WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAMON GALLARDO, ***Applicant***

vs.

NEW CORNER TEAHOUSE; SECURITY NATIONAL INSURANCE COMPANY administered by AMTRUST
Defendants

Adjudication Number: ADJ10053711
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Amended Petition for Reconsideration and the contents of the Report and Recommendation (Report) of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will grant reconsideration, amend the Findings of Fact to include the finding that applicant is entitled to interest pursuant to Labor Code section 5800,[1] and otherwise affirm the Amended Supplemental Findings and Orders.

I.

Former 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, 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] Unless otherwise stated, all further statutory references are to the Labor Code.

> (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."

According to Events, the case was transmitted to the Appeals Board on December 26, 2024, and 60 days from the date of transmission is February 24, 2025. This decision is issued by or on February 24, 2025, 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 and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on December 26, 2024, and the case was transmitted to the Appeals Board on December 26, 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 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 December 26, 2024.

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II.

As discussed in the WCJ's Report, section 5800 interest is payable on "awards…for the payment of compensation." The "interest shall run from the date of the making and filing of an

award, as to amounts which by the terms of the award are payable forthwith." However, "[a]s to amounts which under the terms of the award subsequently become due…, such interest shall run from the date when each such amount becomes due and payable." As discussed *in Koszdin v. Workers' Comp. Appeals Bd.* (2010) 186 Cal.App.4th 480, 496 [75 Cal.Comp.Cases 711], section 5800 "is mandatory in nature. It compels the payment of accrued interest on all WCAB compensation awards and gives no discretion to the WCAB not to award interest." (*Ibid*.) Interest on the award is part of the benefit owed to applicant and must be paid together with the award. (Lab. Code, § 5800; *Myers v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 120 [36 Cal.Comp.Cases 568].)

We agree with the WCJ that interest is mandatory and applicant was not required to raise the issue of interest separately. *That is, defendant should have automatically included the appropriate interest when it made payments.* However, given the tortured history here, we will amend the decision accordingly so that all parties are clear. Therefore, we grant reconsideration and amend the Amended Supplemental Findings and Orders to find that interest is mandatory under section 5800 and that applicant is entitled to interest as appropriate on the award of August 20, 2022. (Finding of Fact 7, Order 5.) We otherwise affirm the Amended Supplemental Findings and Orders.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Amended Supplemental Findings and Orders issued on November 25, 2024 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Supplemental Findings and Orders dated November 25, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

AMENDED SUPPLEMENTAL FINDINGS

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7. Payment of interest under Labor Code section 5800 is mandatory, and applicant is entitled to interest per Labor Code section 5800 as appropriate.

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AMENDED ORDERS

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IT IS FURTHER ORDERED THAT defendants NEW CORNER TEA-HOUSE and SECURITY NATIONAL INSURANCE COMPANY administered by AMTRUST must pay applicant RAMON GALLARDO interest as calculated under Labor Code section 5800 on payments of the August 20, 2022 award to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS , COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 24, 2025

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

RAMON GALLARDO
CLAYTON PERRY
LLARENA MURDOCK

LN/md

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant Ramon Gallardo has through his counsel of record filed a timely, verified petition for reconsideration of the decision entitled "Amended Supplemental Findings and Orders on Retro TD, Penalties, and Other Issues" dated November 25, 2024.

A previous, now final decision of August 30, 2022, found that applicant sustained injury arising out of and in the course of employment to his thoracic and lumbar spine while employed during the period of January 2, 2000 to July 20, 2015 (as of which he was 44 years of age) by New Corner Teahouse as a cook, Occupational Group No. 322, at Cerritos, California, causing 8% permanent disability. The now final prior decision of August 20, 2022 also included the following award of temporary disability, at page 3, last paragraph: "Temporary disability indemnity at the rate of $688.53 per week for a 104-week period starting from July 21, 2015, less credit for applicant's actual wages for subsequent part-time work for Hobo China as a dishwasher and maintenance person starting in early 2017, less credit for any sums paid, and less credit for sums paid by the Employment Development Department (EDD) during this period, and less an attorney fee equal to 15% of any net temporary disability indemnity due to applicant, to be held by defendants pending an agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel of record, The Clayton Perry Law Office for Injured Workers, APC. The parties are to adjust the exact sum of net temporary disability by and between themselves, with the Workers' Compensation Appeals Board reserving jurisdiction in the event of a dispute."

The November 25, 2024 Amended Supplemental Findings and Orders on Retro TD, Penalties, and Other Issues addresses enforcement of the decision of August 30, 2022 decision, and orders defendants New Corner Teahouse and Security National Insurance Company, administered by AmTrust, to pay to applicant Ramon Gallardo temporary disability indemnity in the net sum of $29,972.45, less an attorney fee of $4,495.87 to be held by defendants as a reasonable attorney fee pending further order or agreement determining the portion payable to applicant's current and former counsel of record, less credit for sums actually paid to applicant. The November 25, 2024 decision further orders defendants to pay the amount of permanent disability indemnity awarded in the now-final award of August 20, 2022, payable per that award as $6,960.00, less a fee of $1,044.00 to be held by defendants as a reasonable attorney fee pending further

order or agreement determining the portion payable to applicant's current and former counsel of record, less credit for sums actually paid to applicant. In addition to these orders regarding the amount of temporary and permanent disability indemnity owed, the November 25 decision orders that defendants pay to applicant a penalty in the amount of $9,233.11, less a fee of $1,384.97 payable solely to applicant's attorney of record, The Clayton Perry Law Office for Injured Workers, APC, under Labor Code Section 5814, less credit for fees paid, with the remainder payable to applicant, less credit for sums actually paid to applicant for penalties, and additionally pay solely to applicant's counsel of record The Clayton Perry Law Office for Injured Workers, APC, in addition to all other attorney fees ordered herein, an attorney fee under Labor Code Section 5814.5, for enforcement of the award of August 30, 2022, at the rate of $450.00 per hour, for all time actually expended by applicant's counsel in enforcement of the award after August 30, 2022, subject to an accounting of time to be provided by applicant's counsel, less credit for fees actually paid.

Applicant's petition for reconsideration of the November 25, 2024 decision contends that by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers, and that the evidence does not justify the findings of fact. Specifically, the petition seeks to add interest under Labor Code § 5800 to sums that were not paid in compliance with the decision of August 30, 2022, and seeks Appeals Board review of defendant's conduct in escheating applicant's benefits to the state, presumably for the purpose of determining whether there should be admonishment or sanctions for such conduct, Further, the petition seeks to replace the finding of eight percent permanent disability based on the medical expert opinions of regular physician Peter Newton, M.D. with a finding of permanent disability based on former Agreed Medical Evaluator (AME) Mark Greenspan, M.D., who is now deceased,

At the time of preparation of this report, there is no answer to the petition for reconsideration from defendants,

II
FACTS

A trial hearing was held on October I, 2024 to once again submit all previously-submitted issues that were submitted at the August 17, 2023 trial hearing on retroactive temporary disability, penalties, and other issues, using the record of stipulations, issues, exhibits, and judicial notice of all proceedings since the first commencement of trial in this case on March 9, 2017, Although some of the original issues were finally decided in a Third Amended Findings and Award dated August 30, 2022, other issues relating to payment and enforcement of that award were submitted over applicant's objection on August 17, 2023, and are once again decided here, using additional evidence provided on October I, 2024,

Those issues are: (I) Retro TD balance. (2) Order to Compel Applicant to Disclose Wage, (3) Adverse inference per Evidence Code Section 413. (4) Permanent disability overpayment of $6,039.75, (5) Attorney fees. (6) Penalties per Applicant's penalty petition and enforcement of existing order, Applicant also claims penalties on late supplemental job displacement benefit voucher. (7) Applicant contends the record is closed except for penalties per Applicant's penalty petition, Should the Court find that the record is open, Applicant asserts that the record at least needs to be open as to all issues and specifically the Court needs to amend its order to comply with the late AME's PD findings and Applicant needs the opportunity to conduct additional discovery as well. With reference to the Pre-Trial Conference Statement, applicant's attorney noted that it also says, "See supplemental page for Applicant's exhibits." At the end of the proceedings, applicant's counsel added that Applicant objects to the Pre-Trial Conference Statement, because Applicant Attorney did not know which issues are open and which issues are closed, and accordingly was not able to competently fill out the Pre-Trial Conference Statement.

At trial on both October 1, 2024 and August 17, 2023, judicial notice was taken of all contents of FileNet in Case Number ADJ10053711. The primary basis for the decision of November 25, 2024 was the now-final Third Amended Findings and Award of August 30, 2022. The findings in the Third Amended Findings and Award are as follows: (1) Ramon Gallardo, born [44 years and 11 months before the end of the cumulative industrial exposure period], while employed during the period of January 2, 2000 to July 20, 2015, as a cook, Occupational Group No. 322, at Cerritos, California, by New Corner Teahouse, sustained injury arising out of and in the course of employment to his thoracic and lumbar spine. At the time of injury, the employer's workers' compensation carrier was Security National Insurance Company, administered by AmTrust San Diego. (2) Applicant's earnings at the time of injury were $1,032.80 per week, producing a temporary disability rate of $688.53 per week and a permanent disability indemnity rate of $290.00 per week. (3) According to regular physician Peter Newton, M.D. in his supplemental report dated May 20, 2021, which has been identified and admitted as Court's X6, applicant had work restrictions during his period of unemployment from July 21, 2015 to early 2017, and there is no evidence that he was provided with accommodated work by the employer for this period. Dr. Newton found applicant to have reached Maximal Medical Improvement (MMI) as of his August 20, 2019 evaluation. Accordingly, this is found that applicant was temporarily disabled for the period, from July 21, 2015 to August 20, 2019, and is entitled to temporary disability indemnity for the maximum allowable period of 104 weeks, less credit for applicant's actual wages for subsequent part-time work for Hobo China as a dishwasher and maintenance person stating in early 2017, less credit for any sums paid by defendants, and less credit for sums paid by the Employment Development Department (EDD) during this period, and less an attorney fee equal to 15% of any net temporary disability indemnity due to applicant, to be held by defendants pending an

agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel ofrecord, The Clayton Perry Law Office for Injured Workers, APC. The parties are to adjust the exact sum of net temporary disability by and between themselves, with the Workers' Compensation Appeals Board reserving jurisdiction in the event of a dispute. (4) According to regular physician Peter Newton, M.D. in his supplemental report dated May 20, 2021, which has been identified and admitted as Court's X6, applicant does not have ulnar neuropathy as a separate industrial injury or compensable consequence of the industrial injury found herein. (5) According to regular physician Peter Newton, M.D. in his supplemental report dated May 20, 2021, which has been identified and admitted as Court's X6, applicant does not have an industrial injury to the knees. (6) According to regular physician Peter Newton, M.D. in his supplemental report dated May 20, 2021, which has been identified and admitted as Court's X6, applicant's subjective complaints of pain in the wrists and hand do not warrant any additional impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (7) According to regular physician Peter Newton, M.D., applicant's injury caused permanent disability of 8%, entitling applicant to 24 weeks of disability indemnity payable at the rate of $290.00 per week, in the total sum of $6,960.00, less credit for sums paid, if any, and less a reasonable attorney fee of $1,044.00, to be held by defendants pending an agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel of record, The Clayton Perry Law Office for Injured Workers, APC. (8) Applicant will require further medical treatment to cure or relieve from the effects of this injury. (9) Applicant may be entitled to reimbursement of self-procured medical treatment, payable by defendant in an exact amount subject to proof, to be adjusted by and between the parties, with the WCAB retaining jurisdiction in the event of a dispute. (10) The Employment Development Department (EDD) has paid applicant Unemployment Compensation Disability Benefits during the period July 30, 2015 through and including August 7, 2016 at the rate of $584.00 per week. Because this entire period is within the temporary disability period found and awarded herein, with amounts that are within the temporary disability rate awarded herein, and there is no evidence to suggest that the EDD payments were based on an entirely different condition separate from the industrial injury, it is found that EDD is entitled to recover its lien in full from the award of temporary disability, plus interest payable by defendants. (11) The reasonable value of the services and disbursements of applicant's attorney is 15% of any net temporary disability indemnity due to applicant, payable from the award of temporary disability, plus 15% of permanent disability awarded, or $1,044.00, payable from the award of permanent disability, with both fees to be held by defendants pending an agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel of record, The Clayton Perry Law Office for Injured Workers, APC.

Based on these final findings of August 30, 2022, the following was awarded to applicant Ramon Gallardo: (a) Temporary disability indemnity at the rate of $688.53 per week for a 104- week period sta1iing from July 21, 2015, less credit for applicant's actual wages for subsequent part-time work for Hobo China as a dishwasher and maintenance person starting in early 2017, less credit for any sums paid, and less credit for sums paid by the Employment Development Department (EDD) during this period, and less an attorney fee equal to 15% of any net temporary disability indemnity due to applicant, to be held by defendants pending an agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel of record, The Clayton Perry Law Office for Injured Workers, APC. The parties are to adjust the exact sum of net temporary disability by and between themselves, with the Workers' Compensation Appeals Board reserving jurisdiction in the event of a dispute. (b) Permanent disability indemnity of 8%, entitling applicant to 24 weeks of disability indemnity payable at the rate of $290.00 per week, in the total sum of $6,960.00, less credit for sums paid, if any, and less a reasonable attorney fee of $1,044.00, to be held by defendants pending an agreement or order determining the portion payable to applicant's former counsel, and the portion payable to applicant's current counsel of record, The Clayton Perry Law Ofi1ce for Injured Workers, APC; (c) Future medical treatment reasonably required to cure or relieve from the effects of the injury herein; (d) Reimbursement of self-procured medical treatment in an amount subject to proof, to be adjusted by the parties; (e) Statutory interest payable to EDD by defendants; and, the award specified that (f) the Board shall retain jurisdiction of any unpaid medical-legal, self-procured medical, other liens, and penalty and interest claims.

In addition to these prior findings and award as a foundation for deciding the issues submitted for decision at trial on August 17, 2023, which were ultimately decided in the Amended Supplemental Findings and Orders on Retro TD, Penalties, and Other Issues dated November 25, 2024, all previously-admitted exhibits were considered, including those exhibits admitted by now retired Judge Debra Keyson on March 9, 2017, as follows: Joint Xl, the PQME report of Dr. Yee dated January 9. 2017; Joint X2, the PQME report of Dr. Yee dated March 28, 2016; Applicant's 1, the repo1t of Dr. Ibrahim dated March 1, 2016; Applicant's 2, the report of Dr. Ibrahim dated January 14, 2016; Applicant's 3, the repo1t of Dr. Ibrahim dated December 8, 2015; Applicant's 4, the report of Dr. Ibrahim dated December 8, 2015; Applicant's 5, the report of Dr. Ibrahim dated October 29, 2015; Applicant's 6, the report of Dr. Ibrahim dated September 15, 2015; and, Applicant's 7, the report of Dr. Ibrahim dated July 30, 2015. Also considered were exhibits previously admitted by the undersigned on April 16, 2018, as follows: Cou1t's XI, the AME report of Mark Greenspan, M.D. dated August 29, 2017; Court's X2, the AME report of Dr. Greenspan dated July 13, 2017; Applicant's 8, the report of Dr. Ibrahim dated December 8, 2015 (apparently duplicative of Applicant's 3); Applicant's 9, the report of Dr. Ibrahim

dated January 14, 2016 (apparently duplicative of Applicant's 2); Applicant's 10, the report of Dr. Ibrahim dated March I, 2016 (apparently duplicative of Applicant's I); Applicant's 11, the report of Dr. Ibrahim dated July 30, 2015 (apparently duplicative of Applicant's 7); Applicant's 12, the report of Dr. Ibrahim dated September 15, 2015 (apparently duplicative of Applicant's 6); Applicant's I 3, a notice of permanent disability benefits from AmTrust dated June 29, 2016; Defendant's A, correspondence from defense counsel to EDD dated December 23, 2017; Defendant's B, a printout of benefits dated August 22, 2017; and, Lien Claimant EDD's I, a printout of benefits from EDD dated April 16, 2018. Also part of the record considered were the following exhibits identified and admitted by the undersigned by Notice of Intention dated November 23, 2020 and Order Admitting Exhibits and Submitting Issues dated December 31, 2020: Court's X3, the regular physician report of Peter Newton, M.D. dated July 30, 2019; Court's X4, the regular physician report of Peter Newton, M.D. dated August 20, 2019; and, Court's XS, the regular physician report of Peter Newton, M.D. dated March 25, 2020.

Supplementing these previously admitted exhibits are the following exhibits that were admitted by the undersigned at the further trial proceedings held on August 17, 2023: Applicant's 14, correspondence to defendants' attorney inquiring how they could not owe TD, dated September 22, 2022; Applicant's 15, correspondence to defendants' attorney demanding TD, dated January 28, 2020; Applicant's 16, a CPI inflation calculator printout comparing real value of applicant's average weekly earnings in 2015 using the most recent inflation data available from the Bureau of Labor Statistics; Defendant's C, a benefit printout dated March 8, 2023; Defendant's D, correspondence to applicant's attorney re: meet and confer on wages and Social Security Release Form, dated September 13, 2022; Defendant's E, an email thread between applicant's attorney and defendants' attorney during the period from November 29, 2022 to November 30, 2022; and, Defendant's F, stipulations to pay EDD dated November 30, 2022.

Applicant Ramon Gallardo was called as a witness by the defendants at the August 17, 2023 trial hearing, and on that date he testified substantially as follows: Mr. Gallardo saw Dr. Newton for an evaluation on July 30, 2019. Dr. Newton asked about his employment, and he told him he was working at a Chinese restaurant four hours a day. He worked there five days per week and was paid $350 per week. Mr. Gallardo started working at the restaurant Hobo China on approximately August 31, 2017. He doesn't recall exactly what he told Dr. Newton about this. He did not fill out an application to work at Hobo China and was paid in cash.

Mr. Gallardo received EDD benefits from the State. He believes he received these benefits because he couldn't work. These benefits ended. When asked whether these benefits ended on August 7, 2016, Mr. Gallardo agreed that yes, that seems correct. He started working at Hobo China about 15 to 22 days after

his EDD benefits ended. He is confused as to whether this was in 2016 or 2017. He is not sure which year it was.

After working at Hobo China for about six months, they gave Mr. Gallardo a few more hours of work. It was about $40 more per week in pay, so his pay was about $390 per week after the first six months of work at Hobo China. After that, he agrees that his hours stayed about the same until July 2017.

In response to questioning by his own attorney, Mr. Gallardo admitted that he understands that when he returned to work at Hobo China is important in this case. He testified that he remembers that it was on August 31 that he went to work there, but he is not sure whether the year was 2016 or 2017. He stopped receiving help from EDD and went to work 15 to 22 days later.

Mr. Gallardo denied receiving a $12,000.00 check from AmTrust around August of 2017. He thought that he didn't receive anything. He believed that he didn't receive any information, and that he didn't receive any checks from AmTrust. He did remember that he suffered because he was not paid benefits. He was stressed out and he didn't have money to pay the rent.

In response to further questioning from counsel for defendants, Mr. Gallardo testified that he didn't receive any other money during the period August 31, 2016, to July 30, 2017, besides what the female boss at the Chinese restaurant would give him.

Mr. Gallardo's attorney then questioned him, eliciting the testimony from Mr. Gallardo that he is not sure and is confused as to when he started working at Hobo China. He doesn't know for sure what year it was. He knows he started working on August 31, but he doesn't know whether it was in 2016 or 2017. Defendants' attorney then asked Mr. Gallardo to affirm that be started working at Hobo China 15 to 22 days after his EDD benefits ended, and Mr. Gallardo replied that he is certain that he did. However, when Mr. Gallardo's attorney asked him about the year, Mr. Gallardo testified that he does not remember and does not recall whether EDD benefits began in 2016 or 2017.

At the October 1, 2024 trial hearing, no additional testimony was offered, but four additional exhibits were admitted into evidence without objection. Admitted as Defendant's G was a benefits printout dated July 15, 2024. It shows that five payments of permanent disability indemnity were made to applicant in 2016 and 2017, [The PD checks later stopped were as follows: Check 1219443 dated 6/30/16 in the amount of $5,095.71, Check 1234722 dated 7/13/16 in the amount of$580.00, Check 1252594 dated 7/27/16 in the amount of$580.00, Check 1272716 dated 8/10/16 in the amount of$399.79, and Check #1840144 dated 8/9/17 in the amount of $11,955.75] with later stop payments on four of these checks in 2020 and 2021, but for some reason, the last and largest of these

permanent disability payments was escheated to the state (on a date not specified) instead of simply stopping payment like the rest of the checks. The benefits printout shows that the escheated check was eventually stopped on December 21, 2023. On that same day, it appears that a payment was erroneously issued to "JMS ADVISORY GROUP" in the escheated amount of $11,955.75. [The PD checks to applicant and not later stopped or escheated were as follows: Check 4828641 dated 11/6/23 in the amount of$5,916.00, and Check 5111933 dated 7/12/24 in the amount of $11,955.75, which together total $15,314.19] and not to applicant. Checks for payments of permanent disability indemnity to applicant that were not stopped or escheated to the state were issued in 2023 and total $17,871.752. Like the payments of permanent disability that were not later stopped, temporary disability payments to applicant were also made in 2023 in the amount of$15,314.19. [TD was paid to applicant by Check 4828640 dated 11/6/23 in the amount of $15,314.19.]

Admitted as Defendant's H was email correspondence between applicant's attorney and defense counsel dated December 27, 2023. Applicant's attorney demanded payment "on the $12,000 that [defendants] said they paid [applicant] at trial but he provided evidence that he never receive[d] with 5814 penalties" and defense counsel replied with a question, "Did your client already obtain the $11,955.75 that is being held by what looks like the State Controller's Office? I'll look into the original check to see if I can get a copy... " (Defendant's H, p. 1).

Admitted as Defendant's I was a letter to applicant's attorney from defense counsel dated March 27, 2024 regarding escheatment of one of applicant's benefits checks. Three months after the email exchange shown in Defendant's I-I, defense counsel wrote to applicant's attomey confirm that the State Controller is holding Mr. Gallardo's "property" received from AmTrust in the amount of $11,955.75. The letter instructs applicant's attorney to have his client file a claim with the State Controller's office to retrieve his benefits.

Admitted as Defendant's J is an email message to applicant's attorney from defense counsel dated April 15, 2024, repeating essentially the same thing as the previous month's letter admitted as Defendant's I.

Using the above record, and considering the arguments made in the parties' post-trial briefs and responses to each other's post-trial briefs, amended findings were made on all unresolved submitted issues, and were explained in the opinion of decision as follows regarding each issue.

1. Decision regarding retroactive temporary disability balance

Applicant Ramon Gallardo now has a final award, dated August 20, 2022, of temporary disability indemnity at the rate of $688.53 per week for a 104-week period starting from July 21, 2015, less credit for applicant's actual wages for

subsequent part-time work for Hobo China as a dishwasher and maintenance person "starting in early 2017," less credit for any sums paid, and less credit for sums paid by the Employment Development Department (EDD) during this period, and less an attorney fee equal to 15% of any net temporary disability indemnity due to applicant. The parties were to adjust the exact sum of net temporary disability by and between themselves, with the Workers' Compensation Appeals Board reserving jurisdiction in the event of a dispute. That dispute has apparently now arisen and has been submitted for a decision.

Mr. Gallardo's testimony on August 17, 2023 called into question the provision in the findings and award for a credit for his wages at Hobo China "starting in early 2017," because although he was not sure about the year he began working there, he appeared to be fairly certain that he started either August 31 of either 2016 or 2017, not early 2017. Under Labor Code Section 5803, the undersigned should have continuing jurisdiction to correct this error in the August 20, 2022 findings and award, by allowing credit in the form of an offset for actual wages based on subsequent testimony, in order to give effect to the intention to allow credit for earnings during the period of temporary disability that was found.

Based on Mr. Gallardo's testimony, it was found to be more probable that he began working at Hobo China on August 31, 2016 than on August 31, 2017. This is because he affirmed, apparently with some degree of certainty, that he started working at Hobo China 15 to 22 days after his EDD benefits ended, and Lien Claimant EDD's I shows that the benefits ended on August 7, 2016, with a last check issue date of August 8, 2016, which Mr. Gallardo would not have received until at least the next day, which happens to be 22 days before August 31, 2016. If the check took a week longer to arrive, which is certainly plausible, that would be 15 days before August 31, 2016. Mr. Gallardo would likely measure the ending of his benefits by the last date he received a check, not the last date of benefits, so the conclusion that he began working at Hobo China on August 31, 2016 squares perfectly with his credible testimony.

Since Mr. Gallardo also plausibly testified that his wages increased to approximately $390.00 per week about six months after he was hired at Hobo China, the amount of credit in the form of an offset for earnings should increase to $390.00 per week effective the end of the sixth month thereafter, which is February 28, 2017.

Accordingly, it was found and ordered that defendants are entitled to credit against the temporary disability award of August 20, 2022 in the form of an offset for applicant's actual wages for subsequent part-time work for Hobo China as a dishwasher and maintenance person at the rate of $350.00 per week starting August 31, 2016, increasing to $390.00 per week six months thereafter, after February 28, 2017.

To calculate the retroactive temporary disability (retro TD) balance, it was determined that the award of temporary disability indemnity at the rate of $688.53 per week for a 104-week period" is worth $688.53 times 104, or $71,607.12 before any credits or offsets. This gross amount is "less credit for applicant's actual wages for subsequent part-time work for Hobo China as a dishwasher and maintenance person" during the 104-week period "starting from July 21, 2015," meaning during the period from July 21, 2015 to July 18, 2017 (104 weeks being two days less than two regular calendar years, and 2016 was a leap year with an extra day). The credit is not a dollar-for-dollar credit in the amount of gross earnings, because that is not how temporary disability is calculated. Because gross wages are taxable, and net wages are often significantly less, temporary disability is paid at the rate of two-thirds of gross earnings under Labor Code Section 4653, and, following the instructions of Section 4654 where the loss of earnings is less than total because of wages earned during a temporary disability period, the proper manner of taking credit for the earnings during the temporary disability period is to subtract the earnings from the gross amount of wage loss, and not from the temporary disability rate. After reducing the average weekly earnings rate by the amount actually earned each week, temporary disability indemnity is paid at the rate of two-thirds of the net wage loss under Labor Code Section 4654. Accordingly, the temporary disability indemnity is reduced by two-thirds of the earnings during a period of compensable temporary disability.

As explained above, Mr. Gallardo's testimony plausibly established that he earned $350.00 per week from August 31, 2016 through February 28, 2017, and $390.00 per week thereafter, which would be from March 1, 2017 through July 18, 2017, which marks the end of the 104-week period of compensable temporary disability. The first period, August 31, 2016 through February 28, 2017, is 182 days, inclusive of the start and end dates, which divided by 7 is exactly 26 weeks, or half a year as estimated by Mr. Gallardo. Weekly earnings of $350.00 times 26 weeks equals $9,100.00, which then has to be multiplied by two-thirds to correctly calculate the credit for these earnings against temporary disability benefits using the method prescribed in Labor Code Section 4654. So, $9,100.00 of wage loss offset, times two-thirds, is $6,066.67 of actual credit against temporary disability for earnings during the period from August 31, 2016 through February 28, 2017. The second period, from March 1, 2017 through July 18, 2017, is 140 days, inclusive of the start and end dates, which divided by seven is exactly 20 weeks. Multiplying $390.00 per week by 20 weeks yields $7,800.00, which then has to be multiplied by two-thirds to calculate the amount of actual credit that can be taken from temporary disability for this second period of earnings at the higher rate. So, $7,800.00 times two-thirds is $5,200.00 of actual credit against temporary disability for earnings during the period from March 1, 2017 through July 18, 2017. Adding $6,066.67 of actual credit against temporary disability for earnings during the period from August 31, 2016 through February 28, 2017, and $5,200.00 of actual credit against temporary

disability for earnings during the period from March 1, 2017 through July 18, 2017, the evidence shows that defendants are entitled to a credit in the total amount of $11,266.67 for Mr. Gallardo' s earnings during the temporary disability period.

In addition to this $11,266.67 credit for earnings during the temporary disability period, the now-final temporary disability award states that defendants are entitled to credit "for any sums paid," which should be taken to mean exactly what it says, a credit in the amount of any sums of indemnity paid by defendants to applicant during the temporary disability period, regardless of whether defendants characterized those payments as advances against temporary disability or permanent disability. Looking at the benefits printout admitted into evidence as Defendants' G, it appears that defendants did not actually succeed in paying any temporary or permanent disability benefits to applicant prior to the August 30, 2022 Third Amended Findings and Award.

In addition to the $11,266.67 credit for earnings and credit for sums paid during the temporary disability period (which has been established by Defendant's G to be zero), the now- final temporary disability award allows "credit for sums paid by the Employment Development Department (EDD) during this period" of compensable temporary disability, i.e., credit for any sums paid by EDD-up to the awarded temporary disability rate, of course-during the compensable temporary disability period from July 21, 2015 to July 18, 2017. The EDD benefits accounting admitted as Lien Claimant EDD's 1 indicates that EDD paid benefits at a weekly rate of $584.00, which is less than the full temporary disability rate, and it was paid for the period from August 6, 2015 through August 7, 2016, which is all within the 104-week compensable temporary disability period and prior to any reduction of temporary disability for earnings. So, the total of $30,368.00 paid by EDD during this period, as indicated in Lien Claimant EDD's 1, as well as in Defendant's F (stipulation to pay EDD) is the correct amount of EDD credit allowed by the now-final award against the amount of temporary disability due. The fact that defendants paid a higher sum than this to EDD reflects defendants' settlement of their obligation to pay interest to EDD for the delay in payment of reimbursement to EDD, so the full amount of the lien settlement is not allowed as a credit.

So, net temporary disability, before fees, is $71,607.12, minus $11,266.67 credit for two- thirds of earnings, minus no credit for sums paid during the temporary disability period, and minus $30,368.00 for sums paid by EDD during this period, for a net total of$29,972.45.

The now-final temporary disability award also allows an attorney fee equal to 15% of any net temporary disability indemnity due to applicant, so the fee is $4,495.87, or 15% of net temporary disability indemnity of $29,972.45 at the time of the Third Amended Findings and Award. After deducting this fee, which

is to be held by defendants pending its division by agreement or further order, the net amount of retroactive temporary disability due to Mr. Gallardo is $25,476.58, less sums actually paid to him. The Board will retain jurisdiction over the administration of this supplemental decision, including any disputes over receipt of payment. Known deductions from the award of temporary disability are summarized as follows:

Gross temporary disability: $71,607.12
Less credit for 2/3 earnings: $11,266.67
Less credit for EDD payments: $30,368.00
Less 15% attorney fee on net: $ 4,495.87
Net subtotal to Ramon Gallardo: $25,476.58, less sums actually paid

As indicated in the opinion on decision, defendants may further apply the later-issued $15,314.19 TD payment and $15,314.19 PD payments issued in 2023 and 2024 against the sum of $25,476.58 that was due to Mr. Gallardo under the terms of the final Third Amended Findings and Award if those payments were actually received by Mr. Gallardo. Given the history of stopped and escheated payments, it is not assumed that Mr. Gallardo received the payments, and further hearing may be requested on that issue. Defendants may apply any unused portion of these advances against the final award of permanent disability.

2. Decision not to order applicant to disclose wages in writing

In light of Mr. Gallardo's testimony that he does not recall having any earnings during the period August 31, 2016, to July 30, 2017, besides what his female boss at the Chinese restaurant would give him, and in light of the parties' submission of the issue of temporary disability, it appears that it is no longer necessary or appropriate to compel any further discovery on the issue of his wages during this period, so none was compelled. If testimony or other evidence had elicited some indication of earnings, then further discovery might have been appropriate, but it appears to be the case that Mr. Gallardo in fact did not have other earnings and the parties did submit the issue of net temporary disability without any indication that further deposition testimony would be taken before trial. Formal responses to written discovery are not contemplated in the Labor Code and Title 8 of California Code of Regulations, and to avoid encumbrance as mandated by California State Constitution Article XIV, Section 4, written responses are not typically compelled in workers' compensation proceedings. As former WCAB Commissioner Merv Glow wrote in *Hardesty v. McCord & Holdren, Inc.; Industrial Indem. Co.* (1976) 41 Cal. Comp. Cases 111 (Appeals Board panel opinion): "a set of rules relating to discovery which would permit a paper war of interrogatories and require frequent pre-trial appearances by counsel to argue discovery motions would be inconsistent with that constitutional mandate" now contained in Article XIV, Section 4. Mr. Gallardo's trial testimony seems to be sufficient to resolve the issue of how much credit is

allowed for subsequent earnings under the award, without compelling any further discovery. Accordingly, it was found that no further discovery will be compelled on the earnings issue.

3. Decision not to impose an adverse inference per Evidence Code Section 413

California Evidence Code Section 413 states that "[i]n determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

The terms of Section 413 are themselves permissive, and not mandatory, using the word "may" and not "shall" regarding a failure to explain adverse facts. Additionally, while the Workers' Compensation Appeals Board and its administrative law judges are guided by the Evidence Code, they are not bound by it, except for its provisions regarding privileges. Under Labor Code Section 5708, "[a]ll hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division."

In exercise of the discretion conferred by both Labor Code Section 5708 and the language of Evidence Code Section 413, the undersigned does not believe it is necessary or appropriate to employ any adverse inferences against either applicant with respect to his earnings or against defendants with respect to their motives. Both subjects have been adequately explained by applicant's testimony, where he plausibly identified his earnings, and defendant's exhibits and briefs, which clearly indicate that defendants chose not to pay temporary disability benefits because prior to the August 20, 2023 award the issue was in dispute and after the award they did not know the amount of credit that was included but left to the parties to determine and adjust in the award of permanent disability. Accordingly, no adverse inference was imposed in this case.

4, Decision regarding the alleged permanent disability overpayment of $6,039,75

Given the finding that all benefits paid by defendants should be included in the credit against temporary disability "for any sums paid," there should be no permanent disability overpayment issue. Consistent with the final award, it was found and ordered that in addition to the net temporary payments ordered, defendants should pay the amount of permanent disability indemnity awarded in the now-final award of August 20, 2022, payable per that award as $6,960.00,

less a fee of $1,044.00 withheld pending agreement or order regarding its division between applicant's current and former attorneys, leaving a net amount of $5,916.00 of permanent disability indemnity payable to Mr. Gallardo, less credit for sums paid and actually received by Mr. Gallardo.

5. Decision regarding attorney fees

Following are all sums paid to applicant's current and former attorneys of record, according to the benefits printout in Defendant's G: Deposition fees were paid to applicant's former attorney of record under Labor Code Section 5710 in the amount of$1,575.00 on June 27, 2016, and fees were paid to applicant's current attorney of record in the amounts of $2,702.51, $1,044.00, $374.65, and $6,300.00 on November 3, 2023.

It was found that 15% of net temporary disability as calculated above, plus 15% of permanent disability, is a reasonable fee on the award and order of those benefits for both applicant's current and former counsel under the criteria for determining fees set forth in Labor Code Sections 4903 and 4906(d), California Code of Regulations, Title 8, Section 10844, and WCAB Policy and Procedure Manual Index No. 1.140. These amounts were ordered to be held by defendants pending resolution of applicant's former attorney's lien claim for fees, if any.

In addition to 15% of net temporary disability (as of the time of the August 30, 2022 award) and permanent disability, it was found that 15% of penalties should be awarded to applicant's current counsel, who sought and obtained the penalty through his time, care, and responsibility. Further, an hourly fee was ordered payable to applicant's current counsel as authorized by Labor Code Section 5814.5 for the enforcement of the August 30, 2022 award, because defendants did not actually and correctly pay what was due under the award until 2023 and 2024, and appear to have done so only after litigation. There is no evidence that defendants set the deposition of applicant to compel his testimony regarding his wages during the temporary disability period, nor that they attempted to serve Hobo China with a subpoena duces tecum seeking payroll records or subpoena for a witness deposition of the person most knowledgeable about the payment of wages to Mr. Gallardo during the temporary disability period. Although attorneys for both parties clearly met and conferred in writing about discove1y issues as shown in Applicant's 14 and 15 and Defendant's D and E, discovery efforts ceased with these written exchanges, and an award enforcement trial was required approximately one year after the award. The penalty and enforcement trial could have been avoided by using appropriate petitions to obtain orders compelling depositions, compelling compliance with subpoenas, and compelling other forms of discovery compliance from the WCAB. Instead of taking the initiative to fulfill defendants' ongoing duty to obtain information required to administer benefits as required by California Code of Regulations, Title 8, Section 10109, which could have been accomplished by taking reasonable steps to force applicant's compliance with enforceable mechanisms

of discovery, defendants chose to wait until applicant forced them to comply with the award.

With respect to the amount of the fees ordered under Labor Code Section 4814.5, it was found that applicant's counsel of record is entitled to the rate of $450.00 per hour, which was found to be a very reasonable hourly rate for a certified specialist in California workers' compensation law with more than a decade of experience. However, it is unknown exactly how many hours applicant's counsel actually spent on enforcing the award since it was issued on August 30, 2022, and the amount ordered should not be speculative. Accordingly, it was ordered that defendants pay applicant's current attorney, The Clayton Perry Law Office, an hourly fee under Labor Code Section 5814.5 subject to proof in the form of an accounting of time to be provided by Mr. Perry, less credit for sums already paid to The Clayton Perry Law Office. The opinion on decision expressly provided that fees awarded are subject to credit for the sums of $6,300.00, $2,702.51, $1,044.00, and $374.65, if these sums were actually received by applicant's attorney.

6, Decision regarding penalties per applicant's penalty petitions and enforcement of award

Even though defendants did not know the exact amount of credit they could assert against temporary disability, it was their burden to obtain, and they could and should have obtained, evidence defining the amount of credit. Even if applicant was being uncooperative in response to informal written requests to furnish such information, the information could have been obtained through orders compelling depositions and records subpoenas if necessary, and this should have been clone before unilaterally and speculatively applying such credit to ignore the entire award of temporary disability benefits, and to incorrectly assume that there had been an overpayment of benefits.

Furthermore, defendants actually escheated $11,955.75 of applicant's benefits to the state, then told applicant to file a claim with the State Controller's office if he wanted to receive his workers' compensation benefits. This was found to be unreasonable. The opinion on decision noted that it was unreasonable to regard benefits as "unclaimed" as those same benefits are actively being claimed through legal counsel in active litigation, and was also unreasonable, inconsistent, and arbitrary to stop payment on four checks then escheat the fifth one to the state, without any further payment until more than a year after a final award.

Therefore, under Labor Code Section 5814, it was found that there was not a mild degree of unreasonableness, but a serious degree of unreasonableness in the delay of payment of temporary and permanent disability indemnity that were ultimately ordered on August 30, 2022, so a penalty was ordered under Labor Code Section 5814 in the amount of $9,233.11, which is equal to 25% of what

is now found to have been due more than two years ago ($29,972.45 in net temporary disability, plus $6,960.00 in permanent disability, before deduction of fees). An attorney fee equal to 15% of this penalty ($1,384.97) was ordered to be paid as an attorney fee to applicant's current counsel, The Clayton Perry Law Office, less credit for fees actually received. The remainder after fees was ordered to be paid to applicant, less credit for any penalties already actually received.

In addition, the November 25, 2024 decision noted that defendants were or should have been aware of the existence of both an award of permanent paitial disability, and the lack of a retum-to-work offer that complies with the requirements of Labor Code Section 4658.7, entitling applicant to a Supplemental Job Displacement Benefit (SJDB) voucher under that section. Although under Cal. Code Regs., tit.8, § 10133.31(6) the SJDB voucher must be provided within 60 days of the claims administrator's receipt of a Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36), and no such form is in evidence, it is incumbent upon defendants to furnish that form to an injured worker's physician, as was explained by an Appeals Board panel in the case of *Fndkyan v. Opus One Labs,* 2019 Cal. Wrk. Comp. P.D. LEXIS 51. Defendants were therefore urged to either provide Form DWC-AD 10133.36 to Mr. Galardo's primary treating physician, or to issue an SJDB voucher voluntarily based solely on the requirements of Labor Code Section 4658.7, but no orders were made at this time on any voucher-related issues, given the lack of FormDWC-AD 10133.36. All voucher-related issues, including any claim for penalties for unreasonable delay in investigating entitlement to and furnishing this benefit, were expressly deferred.

7. Decision that the record is now closed, except.for administration and enforcement of the award and penalties, on the issues of earnings and permanent disability, which will not be re-litigated

Applicant raised at the trial hearing on August 17, 2023 the issue of whether the record is closed except for penalties per applicant's penalty petition, and applicant's counsel further asse1ted that should the Court find that the record is open, then the record should be open as to all issues and specifically the Court should amend its order to comply with the late AME's PD findings and Applicant needs the opportunity to conduct additional discovery as well. With reference to the Pre-Trial Conference Statement, applicant's attorney noted that it also says, "See supplemental page for Applicant's exhibits." At the end of the proceedings, applicant's counsel added that applicant objects to the Pre-Trial Conference Statement, because applicant's attorney did not know which issues are open and

which issues are closed, and accordingly was not able to competently fill out the Pre-Trial Conference Statement.

In his trial briefs and petitions, applicant's counsel correctly and astutely recognized that while the Board and its administrative law judges have continuing authority to modify orders and awards under Labor Code Section 5803, there is also a clear intention under Division 4 of the Labor Code to create final awards of compensation. It is contrary to the mandate of the California State Constitution, Article XIV, Section 4 that the workers' compensation system operate "without incumbrance of any character" to re-open and re-litigate issues on which final findings have been issued without any timely appeal. Accordingly, it is found that the findings and award contained in the August 30, 2022 Third Amended Findings and Award are now final, and will not be modified or reopened based on a revisiting of previously-admitted or available evidence. That finality, however, does not serve to negate the provisions of the final findings and award that certain credits were to be adjusted by and between the parties and applied to the award of temporary disability benefits, nor to cut off further discovery as necessary to comply with that provision of the award. As explained above, defendants had the right to pursue and compel post- award discovery to depose applicant and obtain records regarding the exact amount of offset for earnings during the temporary disability period, but they chose not to do so and the issue is now decided based on the evidentiary record and testimony. The November 25, 2024 decision was intended to decide all issues pertaining to enforcement of the August 30, 2022 award at this time, except for the request for penalties for non-issuance of an SJDB voucher, which is deferred.

Applicant filed a timely, verified petition for reconsideration of the November 25, 2024 decision, contending that by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers, and that the evidence does not justify the findings of fact. Specifically, the petition seeks to add interest under Labor Code § 5800 to sums that were not paid in compliance with the decision of August 30, 2022, and seeks Appeals Board review of defendant's conduct in escheating applicant's benefits to the state, presumably for the purpose of determining whether there should be admonishment or sanctions for such conduct. Further, the petition seeks to replace the finding of eight percent permanent disability based on the medical expert opinions of regular physician Peter Newton, M.D. with a finding of permanent disability based on former Agreed Medical Evaluator (AME) Mark Greenspan, M.D., who is now deceased. At the time of preparation of this report, there is no answer to the petition for reconsideration from defendants.

III
DISCUSSION

Applicant's petition for reconsideration raises the following issues: (1) interest under Labor Code§ 5800; (2) review of the appropriateness of defendants' conduct; and (3) a request to replace the finding of eight percent permanent disability based on the medical expert opinions of regular physician Dr. Newton with a finding of permanent disability based on the opinions of former AME Dr. Greenspan. Each of these issues is addressed in turn below.

1. Interest Under Labor Code Section 5800

California Labor Code§ 5800 reads as follows:

> All awards of the appeals board either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award. Such interest shall run from the date of making and filing of an award, as to amounts which by the terms of the award are payable forthwith. As to amounts which under the terms of the award subsequently become due in installments or otherwise, such interest shall run from the date when each such amount becomes due and payable.

Applicant's counsel is absolutely correct that under this section, the award of August 30, 2022, which was for the payment of compensation, carries interest in the same manner as a civil judgment, from the date of making and filing the award.

However, this provision should operate automatically, regardless of whether or not it is expressly ordered in an award or subsequent order. In this case, it was not expressly identified as one of the issues raised in the Minutes of Hearing and Summary of Evidence of August 17, 2023 and ultimately decided by the Amended Supplemental Findings and Orders on Retro TD, Penalties, and Other Issues of November 25, 2024. Accordingly, there is no express finding or order regarding interest. This omission from the submitted issues does not negate the existence and operation of Labor Code § 5800, nor does it relieve defendants of their obligations under that section of the Labor Code, even if that express issue has not yet been formally raised.

Because this issue was not formally raised and submitted, if the parties cannot settle this issue, applicant should still be permitted to enforce the operation of Labor Code § 5800 by obtaining an order that defendants comply with its provisions.

2. Appropriateness of Defendants' Conduct

Although the November 25, 2024 decision certainly penalizes defendants for unreasonable delay under Labor Code§ 5814, and requires them to pay for applicant's necessary efforts to enforce the August 30, 2022 Award under§

5814.5, it does not find or order sanctions under Labor Code§ 5813, which was, like the issue of interest, not formally raised as an issue in the Minutes of Hearing and Summary of Evidence of August 17, 2023, although it certainly was mentioned in briefing and petitions filed by applicant's counsel, and seems to be implied by applicant's statement in the petition for reconsideration that "defendant's conduct with regards to the benefit printout was fairly novel and so egregious that it should be reviewed by the Commissioners" (Petition for Reconsideration 12/20/2024, p. 2, lines 5-7).

Although not raised as an issue, sanctions for bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay may be raised on the Appeals Board's own motion under Labor Code § 5813, and if the Appeals Board feels that is appropriate, it may certainly issue a Notice of Intention (NIT) to order sanctions at any time. However, given the acknowledged novelty of the error in this case, where a payment of compensation was erroneously escheated to the state and represented as having been paid, the undersigned did not feel it was necessary to raise sanctions sua sponte and makes no recommendations in that regard. The mistake seemed to be more of an embarrassing anomaly caused by miscommunication than a frivolous or calculated act of deception. Because attorney fees were ordered for enforcement of the award pursuant to Labor Code§ 5814.5, an order for hourly fees as a cost under§ 5813 would be a redundant basis for the fee award,

3. Request to Modify the PD Award based on Dr. Greenspan

As explained above and in the November 25, 2024 opinion on decision, the findings and award contained in the August 30, 2022 Third Amended Findings and Award are now final, and will not be modified or reopened based on a revisiting of previously-admitted or available evidence, While that finality does not serve to negate the provisions of the final findings and award that ce1iain credits were to be adjusted by and between the parties and applied to the award of temporary disability benefits, it does mean that the award cannot be modified with respect to the underlying determination of permanent disability based upon one physician over another, in this case Dr. Newton over Dr. Greenspan. To alter or amend the now-final findings and award more than five years after the date of injury would violate Labor Code § 5804, which states that "[n]o award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition."

Even if it were legally permissible to rewrite the provisions regarding permanent disability based on Dr. Newton contained in the August 30, 2022 Third Amended Findings and Order, it would be problematic because Dr. Greenspan died before development of the record to obtain substantial medical evidence

addressing the issues submitted by the parties. For this reason, Dr. Newton was appointed as a regular physician pursuant to Labor Code 5701, after the parties were given an opportunity to agree on a replacement AME to take the place of Dr. Greenspan (See Order Appointing Regular Physician dated 4/22/2019, p. 1), While the opinion of Dr. Newton does appear to be conservative, it is not speculative, and appears to be based on an adequate examination and history, so it was used as the basis for the August 30, 2022 Third Amended Findings and Award, which cannot be rescinded, altered, or amended under Labor Code§ 5804.

IV
RECOMMENDATION

Based on the foregoing analysis, it is respectfully recommended that the petition be denied.

Date: December 23, 2024

CLINT FEDDERSEN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE