

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

FIDENCIO REYES RAMIREZ, *Applicant*

vs.

**WESTERN CORRUGATED DESIGN; TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ17790502
Los Angeles District Office**

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

Applicant seeks removal of the Findings of Fact issued on June 25, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed on June 1, 2023, applicant sustained injury arising out of and occurring in the course of employment to the right shoulder and right upper arm, and claims to have sustained injury to upper extremities, bilateral arms, elbows, hands, and fingers; (2) defendant has paid temporary disability benefits at a weekly rate of \$590.16, for a period beginning October 9, 2023 through February 26, 2024; (3) defendant has furnished some medical treatment; (4) no attorney fees have been paid and no attorney fee arrangements have been made; (5) applicant failed to demonstrate entitlement to temporary disability benefits for the period of June 5, 2023 through October 9, 2023; (6) applicant did not receive the July 17, 2023 offer of alternative work; and (7) applicant did not receive the August 3, 2023 offer of alternative work.

Applicant contends that the WCJ erroneously failed to find that Applicant is entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023.

We did not receive an Answer.

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

We have reviewed the Petition and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, we will treat the petition as one for

reconsideration, grant reconsideration, and, as our Decision After Reconsideration, we will affirm the Findings of Fact, except that we will amend to find that the issue of whether applicant is entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023 is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On April 24, 2024, the matter proceeded to trial of the following issues:

Temporary disability, employee claiming the following periods, June 5th, 2023 through October 9, 2023; and whether Applicant received an offer of alternative work.

(Minutes of Hearing, April 24, 2024, p. 2:20-23.)

The parties stipulated that applicant sustained injury arising out of and in the course of employment to right shoulder and right upper arm. (*Id.*, p. 2:9-10.)

On May 28, 2024, the matter proceeded to continued trial. (Minutes of Hearing (Further), May 28, 2024, p. 1.) The parties stipulated that applicant did not receive defendant's July 17, 2023 and August 3, 2023 mailings communicating a "Transitional Work Job Offer." (*Id.*, p. 2:9-18.)

The WCJ admitted an exhibit entitled "Work Progress Status Note dated August 16, 2023" into evidence. In it, Ramy Elias, M.D. places applicant on "Modified Activity" commencing August 17, 2023, stating that applicant was to have "No use of ® arm." (Ex. 1, Work Progress Status Note, August 16, 2023.)

The WCJ also admitted an exhibit entitled "RFA of September 21, 2023 and Dr. Elias Report of September 13, 2023" into evidence. In it, Dr. Elias requests "Right Shoulder Arthroscopy" to be performed on applicant at the Cerritos Surgical Center. (Joint Ex. A, RFA of September 21, 2023 and Dr. Elias Report of September 13, 2023 p. 1.) The Dr. Elias's Report of September 13, 2023 within the exhibit states:

WORK STATUS:

He will return to work with restrictions of no use of the right upper extremity.

FOLLOW-UP:

Follow up in 4 weeks or sooner if the right shoulder arthroscopy is approved.
(*Id.*, p. 4.)

In the Report, the WCJ states:

To the extent the parties stipulated "the 7/17 /23 and 8/3/24 mailings of "Transitional Work Job Offer" were not received by Applicant, and were returned to sender by

the United States Postal Service," the undersigned agrees with Applicant's assertion that the evidence submitted at trial establishes Applicant was not provided with an offer of modified or alternative work.

However, having reviewed the entire record in the instant case, it does not appear to the undersigned that the stipulations related to Defendant's failure to communicate a "Transitional Work Job Offer" are dispositive of the initial issue of whether Applicant established an entitlement to temporary disability benefits from June 5, 2023 through October 9, 2023.

Having reviewed Applicant's Petition for Removal, the undersigned is troubled by several aspects of the petition. The first aspect is Applicant Attorney's decision to attach exhibits to the Petition for Removal.

...

Second, and even more troubling, is Applicant Attorney's decision to attach documents to the Petition for Removal, and assert they are already part of the record, when in reality they are not. I will refrain from further discussion of this conduct at this time.

In reference to the actual record in the instant case, Applicant relies in part on the August 16, 2023 "Work Status Progress Note" authored by a Dr. Ramy Elias M.D., with the Center For Advanced Orthopedics and Sports Medicine, as a basis for asserting an entitlement to the requested temporary disability benefits. **(APPLICANT'S EXHIBIT 1)**. Based on this note, on 8/16/2023, Applicant was given "Modified Activity" effective 8/17/23, for an unknown period of time, with the modified duty appearing to be "no use of arm," without providing a basis for this "modified activity," and without indicating if this "modified activity" stems from an accepted body part or a denied body part. **(APPLICANT'S EXHIBIT 1)**.

Also according to the record in the instant case, the parties stipulated to the fact that Applicant "sustained injury arising out of and in the course of employment to right shoulder and right upper arm." **(MOH/SOE April 24, 2024, pg. 2, lines 9-10)**. Also according to the record in the instant case, the parties further stipulated that Applicant "claims to have sustained injury arising out of and in the course of employment to ... bilateral arms." **(MOH/SOE April 24, 2024, pg. 2, lines 10-11)**.

As the August 16, 2023 "Work Status Progress Note" does not provide a basis for determining if the "modified activity" is in relation to the accept body part, or the denied body part, Applicant has failed to meet his burden.

In support of his claim for temporary disability benefits, Applicant also submitted an unsigned (electronic or otherwise) "WORK STATUS REPORT" dated July 13, 2023, from "Akeso Occupational Health." **(APPLICANT'S EXHIBIT 4)**. Although the words "Modified Work" do appear in three different locations within this exhibit, and there is some discussion of "repetitive bending or stooping," the Applicant has failed to demonstrate that this potential modification applies to the

accepted body parts of "right shoulder" or "right arm," as opposed to a denied body part such as upper extremities, etc. As the document is not deemed to be substantial medical evidence, as it does not provided a basis for establishing which body parts necessitate "modified work," and does not provide any medical support for the conclusion, Applicant has failed to demonstrate he is entitled to the requested temporary disability benefits.

The same is also true for the June 1, 2023 "WORK STATUS REPORT" from Akeso Occupational Health, dated August 3, 2023. **(APPLICANT'S EXHIBIT 5)**. While there is discussion of "modified work," in relation to "no repetitive bending or stooping" within this "report," the Applicant has failed to demonstrate a nexus between this letter, which does not appear to be substantial medical evidence, and the body parts that are industrial at this point. (Report, pp. 4-6.)

DISCUSSION

I.

Former Labor Code 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, Labor Code 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 Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 30, 2024, and 60 days from the date of transmission is Saturday, September 28, 2024. The next business day

that is 60 days from the date of transmission is Monday, September 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, September 30, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 30, 2024, and the case was transmitted to the Appeals Board on July 30, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 30, 2024.

II.

Applicant filed the Petition for Removal of the Findings of Fact. Removal may be requested to challenge interim and non-final orders issued by a WCJ. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [38 Cal. Rptr. 3d 922, 71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal. App. 4th 274, 281, fn. 2 [25 Cal. Rptr. 3d 448, 70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

By contrast, a petition for reconsideration is the mechanism by which a party may challenge a final order, decision, or award. (Lab. Code § 5900.)² 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, 260 Cal. Rptr. 76; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [163 Cal. Rptr. 750, 45 Cal.Comp.Cases 410, 413]; 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 [97 Cal. Rptr. 2d 418, 65 Cal.Comp.Cases 650, 650-651, 655-656].) The Court of Appeal has given examples of threshold issues to include "whether the injury arises out of and in the course of employment, the territorial jurisdiction of the appeals board, the existence of an employment relationship or statute of limitations issues." (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662, 210 Cal. Rptr. 3d 101 (citations omitted.) "Such issues, if finally determined, may avoid the necessity of further litigation." (*Id.*) (internal quotation marks and citations omitted).

Here, applicant seeks relief from the WCJ's finding that applicant is not entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023. Since applicant challenges a determination of applicant's substantive right to temporary disability benefits, i.e., a final order, the Petition is subject to reconsideration and not removal. (*Gaona, supra*, at p. 662.) Accordingly, we will treat the Petition as one for reconsideration.

Applicant contends that the WCJ erroneously failed to find that applicant is entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023. Specifically, applicant argues that he is entitled to temporary disability benefits because he was restricted from work and not provided with an offer of modified or alternative work.

Temporary disability indemnity is a workers' compensation benefit, which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

² Unless otherwise stated, all further statutory references are to the Labor Code.

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (§§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

In *Huston*, the Court of Appeal stated:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] 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. [] 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. [] 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. (Huston, supra, at p. 806 [Emphasis added].)

Thus, *Huston* reflects that an employer's failure to show that modified work was available and offered affects an injured worker's entitlement to temporary disability.

Here, as stated in the Report, although the WCJ concluded that the stipulations in the record establish that applicant was not provided with an offer of modified or alternative work, the WCJ concluded that the medical record is insufficient to establish that applicant was disabled from work during the June 5, 2023 through October 9, 2023 period. Specifically, the WCJ found that the August 16, 2023 "Work Status Progress Note" does not connect the prescribed "modified activity" to the right arm; and that Work Status Reports from Akeso Occupational health also failed to connect their prescribed work modifications provided to the right arm and right shoulder. (Report, pp. 5-6.)

However, the record does not reveal how the WCJ accounted for the August 16, 2023 Work Status Note's use of the symbol ® to apparently attribute the need for modified work to applicant's right arm injury. (Ex. 1, Work Progress Status Note, August 16, 2023.)

Nor does the record reveal how the WCJ accounted for the September 21, 2023 RFA for arthroscopic surgery to the right shoulder with an accompanying report from Dr. Elias indicating that applicant “will return to work with restrictions of no use of the right upper extremity” in concluding that the medical evidence did not show that applicant was temporarily disabled as a result of his right shoulder injury. (Joint Ex. A, RFA of September 21, 2023 and Dr. Elias Report of September 13, 2023, p. 4.)

Labor Code section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, at p. 478), and must be supported by substantial evidence. (§ 5903, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Because the record fails to fully address the medical evidence of the August 16, 2023 Work Status Note and the Dr. Elias Report of September 13, 2023, we conclude that the record should be further developed on the issue of whether the evidentiary record establishes applicant's claim for temporary disability benefits for the period of June 5, 2023 through October 9, 2023. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal.Rptr.2d 898, 63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also § 5313.)

Accordingly, we will rescind the Findings of Fact and return the matter to the trial level for further proceedings consistent with this decision.

Having determined the issue raised by the Petition, we observe that WCAB Rule 10945(c) provides:

(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.

(2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.
(8 CCR 10945 (c)(1)-(2).)

In this regard, applicant's attorney attached four exhibits (including an exhibit dated March 11, 2024, which were not admitted into evidence and not part of the adjudication file) to the Petition. Therefore, we admonish applicant's attorney to comply with these rules in the future.

Accordingly, we will affirm the Findings of Fact, except that we will amend to find that the issue of whether applicant is entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023 is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact issued on June 25, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Petition for Reconsideration of the Findings of Fact issued on June 25, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

5. The issue of whether applicant is entitled to temporary disability benefits for the period of June 5, 2023 through October 9, 2023 is deferred.

IT IS FURTHER ORDERED that the matter is returned to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 30, 2024

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

**FIDENCIO REYES RAMIREZ
KHALIL LAW GROUP
WOOLFORD & ASSOCIATES**

SRO/es

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