

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

JENNIFER MERRITT, *Applicant*

vs.

**BIGGE CRANE & RIGGING and SAFETY NATIONAL CASUALTY COMPANY,
adjusted by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ17040974
Oakland District Office**

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

Applicant seeks reconsideration of the August 8, 2024 Findings, Award, and Orders (FA&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant was not currently entitled to temporary disability benefits for her July 25, 2022 industrial injury to the bilateral shoulders, neck, and upper extremities.

Applicant contends that the WCJ erred in finding that applicant intended to remove herself from the labor market given her trial testimony wherein she indicated her willingness and intent to return to work but for the work injury. Applicant further contends that the WCJ erred in finding that applicant had a burden to prove that she retained her earnings capacity after retirement.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition for Reconsideration and the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition, rescind the FA&O, and substitute a new FA&O wherein we find applicant is entitled to temporary total disability for the period from September 1, 2022 through April 26, 2023 and ongoing subject to the 104 week cap under section 4656.

FACTS

Applicant, while employed on July 25, 2022 by defendant as a material hoist operator, sustained an industrial injury to the bilateral shoulders, neck, and upper extremities.

Prior to the injury, applicant submitted paperwork to defendant in March of 2022 indicating an intended retirement date of September 1, 2022. (Exhibit A, Applicant Deposition, April 19, 2023, p. 15, lines 4-16.)

On April 19, 2023, applicant was deposed by defendant and testified as follows:

Q: Do you plan on eventually going back to work at all?

A: I haven't thought about it.

(April 19, 2023 Deposition, p. 21, lines 3-8.)

A: For my retirement present to myself, I bought myself a 3 month trip to Europe, and I went and had to come back after six weeks because I had to see the doctor. I've been to Mexico, I go to Mexico a lot. My family lives down there. I've been to Mexico once or twice since my retirement, which is supposed to be complete with travel. I was supposed to leave when I retired and not come back. So I had to cut everything out except for important ones. I have a 80 year old sister that needed help. She lives down there, and I went to help her. And I also went to see my nephew's house that he just purchased in a different part of Mexico. My world is travel. I should be traveling right now.

Q: You said you're supposed to leave, so were you planning on moving to Mexico?

A: Yes. I plan on traveling. I've been to 26 countries. I'm a traveler. That's what I'm supposed to be doing right now. When I retired, that was my whole thing.

(*Id.* at pp. 33-34.)

Applicant treated with Dr. David Suarez who served as her primary treating physician and found her temporarily totally disabled during the period from June 8, 2023 through May 16, 2024. (Exhibits 1-7.)

The parties proceeded with discovery and retained Dr. Kyle Natsuhara as the panel Qualified Medical Evaluator (QME). In his December 5, 2023 report, Dr. Natsuhara found applicant temporarily totally disabled and continuing. (Exhibit 11, pp. 18-19.)

According to the benefit printout provided by defendant, defendant paid applicant total temporary disability benefits from September 1, 2022 through April 26, 2023. (Exhibit B.)

In a May 9, 2023 letter to applicant, defendant indicated that temporary disability was being terminated as applicant "retired from employment." (Exhibit D.) Defendant also alleged a

temporary disability overpayment spanning the entirety of temporary disability period paid, from September 1, 2022 through April 26, 2023, totaling \$43,077.66. (Ibid.)

On August 19, 2024, the matter proceeded to trial. Applicant testified that she intended, and was willing, to return to work but for the work injury. (Minutes of Hearing and Summary of Evidence (MOH & SOE, August 19, 2024, pp. 5-6; Report, p. 5.) She also testified that any thoughts of a permanent move to Mexico was not feasible and “only a dream.” (*Id.*)

DISCUSSION

I.

Preliminarily, former Labor Code section¹ 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 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 30, 2024, and 60 days from the date of transmission is November 29, 2024, which is a Friday and a holiday. The next business day that is 60 days from the date of transmission is Monday,

¹ All further statutory references are to the Labor Code unless otherwise noted.

December 2, 2024. This decision is issued by or on December 2, 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 30, 2024, and the case was transmitted to the Appeals Board on September 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 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 30, 2024.

II.

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].)

In the current case, applicant was paid temporary total disability during the period from September 1, 2022 through April 26, 2023. Thereafter, in a letter to applicant dated May 9, 2023, defendant indicated that temporary disability was being terminated as applicant had "retired from employment" as of September 1, 2022. (Exhibit D.) Defendant also alleged a temporary disability overpayment spanning the entirety of temporary disability period paid, totaling \$43,077.66. (*Ibid.*)

Applicant, however, was found temporarily totally disabled and continuing by Panel QME, Dr. Kyle Natsuhara, in his December 5, 2023 report. (Exhibit 11, pp. 18-19.) Applicant was also found temporarily totally disabled during the period from June 8, 2023 through May 16, 2024 by primary treating physician, Dr. David Suarez. (Exhibits 1-7.) Further, during applicant's August 19, 2024 trial testimony, applicant testified to a willingness and intent to return to work but for the work injury and noted that at the time of the April 19, 2023 deposition, she was still recovering from surgery and was therefore not thinking about work. (Minutes of Hearing and Summary of Evidence (MOH & SOE, August 19, 2024, pp. 5-6; Report, p. 5.) At trial, applicant also testified that any thoughts of a permanent move to Mexico post-retirement "was only a dream." (Report, p. 5.)

The WCJ contends that applicant is not entitled to temporary disability benefits as applicant's "deposition testimony supports a finding that applicant intended to fully remove herself from the labor market." (Opinion on Decision (OOD), p. 6.) The WCJ alleges that the current case is analogous to *Gonzales v. Workers' Comp. Appeals. Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477, 1481] wherein the court found that the applicant in that case was not entitled to temporary total disability benefits as she previously stipulated she did not intend to return to work upon retirement. Unlike the applicant in *Gonzales*, however, applicant here made

no such stipulation. As confirmed by the WCJ, applicant testified that but for the work injury, she was and continues to be willing to go back to work. (Report, p. 5.) We also find it reasonable that at the time of applicant's April 19, 2023 deposition, applicant was not thinking about work as she had recently undergone surgery.

The WCJ further cites to the cases of *Jimenez v. San Joaquin Valley Labor, Superior Nat'l Ins. Co.* (2002) 67 Cal.Comp.Cases 74 (Appeals Bd. en banc.) and *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal. App.4th 790, 802 and argues that in seeking temporary disability, applicant has a burden to prove that she "retained earnings capacity after her retirement" and must meet that burden by, for example, "bring[ing] in other co-workers or job postings to describe the availability" of the alleged work that would have been sought or "describ[ing] how often she would work." (OOD, pp. 6-7.) *Jimenez* and *Ochoa*, however, are distinguishable in that the applicants in those cases were seasonal employees and therefore necessarily had two different temporary disability rates, one for off-season and one for in-season. As such, the applicants in those cases needed to provide evidence concerning any off-season wages. Conversely, applicant here is not a seasonal employee. As such, we believe applicant has met her burden in establishing her right to temporary disability benefits and do not believe that she has a further duty to prove "retained earnings capacity" post-retirement.

III.

Lastly, we note that although applicant does not specifically seek reconsideration regarding prior temporary disability paid during the period from September 1, 2022 through April 26, 2023, presumably because those payments were not specifically discussed by the WCJ in her August 8, 2024 FA&O, any grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration is granted, the WCAB has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the original petition for reconsideration. Further, as any determination regarding current and/or ongoing temporary disability necessarily involves prior temporary disability paid, and, given that defendant has already indicated its intent to identify

the prior payments as an overpayment, we believe it prudent that these payments also be addressed herein.

Accordingly, we grant applicant's Petition, rescind the August 8, 2024 FA&O, and substitute it with a new FA&O wherein we find applicant is entitled to temporary total disability for the period from September 1, 2022 through April 26, 2023 and continuing subject to the 104 week cap under section 4656.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the August 8, 2024 Findings, Award, and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 8, 2024 Findings, Award, and Orders is **RESCINDED** and **SUBSTITUTED** with a new Findings, Award, and Orders as provided below.

FINDINGS OF FACT

1. Applicant, Jennifer Merritt, born [], while employed by defendant on July 25, 2022 as a material hoist operator, sustained an injury arising out of and in the course of employment to her bilateral shoulders, neck, and upper extremities.
2. The injury caused a need for continuing medical care.
3. Defendant's exhibits A, B, C, and D are admissible.
4. Applicant is entitled to temporary total disability for the period from September 1, 2022 through April 26, 2023.
5. Applicant is also entitled to payments for ongoing temporary disability based upon the December 5, 2023 report of panel QME, Dr. Kyle Natsuhara and the reports of primary treating physician, Dr. David Suarez, subject to the 104 week cap under Labor Code section 4656(c)(2).

AWARD

1. Applicant is entitled to continuing medical care for the bilateral shoulders, neck, and upper extremities.
2. Applicant is entitled to temporary disability for the period from September 1, 2022 through April 26, 2023 and continuing subject to the 104 week cap under Labor Code section 4656(c)(2).

ORDER

1. Defendant's Exhibits A, B, C, and D are admitted into evidence.
2. All other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 2, 2024

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

**JENNIFER MERRITT
LAW OFFICE OF CHRISTINA LOPEZ
LAUGHLIN, FALBO, LEVY & MORESI**

RL/cs

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

CS