code section 4903.2, she should specifically analyze whether all of the criteria of Labor Code section 4903.2 are met. Most importantly, EDD must be apprised of the issue as required by due process and as specifically required by Labor Code section 4903.2(a).

We will defer the issue of permanent disability so that the evidentiary record can be further developed on the issue of apportionment. We note that this case was initially presented as a specific injury occurring on November 15, 2019. Qualified medical evaluator David S. Kim, M.D. opined that 15% of applicant's permanent impairment was attributable to factors other than the industrial injury. (December 20, 2022 report at p. 9.) Primary treating physician Dr. Etemad found that 10% of applicant's impairment was due to non-industrial factors. (June 17, 2022 report at p. 8.) Subsequently, Dr. Kim opined that applicant's injury was a cumulative trauma. However, Dr.

Kim did not perform the apportionment analysis required by Labor Code section 4663 with regard to his new finding of cumulative trauma. Although he wrote in his October 11, 2024 supplemental report, “There is only one injury, and therefore, apportionment would not apply,” it is unclear whether Dr. Kim was writing about apportionment generally or only between a cumulative and specific injury. This issue must be clarified in the further proceedings.

Finally, we note that the Labor Code section 5412 date of injury was an issue for determination set forth at trial, but that there is no finding on that issue.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. The WCAB has a constitutional mandate to ensure “substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ’s decision to defer the issues of temporary disability, permanent disability, attorney’s fees, the EDD lien, and applicant’s Labor Code section 5412 date of injury. We express no opinion on the ultimate resolution of this matter.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings & Award & Order of April 16, 2025 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award & Order of April 16, 2025 is **AMENDED** as follows:

### **FINDINGS OF FACT**

1. Mark Ponce, while employed during the period November 15, 2018, through November 15, 2019, as a laborer at various locations in California, by Gama Contracting Services, whose workers' compensation insurance carrier was State Compensation Insurance Fund, sustained injury arising out of and occurring in the course of employment to his back. Applicant did not sustain injury arising out of and occurring in the course of employment to his trunk.

2. Applicant's earnings at the time of injury were \$1,229.15 per week producing a temporary disability rate of \$819.44 per week and a permanent disability indemnity rate of \$290.00 per week.

3. The issue of temporary disability is deferred, with jurisdiction reserved.

4. The issue of the lien of Employment Development Department (EDD) is deferred, with jurisdiction reserved.

5. The issue of permanent disability is deferred, with jurisdiction reserved.

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

7. The issue of attorney's fees is deferred, with jurisdiction reserved.

8. The issue of applicant's Labor Code section 5412 date of injury is deferred, with jurisdiction reserved.

### **AWARD**

**AWARD IS MADE** in favor of Mark Ponce against State Compensation Insurance Fund of:

a) Future medical treatment is reasonably required to cure or relieve from the effects of the injury herein.

**EVIDENTIARY ORDER**

Defendant's Exhibit C, the Applicant's deposition transcript, which was marked for identification purposes only, is hereby admitted into evidence, as to page 46 only.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**/s/ PAUL F. KELLY, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**July 14, 2025**

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

**MARK PONCE  
PERONA, LANGER, BECK & HARRISON  
STATE COMPENSATION INSURANCE FUND  
BOBER PETERSON KOBAY  
EDD SDI LONG BEACH**

**DW/oo**

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