WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EUGENIO GARCIA, ***Applicant***

vs.

MIKE THOMPSON RV; COMP WEST INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ17022785
Los Angeles 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 the workers' compensation administrative law judge (WCJ) on July 29, 2026, wherein the WCJ found in pertinent part that applicant, while employed from November 2, 2017 through November 2, 2022, as a RV Technician by defendant, sustained injury arising out of and in the course of employment to his bilateral shoulders, cervical spine, shoulder, left elbow, bilateral carpal tunnel, wrists, lumbar spine, knees, acid reflux, hypertension, hands, and UBS/unidentified bowel syndrome; and that under Labor Code section[1] 4661.5 and *Hofmeister v. Workers' Compensation Appeal Board* (1984) 156 Cal.App.3d 848, 852 [49 Cal.Comp.Cases 438], applicant is entitled to temporary disability benefits at the rate of $1,764.11 per week since no payment of temporary total disability was paid within two years of the date of injury, and the injury resulted in temporary disability for the period of December 13, 2022, and continuing, for 104 weeks.

Defendant contends that section 4661.5 and *Hofmeister* are inapplicable in this matter because applicant is neither a minimum nor maximum wage earner, and the appropriate indemnity rate for temporary disability is $800.00 per week.

We have not received an answer from applicant.

[1] All statutory references are to the Labor Code unless otherwise stated.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed below, we will grant defendant's Petition and rescind the F&A, and substitute a new decision that finds that the temporary disability rate is $800.00 per week; and that applicant is entitled to penalties and interest on the award of temporary disability benefits.

BACKGROUND

Applicant sustained injury to his bilateral shoulders, cervical spine, shoulder, left elbow, bilateral carpal tunnel, wrists, lumbar spine, knees, acid reflux, hypertension, hands, and UBS/unidentified bowel syndrome while employed by defendant as a RV Technician, during the period from November 2, 2017 to November 2, 2022. (Minutes of Hearing (MOH), July 14, 2026, at p. 2:3-7.)

Todd Borenstein, M.D., served as panel Qualified Medical Evaluator (QME) in orthopedic surgery and he authored eight reports and underwent deposition. (Joint Exhibits E-M.)

In his Report, the WCJ provided the following facts concerning applicant's temporary disability status:

At the time of injury, the employees' earnings were $1,200 per week.

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On December 13, 2022, Primary Treating Physician Dr. Rosenzweig, found Applicant temporarily totally disabled. **Applicant Exhibit 4**.

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On December 14, 2023, PTP Dr. Rosenzweig declared Applicant MMI. **Applicant Exhibit 3**. However, PQME Dr. Borenstein found that Applicant was not permanent and stationary as of November 20, 2023. **Joint Exhibit L**. Per PQME Dr. Borenstein's report dated December 22, 2025, Applicant remains not permanent and stationary as Applicant should be referred to an orthopedic surgeon for cortisone injection and surgical intervention of bilateral shoulders and knees. Also, the PQME Dr. Borenstein opined that a referral to a spine surgeon or pain specialist for possible epidural steroid injections is needed. **Joint Exhibit E**, page [4].

For the TTD period, on July 08, 2025, Dr. Borenstein testified at his deposition that:

"Q: You still are of the opinion that the applicant is not at maximum medical improvement; would that be accurate, sir?

A Yes."

Joint Exhibit H p 11, lines 3-6.

…

"Q: So, again, with medical probability, you do believe that this applicant sustained a continuous-trauma injury on an industrial basis; correct?

A: Yes.

…

"Q: And he's either been temporary totally disabled or temporary partially disabled, in your medical opinion, from the date he last worked until such time he reaches an MMI status by you. Would that be accurate, sir?

A: That would be accurate."

Joint Exhibit H, p 25-26 lines 25-3, and p 26 lines 9-13.

(Report, at pp. 2-3.)

The WCJ found Dr. Borenstein's reports to be substantial medical evidence on the issue of applicant's temporary disability status. (Opinion on Decision, July 29, 2026, at p. 6; Report, at p. 7.)

On July 14, 2026, the matter proceeded to trial on the issues of 1) Parts body injured; 2) Applicant claims to have sustained injury arising out of and in the course of employment to ear, lower extremities, feet, sleep disorder, cardiovascular, ankles, toes, and brain; 3) Temporary disability, employee claiming the following period: November 2, 2022, through November 22, 2024; 4) EDD lien, in the amount of $37,440 for the periods of December 20, 2022, through December 18, 2023, at $720.00 per week; 5) Attorney fees; and 6) Penalties and interest. (MOH, July 14, 2026, at pp. 2:18-3:2.)

It is from the corresponding decision that defendant seeks reconsideration of one issue only: applicant's temporary disability rate.

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to section 5909, which states 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 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 August 24, 2026, and 60 days from the date of transmission is October 23, 2026. This decision is issued by or on October 23, 2026, so that we have timely acted on the Petition as required by section 5909(a).

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. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 24, 2026, and the case was transmitted to the Appeals Board on August 24, 2026. 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 section

5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 24, 2026.

II.

Turning to the merits, we consider the only issue raised on reconsideration, applicant's temporary disability rate.

The calculation of an award of temporary disability requires (1) a determination of the employee's average weekly earnings (which may be based on various calculations, including actual earnings or on earnings capacity), (2) the application of the minimum and maximum disability rates, and (3) a determination of the period the employee was temporarily totally disabled.

Section 4453(c) provides four methods to calculate average weekly earnings. (Lab. Code, § 4453(c)(1)-(4).) Section 4453(a) provides the statutory minimum and maximum temporary disability rates, based on the average weekly earnings calculated under section 4453(c).

Once the temporary disability rate has been calculated based on average weekly earnings, a determination of the period of temporary disability must be made, subject to section 4656, which limits the aggregate disability payment available for a single injury causing temporary disability. (Lab. Code, § 4656.)

Here, the parties stipulated that at the time of injury, the applicant's earnings were $1,200.00 per week warranting an indemnity rate of $800.00 for temporary disability. (MOH, July 14, 2026, at p. 2:9-11.) The WCJ found that applicant's earnings at the time of injury, for purposes of determining temporary disability rates, were $1,200.00 per week. (Finding of Fact No. 1.) This $1,200.00 in weekly earnings yields a temporary disability rate of $800.00. For applicant's November 2, 2022 date of injury, the statutory minimum and maximum were $230.95 and $1,539.71, respectively. Hence, for purposes of section 4453(a), applicant's temporary disability rate of $800.00 is neither minimum nor maximum.

Section 4661.5 provides:

> Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from 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 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.

(Lab. Code, § 4661.5.)

The WCJ erroneously relied on *Hofmeister*, *supra*, 156 Cal.App.3d 848, wherein an applicant was injured in September 1979, but the defendant disputed employment and paid no benefits until an award issued in July 1983. In the interim, the maximum statutory temporary disability rate had increased from $154.00 per week to $196.00 per week. The Court of Appeal held that in enacting section 4661.5, the Legislature assigned the risk of inflation of indemnity rates to the employer. Accordingly, temporary disability payments more than two years from the date of injury should be paid at the statutory amount prevailing when the payment is made. (*Id*. at pp. 851; 853.)

Here, by statute in 2022 and by statute in 2026, applicant is entitled to a rate based on two thirds of his average weekly earnings. That is, temporary total disability benefits are calculated based on the injured worker's average weekly earnings at the time of injury and not based on the State Average Weekly Wage (SAWW), unless the worker is a "maximum earner" under section 4453(a)(10). Unlike the applicant in *Hofmeister*, applicant was not entitled to the maximum temporary disability rate at the time of his injury in 2022, hence he is not entitled to the maximum temporary disability rate when the payments are made more than two years later in 2026.

III.

Section 4650(d) states: "If any indemnity payment is not made timely ... the amount of the late payment shall be increased by 10 percent and shall be paid, without application, to the employee." The section 4650(d) penalty is a self-executing, strict liability provision that applies to delays in payments of temporary or permanent disability payments. (*Rhiner v. Workers' Comp. Appeals Board* (1993) 4 Cal.4th 1213, 1227 [58 Cal.Comp.Cases 172]; *Mote v. Workers' Comp. Appeals Board* (1997) 56 Cal.App.4th 902, 910 [62 Cal.Comp.Cases 891].) Under section 4650(d), if a payment is late, that individual payment is automatically increased by 10 percent, and the penalty applies irrespective of the reason for delay. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Board* (*Stuart*) (1998) 18 Cal.4th 1209, 1213 [63 Cal.Comp.Cases 916].) Clearly, when an applicant is entitled to retroactive temporary disability benefits, they are also entitled to an automatic increase in temporary disability indemnity payments pursuant to section 4650(d).

Here, penalties and interest were an issue for trial, and the WCJ noted the award of "interest due." (MOH, July 14, 2026, at p. 3:2; Award b.) However the WCJ failed to clearly award the 10% section 4650(d) penalty. With this said, defendant lodged no objection to the "interest due" language, and we will clarify the findings and award.

We will also clarify the findings and award so that the parties' stipulations at trial with respect to the finding of injury and defendant's insurance coverage are now findings of fact. Section 5702 states that:

> 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.

(Lab. Code, § 5702, emphasis added.)

This means that under section 5702, when the parties enter into stipulations, ***findings*** are made by the WCJ or the Appeals Board based on the stipulations. It is not necessary, and indeed it is not commensurate with the statutory language of section 5702, to differentiate between "stipulated facts" and "findings of fact." Under section 5702, the underlying basis for the ***findings*** is either a stipulation or a determination by the WCJ based on the evidence presented, but regardless of the basis, all ***findings*** are equally enforceable.

Accordingly, we grant defendant's Petition for Reconsideration, rescind the F&A, and substitute a new F&A that finds that applicant's temporary disability rate is $800.00 per week; and that applicant is entitled to penalties and interest on the award of temporary disability benefits.

For the foregoing reasons,

IT IS ORDERED that the defendant's Petition for Reconsideration of the July 29, 2026 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the July 29, 2026 Findings and Award is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Eugenio Garcia, while employed during the period, November 2, 2017 through November 2, 2022, as a RV Technician at Santa Fe Springs, California by Mike Thompson RV, sustained injury arising out of and in the course of employment to bilateral shoulders, cervical spine, shoulder, left elbow, bilateral carpal tunnel, wrists, lumbar spine, knees, acid reflux, hypertension, hands, and UBS/unidentified bowel syndrome and claims injury to his ear, lower extremities, feet, sleep disorder, cardiovascular, ankles, toes, and brain.

2. At the time of the injury, the employer's workers' compensation carrier was Comp West Insurance Company.

3. At the time of injury, the employee's earnings were $1,200.00 per week warranting indemnity rates of $800.00 for temporary disability, and $290.00 for permanent disability.

4. The injury resulted in temporary disability for the period of December 13, 2022, and continuing, for 104 weeks, payable at the rate of $800.00 per week, plus penalties pursuant to Labor Code section 4650(d) and interest pursuant to Labor Code section 5800.

5. EDD is entitled to reimbursement, subject to proof.

6. The reasonable value of the services of applicant's attorney is 15% of the retroactive portion of the Award.

AWARD

AWARD IS MADE in favor of Eugenio Garcia against Mike Thompson RV; Comp West Insurance Company of:

Temporary disability indemnity at the rate of $800.00 per week, beginning on December 13, 2022, and continuing for 104 weeks, including a 10% penalty and interest, less attorney's fees, less credit for sums EDD paid on account thereof, to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 23, 2026

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

EUGENIO GARCIA
GRAIWER, KAPLAN, VERNIK & EVANS
SAPRA & NAVARRA

SL/abs

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