WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KENNETH HELLER, ***Applicant***

vs.

OCEAN PARK MECHANICAL, INC.; BENCHMARK INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ18296084
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and lien claimant Nyman Turkish, who is applicant's counsel in this matter, seek reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact & Award of May 21, 2026, wherein it was found that while employed as sheet metal installer during a cumulative period ending April 1, 2020, applicant sustained industrial injury to his cervical spine, lumbar spine, upper extremities, hips, and lower extremities causing compensable temporary disability from June 30, 2020 to June 28, 2022, permanent disability of 48%, and the need for further medical treatment. As relevant to the instant Petition for Reconsideration, it was found that applicant's average weekly earnings were $1,557.31 per week, entitling applicant to temporary disability indemnity at the rate of $1,038.21 per week. Applicant was awarded 104 weeks of temporary disability for a gross temporary disability indemnity award of $107,973.84. However, the WCJ allowed an Employment Development Department (EDD) lien in the amount of $47,000.57. Nevertheless, the WCJ awarded an attorneys' fee of $12,956.82 with regard to temporary disability, computed as 12 percent of the temporary disability indemnity payable by defendant rather than a percentage of the remaining amount payable to the applicant ($60,973.27). With regard to attorneys' fees on permanent disability indemnity, the WCJ awarded $8,943.60, computed as 12 percent of the permanent disability indemnity payable to the applicant ($74,530.00).

Applicant contends that the WCJ erred in finding average weekly earnings of only $1,557.31 per week. Applicant's counsel contends that the WCJ erred in computing attorney's fees as only 12 percent of applicant's recovery rather than 15 percent of applicant's recovery. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). In the Report, the WCJ recommends dismissal of the Petition for failure to file a proof of service and a Notice of Adverse Interest with regard to the attorneys' fees issue. However, applicant's counsel has since cured that defect by filing both documents, and we therefore consider the Petition on the merits.

As explained below, we affirm the WCJ's findings regarding applicant's average weekly wage for the reasons stated by the WCJ in the Report. However, we will grant reconsideration and defer all issues regarding attorneys' fees. Here, the WCJ appears to have incorrectly awarded attorneys' fees on temporary disability indemnity based on the gross award of temporary disability indemnity rather than the net award after consideration of the EDD lien. Since we defer the issue of attorneys' fees on this basis so that the WCJ may clarify or reformulate the award of attorneys' fees, we do not reach the issue of what percentage of applicant's recovery fees should be computed at for temporary or permanent disability.

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code 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.
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> (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.
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> (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 August 7, 2026 and 60 days from the date of transmission is October 6, 2026. This decision is issued by or on October 6, 2026, 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 shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 7, 2026, and the case was transmitted to the Appeals Board on August 7, 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 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 August 7. 2026.

II.

With regard to the issue of applicant's average weekly earnings, we affirm the WCJ's decision for the reasons stated by the WCJ in the Report, which we quote as follows (footnotes omitted):

> Complete payroll information is in evidence during the entire period of employment, which is also the entire period of cumulative injury. This period consisted of 636 days(90 6/7 weeks) during which time Petitioner earned $138,875.79 ($138,463.49 of regular earnings and $412.20 of overtime pay) *Applicant's Exhibit 14/Defendant's Exhibit J: Ocean Park Mechanical Inc-Employee Earnings History Summary Report 10/27/2023*. This equals $1,528.51 per week. Defendant alleged average weekly earnings at the slightly higher figure of $1,557.31. *Pre-Trial Conference Statement 10/09/2025 p. 3 (Issues); Minutes of Hearing 1/29/2026 p. 3 lines 6-8 (Issue #2)*. Defendants were held to the higher figure.

> Petitioner alleges a much higher average weekly wage. Petitioner argues that he had average weekly earnings of $1,771.20 per week during 2018 and part of 2019 and $1.831.20 per week during the rest of 2019 and until the end of employment in April 2020. Petitioner appears to derive these figures by multiplying the then-current rate of pay ($44.28 per hour and later $45.78) by full time employment of 8 hours per day and 40 hours per week. *Petition for Reconsideration 6/10/2026 p. 4 lines 5-15.*
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> In fairness, 40 hours at 44.28 per hour is $1,771.20 and 40 hours at $45.78 per hour is $1,831.20. But the assumption of uniform full-time work is incorrect. Only 39 of the reported weekly pay periods included 40 hours. Total hours were 3,090.25 instead of the 3,632 which would have resulted from uniform full-time work for 90 and 6/7th weeks. *Applicant's Exhibit 14/Defendant's Exhibit J: Ocean Park Mechanical Inc-Employee Earnings History Summary Report 10/27/2023.*

(Report at p. 5.)

III.

With regard to the issue of attorneys' fees, we note that fees on applicant's temporary disability indemnity recovery were computed based on the gross temporary disability indemnity payable by defendant, including the EDD lien, rather than based on applicant's actual recovery. There was no discussion of this unusual finding in the Opinion on Decision.

Since this issue was not raised, we will grant reconsideration and defer the issue of attorneys' fees so that the WCJ may clarify this issue. In the further proceedings, applicant's counsel may re-raise the issue of the percentage of applicant's recovery that should be awarded as attorneys' fees.[1] Other than agreeing with the WCJ that applicant's acknowledgement of notice that counsel would seek a fee of 15 percent is not tantamount to a fee agreement of 15 percent, we take no position on the ultimate resolution of this issue. The defendant should hold 15 percent of applicant's permanent disability indemnity recovery in addition to $12,956.82 (the amount of fees awarded by the WCJ with regard to temporary disability indemnity) in trust pending resolution of the attorneys' fees issue.

[1] We note that in very limited circumstances, an applicant's attorney may be entitled to recovery on a lien claimant's recovery. (Lab. Code, § 4903.2.) This does not appear to be an issue in this case.

We note that the WCJ's decision incorrectly awarded permanent disability indemnity from the permanent and stationary date rather than the due date of the last payment of temporary disability indemnity. We have corrected this error in our decision. (Lab. Code, § 4650, subd. (b).)

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Joint Findings and Order of May 21, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Order of May 21, 2026 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

Findings of Fact

1. Applicant Kenneth Heller, age 59 at the end of the period of cumulative injury, sustained an injury arising out of and it the course of employment to his cervical spine, lumbar spine, bilateral upper extremities, bilateral hips and bilateral lower extremities, particularly thighs and knees during the period from July 5, 2018 to April 1, 2020 while employed in Los Angeles, California, as a Sheet Metal Installer (Occupational Group 482) by Defendant Ocean Park Mechanical, Inc.

2. During the period from July 5, 2018, to April 1, 2020, Defendant-Employer Ocean Park Mechanical, Inc. was insured for California workers compensation liability by Defendant-Carrier Benchmark Insurance Company.

3. During the period from July 5, 2018, to April 1, 2020, Applicant Kenneth Heller had average earnings of $1,557.31 per week.

4. Applicant Kenneth Heller was temporarily totally disabled as a result of the cumulative industrial injury during the period from July 5, 2018, to April 1, 2020, during the period from June 30, 2020, to February 13, 2024.

5. The obligation of Defendants to indemnity Applicant Kenneth Heller for temporary disability arising from the cumulative industrial injury during the period from July 5, 2018, to April 1, 2020, ended at 104 weeks of indemnity liability on June 28, 2022.

6. Applicant Kenneth Heller received State Disability Insurance (SDI) benefits from Lien Claimant Employment Development Department (EDD) during the period from June 8, 2020, to June 6, 2021, at the rate of $962.00 per week, totaling $50,024.00.

7. Defendant Benchmark Insurance was informed of the payment of

State Disability Insurance benefits to Applicant Kenneth Heller on October 10, 2023.

8. Applicant Kenneth Heller was permanent and stationary from the effects of the cumulative industrial injury during the period from July 5, 2018, to April 1, 2020, on February 14, 2024.

9. Applicant Kenneth Heller sustained 48% permanent partial disability, after applicable adjustment and apportionment, as a result of the cumulative industrial injury during the period from July 5, 2018 to April 1, 2020.

10. Applicant Kenneth Heller is in need of further medical treatment to cure or relieve from the effects of the cumulative industrial injury during the period from July 5, 2018, to April 1, 2020.

11. Applicant Kenneth Heller was not shown to have self-procured medical treatment to cure or relieve him from the effects of the cumulative industrial injury during the period from July 5, 2018, to April 1, 2020.

12. The issue of attorneys' fees is deferred, with jurisdiction reserved.

13. Applicant's filing of the Application for Adjudication of Claim on October 3, 2023 was not shown to be beyond the time allowed by law.

Award

Award is made in favor of Applicant and against Defendant as follows:

A} Applicant is awarded such further medical treatment as may be necessary and appropriate to cure or relieve from the effects of the cumulative industrial injury during the period from July 5, 2018 to April 1, 2020.

B} Applicant is awarded temporary total disability indemnity at the rate of $1,038.21 per week for the period from June 30, 2020 to June 28, 2022, totaling $107,973.84, less the lien of Employment Development Department (EDD) in the amount of $47,000.57, and less $12,956.82 to be held in trust by defendant pending resolution of the attorneys' fee issue.

C} Applicant is awarded permanent partial disability indemnity in the total amount of $74,530.00, payable at the rate of $290.00 per week, beginning June 28, 2022, less 15 percent of the permanent disability awarded herein to be held in trust by defendant pending resolution of the attorneys' fee issue.

D} The lien claim of the Employment Development Department (EDD) is allowed as specified herein. Additionally, Defendant-Carrier shall pay interest to Lien Claimant EDD at the lawful rate beginning October 10, 2023 and continuing until paid.

E} Defendants shall pay, adjust or litigate any unresolved lien claims of record with all rights and defenses reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 6, 2026

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

KENNETH HELLER
NYMAN TURKISH
STACEY L. TOKUNAGA
EMPLOYMENT DEVELOPMENT DEPARTMENT

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