WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAVIER HIDALGO, *Applicant*

vs.

DUCOING MANAGEMENT, INC.; SIRIUS POINT AMERICA INSURANCE COMPANY, administered by CORVEL, *Defendants*

Adjudication Number: ADJ17503090
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration and/or removal of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 3, 2024. In that decision, the WCJ found, in pertinent part, that applicant's lodging and food allowance are considered part of his wages; that applicant's weekly earnings are $1,439.10 a week; that applicant's benefits were unreasonably delayed or refused; and that the award is increased by 15 percent of unpaid total temporary disability pursuant to Labor Code[1] section 5814.

Defendant contends that the WCJ erred in considering applicant's lodging and food allowance part of his wages. Defendant also contends that there were mathematical errors in the calculation of applicant's weekly earnings. Defendant further contends that there was a good faith dispute as to the amount of applicant's weekly earnings and thus as to the amount of temporary disability owed and therefore penalties under section 5814 were improper.

We have not received an answer from applicant.

The WCJ issued a Report and Recommendation on defendant's Petition for reconsideration and/or removal (Report) recommending that defendant's Petition be denied in part and granted in part. Specifically, the WCJ recommended that the Petition be denied regarding the determination that applicant's lodging and food allowance is a part of his remuneration, but that the Petition be

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

granted to accurately obtain applicant's earnings, temporary total disability rate, attorney fees, and penalty determination.

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 for the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the January 3, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to various body parts while employed by defendant as a laborer on January 26, 2023.

On October 11, 2023, the matter proceeded to trial on the following issues:

> 1. Earnings: The employee claims $1,658.46 per week. The employer/carrier claims $620.00 per week.
> 2. Attorney fees.
> 3. Temporary total disability rate/underpayment of temporary total disability and penalties pursuant to Labor Code Section 4650 and Labor Code Section 5814.
>
> (Minutes of Hearing and Summary of Evidence, October 11, 2023 trial (MOH/SOE), p. 2.)

On October 11, 2023, applicant testified at trial with the assistance of a certified Spanish interpreter. Stephen Marquez, an employee of defendant, also testified on October 11, 2023. In pertinent part, the WCJ summarized applicant's testimony as follows:

> ...
>
> Applicant was hired to work full time. He answered in the affirmative when asked if he was to be provided lodging. He stated that he lived at a hotel during his employment. He would be at different locations. One week he would be in San Francisco and the following week in Sacramento. He agreed that the employer provided the lodging [].
>
> Applicant stated that about 15 years ago he worked with the same employer doing the same work and that his previous stint with the employer, lodging was not provided.
>
> According to the Applicant, he was hired 3 months prior to his injury. On the first day of work he went to Modesto. He was taken there by a person and then on the same day at the end of the workday he was taken to Oakland. He was then

provided lodging in Oakland. He was in Oakland for about a week. He was provided lodging the entire time he was in Oakland and given money for food. He did not recall the name of the hotel he stayed at. He does not read English.

(MOH/SOE, p. 4.)

After being in Oakland, he went to Salinas. He stated that he just went wherever the foreman took him. He believed he stayed at Salinas for about four days. During this time he did not go back to Mexico or Orange County. Lodging was provided for him in Salinas. He was also provided food or money for food. He moved quite often while working and he might have been sent to Sacramento after Salinas, but was not sure. He stated that lodging was provided in Sacramento.

(MOH/SOE, pp. 4-5.)

Applicant also worked in Fresno and Bakersfield. He stayed in Fresno for about a week. He was given lodging and money for food. He was given about $300.00 every two weeks for food. He estimated that he worked about 75 out of 90 days for the employer. He stated he was still provided a hotel by the employer for the 15 days he did not work. He worked in Bakersfield for about week. That is the last location he recalled working at.

Applicant was provided with lodging for the entire three month period and never went back home or to Orange County. During the three months he worked there if he had any mailed he used the foreman's P.O. box in Oakland. He stated he was injured in Bakersfield which resulted in hospitalization for about a week at a trauma hospital then he was sent to a rehabilitation hospital. Thereafter, he went to stay with his sister.

Applicant stated that his principal language is Spanish. Part of the job was traveling when working off site. He did not use his car. He traveled with the employer and used company transportation which the foreman drove. He did not pay for the gas. The foreman paid for the gas. When working outside of Anaheim, he stayed at motels. He did not pay for the motels. He did not receive money for hotels and he did not use his own money for the hotels. The foreman was in charge of arranging the hotels.

Applicant had roommates in the hotels. During the off days he stayed near the location where he was working at. He was given a check on the first day of work for food. The check was for $300.00. When questioned by the defense counsel, he stated that the check may have been for $299.32. When he received his first check he stated that his friend cashed it for him and he got $300.00.

(MOH/SOE, p. 5.)

> Thereafter, he stated the foreman would cash the check for him for $300.00. He received his first check for his hourly work after working two weeks. When he received the check for hours worked, the amount of the check varied depending on the time that he had worked. The money he received for food has stayed the same. In 2023 the check he received for food was the same. He did not recall receiving a check in the amount of $331.88.

(MOH/SOE, pp. 5-6.)

> He worked on Christmas. He did not remember working the entire day of Christmas. He did not recall if he worked less during Christmastime. He did not remember a different amount being given to him during Christmas for food. The week prior to Christmas he stayed at a hotel or motel. He stated that he was always at a hotel during the time of hire until the time of injury. He stated he was not at Anaheim during the employment he was always at least one or two hours outside of Anaheim.
>
> While working with the employer, the employer never paid for an apartment, condo or home. He was never given any specific money to pay for an apartment. During the week of Christmas 2022 he did not recall what city he was in.
>
> ...
>
> Applicant did not have any designated days off. Normally, weather such as rain or no work dictated whether or not he worked.

(MOH/SOE, p. 6.)

Defendant's employee Stephen Marquez also testified at trial on October 11, 2023. The WCJ summarized his testimony as follows:

> [Stephen Marquez's] job position at Ducoing was that of safety and security. He checked for drugs, field services, contacts customers, checked jobs. He has been employed for ten plus years. He knew Applicant after the accident. The injury was reported to Mr. Marquez. Part of his job was to be notified of work injuries.

(MOH/SOE, pp. 6-7.)

> He stated that the Applicant's job was that of an assistant laborer. His work consisted of prepping, cleaning and taping. The Applicant worked at various locations. He was injured in Bakersfield. He got to the work sites by riding in a company truck as a passenger from site to site. The foreman be would be the one driving the truck.
>
> Applicant did not drive the truck and was not responsible for paying for gas. The employer did not provide money to pay for gas. Company policy was to cover

gas. According to Mr. Marquez, the Applicant stayed at hotels or lodges that the employer paid for. The employer did not give Applicant any money directly for lodging. The employer did not give Applicant money to pay for lodging. Lodging was considered a business expense.

The employer made the arrangements for lodging and covered for lodging outside of Anaheim. The employer would not cover for any lodging near Anaheim.

Applicant was given a per diem check for food. He was given a check prior to departing for job sites. The per diem check was not part of the salary. It was separate. He was given a check for days he would work off-site. The company only gave money for food to employees working off-site outside of Anaheim. The per diem for food was considered a business expense. Applicant would not be given the per diem for food if he worked near Anaheim. Applicant was paid bi-weekly. He earned $14.00 an hour in 2022 and earned $15.50 in 2023.

Mr. Marquez was presented with Exhibit A. He stated that Exhibit A was accurate to what Applicant received from the employer for pay. The per diem for food was provided when traveling.

Mr. Marquez was then presented with Exhibit B. He disagreed with the investigative report and noted that the payment per diem was $40.00 per day. He was again shown Exhibit A. He was referred to the January 13, 2023 per diem that paid $331.38.

(MOH/SOE, p. 7.)

According to Mr. Marquez, his superintendent told him that the Applicant went home after December 6, 2022, as he only worked for five days during that pay period. The Applicant was only given money per diem on days he worked. When not working, off-site lodging was not covered.

(MOH/SOE, pp. 7-8.)

Mr. Marquez was not in charge of personnel matters nor was he in charge of payroll matters. He did not pay for the hotels. He did know what hotels the workers stayed at. There was a list of the hotels that the Applicants stayed at, but not of all the hotels. He did not participate in supervision or hiring. He was not with the Applicant at the work site.

Mr. Marquez was notified when the injury occurred. He knew the per diem policies. He spoke to the owner about the per diem policies and he was aware of the lodging policies.

Mr. Marquez did not supervise the per diem policies. He did not do the hiring.

> Mr. Marquez was asked if he was aware regarding the locations of hotels the Applicant has stayed at. He stated that he could obtain the information regarding the lodging where Applicant had stayed at. He stated that the person at the employer who had that information was named Sabina.

(MOH/SOE, p. 8.)

Trial was continued for a second session for arguments regarding the admissibility of exhibits. Trial concluded on November 6, 2023.

DISCUSSION

A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, at 1075 ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer*, *supra*, at 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kramer*, *supra*, at 45 ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A decision issued by the Appeals Board may also address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding

interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes findings on threshold issues, including the finding of injury AOE/COE and findings regarding temporary disability indemnity. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Here, applicant testified that he was hired to work full time and a wage statement shows that applicant worked more than 30 hours per week in all but one pay period. (MOH/SOE, p. 4; Ex. A, wage statement, p. 1.) Thus we look to section 4453(c)(1), which provides that "[w]here the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury." (Lab. Code, § 4453(c)(1).)

With respect to whether specific items, such as food and lodging, are included in the computation of average weekly earnings, we look to section 4454:

> In determining average weekly earnings within the limits fixed in Section 4453, there shall be included overtime and the market value of board, lodging, fuel, and other advantages **received by the injured employee as part of his remuneration**, which can be estimated in money, but such average weekly earnings **shall not include** any sum which the employer pays to or for the injured employee **to cover any special expenses** entailed on the employee **by the nature of his employment**, nor shall there be included either the cost or the market value of any savings, wage continuation, wage replacement, or stock acquisition program or of any employee benefit programs for which the employer pays or contributes to persons other than the employee or his family.

(Lab. Code, § 4454, emphasis added.)

Remuneration is defined by Black's Law Dictionary as "Payment; reimbursement. Reward; recompense; salary; compensation." (Black's Law Dict. (6th ed. 1990) p. 1296, col. 1.) The analysis of whether lodging and meals are "remuneration" as opposed to "special expenses" is outlined in *Burke v. Workers' Comp. Appeals Bd*. (2009) 74 Cal.Comp.Cases 359, as follows:

> In the context of employment, remuneration is payment or reward for services rendered. The plain meaning of "remuneration" does not include reimbursement for costs or expenses. When an employee's expenses "entailed by the nature of [her] employment" are paid by an employer, an exchange of services for payment does not take place and the applicant does not obtain an advantage from the transaction.

> Determining whether fuel, lodging, and meals are "remuneration" or "special expenses" requires an analysis of several factors including whether they were provided in exchange for services, whether they are an advantage to the applicant, and whether they are provided to the applicant only while the applicant is performing employment duties.

(*Burke v. Workers' Comp. Appeals Bd*. (2009) 74 Cal.Comp.Cases 359, 363 (writ den.).)

There is no evidence that applicant bargained for payment of food or lodging as part of his remuneration. Applicant testified that he worked for the same employer, doing the same work, about fifteen years ago and lodging was not provided. (MOH/SOE, p. 4.) We note that applicant was not questioned about the location of his jobsites during his previous stint with defendant, so we cannot determine whether he traveled to his jobsites, as he did here. (MOH/SOE, pp. 4-6.)

With respect to meals, *Burke* provides the following:

> Meals are remuneration if the employee is provided with meals in exchange for services and the meals are an economic advantage to applicant. For example, in *Watson v. Workers' Comp. Appeals Bd. (Ramirez)* (1980) 45 Cal.Comp.Cases 50 (writ den.), the value of meals [] were included in the calculation of applicant's earnings as a waitress. The applicant was relieved of the necessity of providing herself with the meals ... and, therefore, her employer's provision of the meals was an economic advantage to the applicant.

(*Burke, supra*, at 363.)

Applicant testified that the per diem check for food was not part of the salary, it was separate. (MOH/SOE, p. 7.) His starting pay was $14.00 per hour and went up to $15.50 per hour in January of 2023. (MOH/SOE, pp. 4, 7.) Applicant's per diem for meals was generally $300.00 for 14 days when he worked away from home. (MOH/SOE, pp. 5-6; Ex. A, wage statement, p. 1.) Defendant's employee Stephen Marquez testified that defendant only provided money for food to employees working off-site, outside of Anaheim. Applicant was given a per diem check for food prior to departing for job sites for days he would work off-site. Applicant would not be given the per diem for food if he worked near Anaheim. (MOH/SOE, pp. 7-8.)

Because all of his jobsites in 2022 and 2023 were away from home, it logically follows that applicant received a per diem for all of the days worked in 2022 and 2023. However, there was no evidence presented that the per diem for meals was part of his remuneration or understood to be an economic advantage to applicant above and beyond his wages. Based on the record before us, upon return, the WCJ should consider whether the money applicant received for meals was a

"special expense" as opposed to "remuneration" and whether it should be included in the calculation of applicant's average weekly earnings. (Lab. Code, § 4454.)

Turning to whether the cost of applicant's lodging is remuneration for purposes of calculating his average weekly earnings, the evidence is less clear cut. When working outside of Anaheim, applicant stayed at hotels or motels, which the foreman arranged and paid for. (MOH/SOE, pp. 5, 7.) He stated that he was always at a hotel from the time of hire until the time of injury, as he was always at least one or two hours outside of Anaheim, but he was never given money to pay for an apartment when he was not working. (MOH/SOE, p. 6.) Defendant did pay for a hotel/motel on some of applicant's days off. (MOH/SOE, p. 5.) However, applicant went wherever the foreman took him, he moved quite often while working, stayed near the location he was working, and had roommates in the hotels/motels. (MOH/SOE, pp. 4-5.) Upon return, the WCJ should consider whether lodging was an expense necessitated by the nature of applicant's employment, and whether payment for lodging provided any bargained for economic advantage to applicant.

Accordingly, we grant defendant's petition, rescind the January 3, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this decision. Upon return to the trial level, we recommend that the WCJ consider what further development of the record is appropriate to accurately determine applicant's earnings, temporary total disability rate, attorney fees, and penalty determination.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on January 3, 2024 is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 25, 2024

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

JAVIER HILDALGO
ORACLE LAW FIRM
DAVID JANE & ASSOCIATES

JB/*cs*

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