

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

ERNESTO NAVARETTE, *Applicant*

vs.

**ARCARO'S AUTO BODY REPAIR, INC.;
EMPLOYERS PREFERRED INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ14896429; ADJ14896432
Van Nuys District Office**

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

Defendant seeks reconsideration, or in the alternative removal, of the August 19, 2024 Findings, Award, and Order (FA&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a detailer for defendant during the period from June 17, 2019 through June 28, 2021, sustained industrial injury to his back and right shoulder with entitlement to temporary disability for 104 weeks during the period from August 28, 2021 through August 26, 2024 at a weekly rate of \$453.33 for a total amount due of \$47,146.32 less reimbursement of \$22,204.00 to the Employment Development Department (EDD) and payment of attorney's fees in the amount of \$3,741.35. (ADJ14896432) In a separate August 19, 2024 Findings and Order (F&O), the WCJ found that applicant, while employed as a detailer for defendant on July 17, 2019, sustained industrial injury to his back with a permanent and stationary (P&S) date of October 3, 2019 and no periods of temporary disability. (ADJ14896429)¹

Defendant contends that with respect to the temporary disability findings for the cumulative injury (ADJ14896432), the WCJ "misinterpreted the evidence provided and therefore

¹ The cases were consolidated at the June 3, 2024 trial and defendant properly listed both ADJ14896429 and ADJ14896432 on its Petition.

issued a ruling that does not conform with the facts.” (Petition, p. 2.) Defendant argues that reports from Qualified Medical Evaluator (QME), Dr. Jean-Jacques Abitbol, do not indicate applicant was temporarily disabled from August 28, 2021 through March 9, 2022. (Petition, pp. 2-3.) Defendant also contends that the WCJ did not consider reporting by Dr. Veerinder Anand or “long standing” precedent which establishes that no temporary disability is owed if applicant is “terminated for cause.” (Petition, p. 3.)

We have not received an Answer from applicant. The WCJ prepared a Joint Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.²

We have considered the Petition, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition as one seeking reconsideration, rescind the August 19, 2024 F&O (ADJ14896429) and FA&O (ADJ14896432), and substitute a Joint Findings and Award. We make no other substantive changes to the WCJ’s decision.

FACTS

Applicant, while employed as a detailer for defendant during the period from June 17, 2019 through June 28, 2021, sustained industrial injury to his back and right shoulder. Applicant also sustained a specific June 17, 2019 industrial injury to his back.

Applicant was treated by Dr. Veerinder Anand who took applicant off work during the period from August 28, 2021 through February 9, 2022 and placed him on semi sedentary work restrictions during the period from February 10, 2022 through March 30, 2023. (Exhibits 8-9.) Per Dr. Anand, applicant was to be considered temporarily totally disabled if light work was unavailable. (Exhibit 9.)

On October 3, 2019, applicant was found permanent and stationary for the June 17, 2019 specific injury by orthopedic surgeon, Dr. Sohail Ahmad. (Exhibit A.)

The parties ultimately retained Dr. Jean-Jacques Abitbol as the panel QME. During his initial August 1, 2022 evaluation, Dr. Abitbol confirmed that applicant’s back was permanent and stationary for both, the specific and cumulative injuries. (Exhibit 3, pp. 12-13.) However, he did not find applicant’s cumulative injury to the right shoulder to be permanent and stationary. (*Ibid.*)

² Although the WCJ inexplicably issued two sets of findings, he properly issued a single joint Opinion on Decision and a single joint Report.

In a January 20, 2023 follow-up evaluation, Dr. Abitbol opined that a right shoulder MRI was needed. (Exhibit 2, p. 10.) Applicant was then placed on work restrictions for the right arm, which included no work at or above shoulder level and no lifting over fifteen pounds. (*Ibid.*) In a November 6, 2023 supplemental, Dr. Abitbol opined that the right shoulder MRI showed evidence of a rotator cuff tear, and as such, applicant was in need of further treatment, including potential surgery. (Exhibit 3, pp. 1-2.). Applicant was placed on continued work restrictions. (*Ibid.*)

Applicant was most recently seen by Dr. Ezequile Suarez who took applicant off work during the period from June 5, 2023 through March 5, 2024. (Exhibit 10.)

Applicant's last date of work was June 28, 2021. (Minutes of Hearing and Summary of Evidence, June 3, 2024, p. 6.) Applicant was terminated for cause. (*Id.*)

DISCUSSION

I.

Preliminarily, former Labor Code section³ 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) 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 under the Events tab in the Electronic Adjudication Management System (EAMS). Specifically, in Case

³ All further statutory references are to the Labor Code unless otherwise noted.

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 September 16, 2024, and 60 days from the date of transmission is November 15, 2024. This decision is issued by or on November 15, 2024, 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.

Here, according to the proof of service for the Report, it was served on September 16, 2024, and the case was transmitted to the Appeals Board on September 16, 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 September 16, 2024.

II.

We also find it relevant here to discuss the distinction between a petition for reconsideration and a petition for removal. A petition for reconsideration is taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order is defined as one that determines “any substantive right or liability of those involved in the case” or a “threshold” issue fundamental to a claim for benefits. (*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 [43Cal.Comp.Cases 661]; *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, injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations. (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 p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 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, and other similar issues.

Here, the August 19, 2024 F&O and FA&O address threshold issues and are therefore considered final orders. As such, to the extent that defendant seeks removal, we consider the Petition as one seeking reconsideration.

III.

Turning now to the Petition, pursuant to *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631], "Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income." Temporary total disability occurs when an employee is unable to earn any income during the period of recovery. (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].)

Temporary partial disability occurs when an employee is able to earn some income during their recovery period but not full wages. (*Id.*) "If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. (Lab. Code, § 4657.) If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability." (*Huston v. Workers' Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].) "If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Id.* citing *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417 [24 Cal.Comp.Cases 144, 340 P.2d 622] and *Transport Indem. Co. v. Ind. Acc. Com.* (1958) 157 Cal.App.2d 542 [23 Cal.Comp.Cases 30, 321 P.2d 21].)

Temporary disability ends when (1) the employee returns to work, (2) the employee is deemed medically able to return to work, or (3) the employee's medical condition becomes permanent and stationary. (*Huston, supra*, at p. 868; *Bethlehem Steel Company v. Industrial Acc. Com. and Harvey Lemons* (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250, 252]; *Industrial Indemnity Exchange v. Industrial Acc. Com. and Riccardi* (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25, 26-27].)

Defendant contends that applicant is not entitled to 104 weeks of temporary total disability as the WCJ did not take the recent reports of Dr. Anand into account and misstated the QME findings when he found that Dr. Abitbol found applicant temporarily totally disabled from August 28, 2021 through March 9, 2022. (Petition, pp. 3-4.) In referring to the WCJ's Opinion on Decision (OOD), however, although the WCJ states that "Applicant was again temporarily totally disabled from August 28, 2021, to March 9, 2022," the WCJ does not specifically indicate that the findings were based upon reporting from Dr. Abitbol (OOD, p. 3.) Based upon reports located in the record, the findings appear to be based upon reports from Dr. Anand. Applicant was taken off work and found temporarily totally disabled by Dr. Anand during the period from August 28, 2021 through February 9, 2022. (See Exhibits 8-9.) From February 10, 2022, through March 30, 2023, applicant was then placed on semi sedentary work. (See Exhibit 9.) Dr. Anand noted that if light work was unavailable, applicant should be considered temporarily totally disabled. (*Ibid.*)

Dr. Abitbol did not evaluate applicant until August 1, 2022. At the initial evaluation, he found applicant's specific and cumulative injury to the back permanent and stationary, but did not find applicant's cumulative injury to the right shoulder permanent and stationary. (Exhibit 3, pp. 12-13.) In his January 20, 2023 follow-up evaluation, Dr. Abitbol opined that a right shoulder MRI was needed. (Exhibit 2, p. 10.) Applicant was then placed on work restrictions for the right arm which included no work at or above shoulder level and no lifting over fifteen pounds. (*Ibid.*) In his November 6, 2023 supplemental report, Dr. Abitbol opined that the right shoulder MRI showed evidence of a rotator cuff tear, and as such, applicant was in need of further treatment, including potential surgery. (Exhibit 3, pp. 1-2.) Applicant was placed on continued work restrictions. (*Ibid.*) It does not appear that applicant completed treatment for the right shoulder. Subsequent to Dr. Abitbol, applicant was seen by Dr. Ezequile Suarez who took applicant off work during the period from June 5, 2023 through March 5, 2024.

Based upon the foregoing, applicant was temporarily totally disabled from August 28, 2021, to February 9, 2022 as per Dr. Anand. Thereafter, from February 10, 2022 through November 6, 2023 and ongoing, applicant was on light duty as per the findings of Dr. Anand and Dr. Abitbol. Arguably, applicant was off work and therefore temporarily totally disabled during the period from June 5, 2023 through March 5, 2024 as per the reports of Dr. Suarez.

Defendant argues that applicant is not entitled to temporary disability as applicant was terminated for cause. Pursuant to *Hardware Mut. Casualty Co. v. Workers' Comp. Appeals Bd.* (1967) 253 Cal.App.2d 62, 66-67 [32 Cal.Comp.Cases 291], a defendant is liable only for the wage loss incurred as a result of the industrial injury. An employee is not entitled to temporary disability when he suffers wage loss for other reasons than the industrial disability. (*Id.*) While a termination for cause is “tantamount to a refusal to perform modified work . . . [because] it is the applicant’s conduct, rather than the work injury, which is disqualifying the applicant from employment,” in situations where there is no modified work either because it is unavailable or because the worker is unqualified to perform the work, it cannot be claimed that wage loss was the result of the termination for cause. (*Romero v. Sunbelt USA, Inc.* (December 19, 2014, ADJ9408761) 2014 Cal. Wrk. Comp. P.D. LEXIS 728; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417, 421.) Here, there is nothing in the record which evidences that applicant’s work restrictions were able to be accommodated by defendant. Further, as indicated by the WCJ in his Report, applicant’s semi-sedentary work restrictions appeared to be more than defendant could accommodate. This is confirmed by testimony from defendant witness Cindy Arcaro who previously placed applicant on a leave of absence back in 2019 due to an inability to accommodate work restrictions. (Minutes of Hearing and Summary of Evidence, June 3, 2024, p. 7.) Mrs. Arcaro testified that as time went on, “the restrictions got progressively stricter.” (*Ibid.*) Since there is no evidence defendant was able to accommodate applicant’s restrictions and no evidence applicant was able to retain work elsewhere, we conclude that applicant was entitled to temporary total disability benefits for 104 weeks during the period from August 28, 2021 through August 26, 2024.

Lastly, at the June 3, 2024 trial, the WCJ ordered consolidation of the specific injury of June 17, 2019 (ADJ14896429) and the cumulative injury of June 17, 2019 through June 28, 2021 (ADJ14896432). Pursuant to WCAB Rule 10396(a), consolidation is appropriate in cases that involve two or more related cases, involving the same employee, with common issues of fact and law to avoid the issuance of duplicate or inconsistent orders and to promote the efficient use of

judicial resources by deciding matters in a single proceeding. (Cal. Code Regs., tit. 8, § 10396(a).) Here, despite the prior consolidation, the WCJ has opted to issue two separate August 19, 2024 orders rather than a single joint order. To provide clarity and in accordance with the intent behind WCAB Rule 10396(a), we will rescind both the F&O and FA&O and issue a single joint Findings and Award.

Accordingly, we grant the Petition as one for reconsideration, rescind the August 19, 2024 F&O and FA&O, and substitute a Joint Findings and Award. We make no other substantive changes to the WCJ's decisions.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the August 19, 2024 Findings, Award, and Order (ADJ14896432) and Findings and Order (ADJ14896429) is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 19, 2024 Findings, Award, and Order (ADJ14896432) and the August 19, 2024 Findings and Order (ADJ14896429) are **RESCINDED** and **SUBSTITUTED** with a new Joint Findings and Award as provided below.

FINDINGS OF FACT

1. Applicant, Ernesto Navarette Medina, born [], while employed on June 17, 2019 as a detailer at Palm Springs, California by Arcaro's Auto Body Repair, Inc. sustained injury arising out of and in the course of employment to his back.
2. Applicant, Ernesto Navarette Medina, born [], while employed during the period from June 17, 2019 through June 28, 2021 as a detailer at Palm Springs, California by Arcaro's Auto Body Repair, Inc. sustained injury arising out of and in the course of employment to his back and right shoulder.
3. At the time of the above injuries, the employer's workers' compensation carrier was Employers Preferred Insurance.
4. With respect to the June 17, 2019 specific injury (ADJ14896429), applicant reached permanent and stationary status on October 3, 2019 and did not have any periods of temporary disability.
5. With respect to the cumulative injury during the period from June 17, 2019 through June 28, 2021 (ADJ14896432), applicant is entitled to temporary disability indemnity for the period from August 28, 2021 through August 26, 2024 for a

period of 104 weeks at the weekly rate of \$453.33 for a total amount due of \$47,146.32 less \$22,204.00 payable to the Employment Development Department for reimbursement and less \$3,741.35 payable as attorney's fees.

6. Applicant is not entitled to a Labor Code section 5814 increase.

AWARD

1. Award is made in favor of Ernesto Navarette Medina against Employers Preferred Insurance for 104 weeks of temporary disability indemnity due and owing at the weekly rate of \$453.33 less payment for reimbursement to the Employment Development Department in the amount of \$22,204.00 and payment of reasonable attorney's fees in the amount of \$3,741.35 to the Law Office of Alex Narayan, APC.

Payment to the Employment Development Department is to include statutory interest pursuant to Unemployment Insurance Code section 2629.1(e). Defendant shall not be entitled to a credit against applicant's awarded benefits herein for any interest due and payable to the Employment Development Department.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 14, 2024

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

**ERNESTO NAVARETTE
LAW OFFICES OF ALEX NARAYAN
SHEFFIELD & RICHARDS**

RL/cs

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

CS