WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE MEDINA, ***Applicant***

vs.

FOSTER DAIRY FARMS, PERMISSIBLY SELF-INSURED, ADMINISTERED BY GALLAGHER BASSETT SERVICES, ***Defendants***

Adjudication Number: ADJ17875984
Lodi District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the August 13, 2024 Findings of Fact and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a dairy worker on August 10, 2022, sustained industrial injury to his right wrist. The WCJ found that applicant did not meet the burden of establishing that he was temporarily totally disabled from October 19, 2023 to April 15, 2024.

Applicant contends that the WCJ erred because defendant failed to prove that it had offered modified work consistent with the work restrictions identified by the panel QME.

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 Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons discussed below, we will rescind the F&O and substitute new Findings of Fact that applicant is entitled temporary total disability for a period of 45 days commencing December 21, 2023, and issue an award of corresponding benefits less attorney fees.

FACTS

Applicant claimed sustained injury to his right wrist while employed as a dairy worker by defendant Foster Dairy Farms, permissibly self-insured, on August 10, 2022. Applicant sustained injury when he lost his footing while climbing over a fence and fell backward, striking his wrist on the fence. (Ex. 3, Report of Ogoegbunam Agubuzu, M.D., dated October 19, 2023, at p. 2.)

On August 15, 2022, applicant was referred to the Concentra medical clinic. Treating physician Michael Tenison, M.D., completed a Doctor's First Report of Occupational Illness/Injury form, and diagnosed a right wrist fracture. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 3.) Dr. Tenison provided medical treatment and opined that applicant could return to modified work.

On August 23, 2022, Dr. Tenison reevaluated applicant, renewed applicant's medications, and again allowed applicant to return to modified duties. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 7.)

On October 4, 2022, Dr. Tenison reevaluated applicant, and noted that applicant had recovered full range of motion in the wrist. The physician declared applicant to be permanent and stationary, "without any future ratable disability or treatment needed." (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 7.) Dr. Tenison released applicant from care, and instructed applicant to return to full duty the same day.

On December 5, 2022, Dr. Tenison reevaluated applicant, noting the injury as now four months prior. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 8.) The treating physician again noted a full range of motion, and that there was "no treatment needed at this point." (Ibid.) Dr. Tenison again released applicant to full duty without restriction, and without need for future medical care.

Applicant worked until April 12, 2023, at which time he was laid off from his employment when the dairy closed. (July 2, 2024, Minutes of Hearing and Summary of Evidence (Minutes), dated July 2, 2024, at p. 2:16; 4:4.)

The parties selected Ogoegbunam Agubuzu, M.D., as the orthopedic Qualified Medical Evaluator (QME). On October 19, 2023, the QME evaluated applicant, but noted that "no medical records were available for review prior to the evaluation and the preparation of this report." (Ex. 3, Report of Ogoegbunam Agubuzu, M.D., dated October 19, 2023, at p. 2.) The QME obtained applicant's self-reported history and administered a clinical examination which revealed

diminished grip strength and limited range of motion in the right wrist. The QME diagnosed a "reported right wrist fracture status-post casting now with residual pain and impaired range of motion." (*Id.* at p. 9.) The QME deferred most of his analysis pending receipt of medical records, but nonetheless opined that he "suspected" applicant could return to modified duties involving no use of the right upper extremity. (*Id.* at p. 11.)

The parties submitted applicant's medical records to the QME, who issued a supplemental report on December 21, 2023. Therein, the QME reviewed primarily the records of applicant's treatment following the injury at the Concentra clinic. Following his review, Dr. Agubuzu concluded that "[t]he provided medical records indicate that the applicant first presented for medical care on 8/15/22 with a right wrist injury," and that applicant's diagnosis was now that of a "[r]ight ulnar styloid fracture status-post splinting now with residual pain, impaired range of motion, impaired grip strength." (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 9.) Applicant was noted to not yet be permanent and stationary. With respect to periods of disability, the QME again opined that applicant was temporarily partially disabled from the date of injury until applicant was released to regular duty. The QME noted that applicant's condition had "apparently worsened when compared to their last primary treating physician valuation on 12/5/22," and that at the "present time the applicant is not working but could work with the following restrictions: no use of the right upper extremity." (*Id.* at p. 10.)

On July 2, 2024, the parties proceeded to trial on the sole issue of applicant's claim of temporary disability from October 19, 2023, through April 15, 2024, based on the reporting of the QME. (Minutes, at p. 2:18.) Applicant testified that, in relevant part, he had not worked since the dairy closed in April, 2023, and that he did not receive an offer of modified work following the October 19, 2023 QME evaluation. (Minutes, at p. 3:21.) Applicant also testified that he had received an MRI study of the right wrist in May, 2024, which demonstrated a right wrist fracture. The WCJ ordered the matter submitted for decision the same date.

On August 13, 2024, the WCJ Issued the F&O, determining in relevant part that the panel QME evaluations did not constitute substantial evidence (Finding of Fact No. 9), that applicant's testimony was not credible (Finding of Fact No. 10), and that applicant was not owed temporary total disability from October 19, 2023 through April 15, 2024 (Finding of Fact No. 11). The WCJ ordered that applicant "take nothing." The WCJ's Opinion on Decision noted that applicant did not produce contemporaneous treatment records during the period of temporary disability claimed,

and that the QME did not explain how applicant's condition had worsened since his last treatment at Concentra in 2022. Because the QME reporting did not constitute substantial evidence, applicant failed in his burden of establishing entitlement to temporary disability benefits from October 19, 2023 to April 15, 2024. (Opinion on Decision, at p. 5.)

Applicant's Petition avers the WCJ failed to address whether defendant made a valid offer of modified duties following receipt of the QME reporting, and that the WCJ's Opinion fails to describe with specificity why the QME reporting was not substantial evidence. (Petition, at p. 2:4.)

Defendant's Answer avers notes that Dr. Tenison indicated that if applicant was still bothered by his wrist, he could return for an orthopedic consult, and "that the Applicant at any point could have sought future medical care based on this report to Applicant's claim that he was restricted in some form or fashion is incomplete and misleading." (Answer, at p. 2:3.)

DISCUSSION

I.

Former Labor Code[1] 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) 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 System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The

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

case is sent to the Recon board." Here, according to Events, the case was transmitted to the Appeals Board on September 9, 2024, and the next business day that is 60 days from the date of transmission is November 8, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after November 8, 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 and Recommendation by the workers' compensation administrative law judge, the Report was served on September 9, 2024, and the case was transmitted to the Appeals Board on September 9, 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 9, 2024.

II.

Applicant challenges the WCJ's determination that he has not met his burden of establishing entitlement to temporary total disability (TTD) benefits between October 19, 2023 and April 15, 2024. The F&O determined that applicant failed to submit medical records substantiating the claimed period of TTD, that the QME reporting describing work restrictions was not substantial medical evidence, and that the lack of contemporaneous medical evidence rendered applicant's unchallenged trial testimony not credible. (Opinion on Decision, at pp. 4-5.)

Applicant's Petition contends the reports of the QME establish that he could return to modified work, and that the burden of proof then shifted to the defendant to establish that modified

[2] 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.

work was available and offered. (Petition, at p. 7:27.) Because defendant did not establish the availability of modified duties, applicant is entitled to TTD during the claimed period. (*Id.* at p. 8:1.)

The existence of temporary disability and its duration are questions of fact and the burden of proof of a fact rests on the party holding the affirmative of an issue. (Lab. Code, § 5705; *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196].) An award of temporary disability requires both a physical impairment and a wage loss resulting from the inability to perform one's employment. (*Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1963) 211 Cal.App.2d 821, 831 [28 Cal.Comp.Cases 11].) Unlike permanent disability, which compensates an injured employee for diminished future earning capacity or decreased ability to compete in the open labor market, temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. (*Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].)

Applicant bears the initial burden of proving that he is either temporarily totally disabled, or that he could return to modified duties. (See *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].) If the applicant meets his burden of establishing disability, either partial or total, and the 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*, at p. 868.)

Here, QME Dr. Agubuzu first evaluated applicant on October 19, 2023. The evaluation was undertaken without the benefit of medical records. (Ex. 3, Report of Ogoegbunam Agubuzu, M.D., dated October 19, 2023, at p. 2.) The QME nonetheless obtained a history of injury as described by applicant and performed a clinical evaluation. The QME noted limited range of motion in the right wrist and hand and exquisite tenderness to palpation of the ulnar aspect of the right wrist. (*Id.* at p. 7.) Applicant's grip strength was noted to be diminished on the right. The QME entered a diagnostic impression of "reported right wrist fracture status-post casting now with residual pain and impaired range of motion." (*Id.* at p. 9.) The QME noted that applicant's reported mechanism of injury was consistent with his clinical presentation, but in the absence of medical

records, no formal opinion on disability status and work restrictions was possible. The QME opined that although applicant was not currently working, "I suspect he could have the following modified work duties: No use of the right upper extremity." (*Id.* at p. 11.)

The parties submitted applicant's medical records to the QME, who reviewed them and issued a supplemental report of December 21, 2023. Therein, the QME noted that applicant had previously been released from treatment without need for future treatment and without work restrictions or disability. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 8.) Based on the review of applicant's medical records, the QME revised his diagnostic impression to "[r]ight ulnar styloid fracture status-post splinting now with residual pain, impaired range of motion, impaired grip strength." (*Id.* at p. 9.) The QME concluded that applicant's condition was not yet permanent and stationary, and that applicant should have an orthopedic surgery consult, and access to various interim treatment modalities. (*Id.* at p. 10.) With respect to disability status, the QME again opined that "applicant is not working but could work with the following restrictions: no use of the right upper extremity." (*Ibid*.)

The QME reporting thus reflects a compensable industrial injury resulting in a need for work restrictions to the right upper extremity.

The F&O determines, however, that notwithstanding the QME reporting, applicant has not met his burden of establishing entitlement to TTD. The WCJ's Opinion states, "[t]here was no testimony or any other evidence submitted addressing why the applicant did not procure treatment after 12/5/2022 through 4/15/2024, even though Applicant testified he self-modified his duties after he was released to regular duties." (Opinion on Decision, at p. 4.)

Administrative Director (AD) Rule 9785(b)(3) provides that "[i]f the employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute shall be resolved under the applicable procedures set forth at Labor Code sections 4060, 4061 4062, 4600.5, 4616.3, or 4616.4." (Cal. Code Regs., tit. 8, § 9785(b)(3).)

In *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd*. (*Rushing*) (2000) 80 Cal.App.4th 1041, 1043 [65 Cal.Comp.Cases 477]) (*Rushing*), the Court of Appeal held that where an applicant's primary physician declared an injury to be permanent and stationary and releases applicant to return to work without the need for future medical treatment, the applicant has been discharged and must comply with the provisions of section 4061 and 4062 to change

primary treating doctors. The court wrote, "[b]ecause Rushing was discharged from [the primary treating physician's] care and disagreed with the physician's determination, she was required to comply with Labor Code sections 4061 and 4062 before changing physicians." (*Id.* at p. 1048.)

Here, applicant was released by Dr. Tenison without disability or work restrictions to his usual and customary duties on December 5, 2021. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 7.) Pursuant to Administrative Director Rule 9785 and *Rushing*, *supra*, 80 Cal.App.4th 1041, applicant was precluded from seeking a new primary treating physician to challenge his release from treatment to unmodified work until such time as he complied with sections 4061 and 4062 and obtained a QME. Applicant obtained a QME evaluation with Dr. Agubuzu as of October 19, 2023, and applicant's present claim for temporary disability only commences following that initial report of the QME. Thus, we are persuaded that the lack of interim reporting from a primary treating physician was a result of applicant's compliance with Rule 9785, and with sections 4061 and 4062.

A similar analysis applies to the WCJ's credibility determination regarding applicant's trial testimony. Applicant testified that he returned to work through the date of the closure of the dairy in April, 2023, but that he self-modified his job duties. (Minutes, at p. 3:2.) The WCJ found applicant's testimony not credible because of a "lack of contemporaneous medical reporting by a treating physician from 12/5/2022 thru 4/15/2024 addressing symptoms flowing from the performance of regular duties thereby causing deterioration of the applicant's physical condition." (Opinion on Decision, at p. 4.) However, applicant had been released by his primary treating physician and was precluded from obtaining a new primary treating physician until such time as he obtained a QME evaluation. Insofar as applicant wished to challenge his former PTP's determination that applicant could return to work in an unmodified capacity, applicant's recourse was to obtain a QME pursuant to section 4061 and 4062. Thus, we are not persuaded that the lack of contemporaneous medical reporting is a reasonable basis to find applicant's trial testimony not credible.

The WCJ also finds the QME reports are not substantial medical evidence for failing to adequately address applicant's interim medical history between being released by Dr. Tenison on December 5, 2022, and the QME evaluation in October 19, 2023. (Opinion on Decision, at p. 4.) However, given our discussion above of why applicant was required to comply with sections 4061 and 4062 to challenge his TTD status, we are not persuaded that the lack of interim discussion

renders the QME reporting insubstantial. To the contrary, the QME's reporting identifies work restrictions based on an applicant's *current symptoms and clinical presentation*. (Ex. 2, Report of Ogoegbunam Agubuzu, M.D., dated December 21, 2023, at p. 10.) We also note that the QME is authorized and required to address periods of temporary disability pursuant to WCAB Rule 10682 (Cal. Code Regs., tit. 8, § 10682(b)(8) [Medical reports should include where applicable … [o]pinion as to the nature, extent and duration of disability and work limitations, if any."].)

Following our independent review of the record occasioned by applicant's Petition, we are persuaded that the QME reporting of Dr. Agubuzu reasonably establishes that applicant was capable of returning to work but required modified duties as of December 21, 2023, the date of the QME's second report. Pursuant to *Huston, supra,* 95 Cal.App.3d 856, 868, the burden of proof shifted to the employer to establish that work was available and offered. Here, we discern no such evidence in the record. Consequently, "the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Id.* at p. 868.)

However we do not find that the evidence supports the entire period of TTD claimed. WCAB Rule 9785(f)(8) (Cal. Code Regs., tit. 8, § 9785(f)(8)) provides that when continuing medical treatment is provided by the primary treating physician, a progress report shall be made no later than forty-five days from the last report. We note that here, the record reflects no designation of a PTP and no PTP reporting during the claimed period of temporary disability. Applicant has not satisfied the burden of proof necessary to support an award beyond an initial period of 45 days. (Lab. Code, § 5705; *Huston, supra,* 95 Cal.App.3d 856, 868.) Accordingly, we will grant applicant's Petition, rescind the F&A, and substitute new Findings of Fact that applicant is entitled temporary disability for a period of 45 days commencing December 21, 2023, and issue a corresponding award of benefits less attorney fees.

We also write to note our disagreement with the assertion in the Opinion on Decision that "it is not the duty of the WCJ to develop the record when a party fails to meet its burden of proof by failing to introduce competent evidence." (Opinion on Decision, at p. 5.) "It is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence." (*Kuykendall v. Workers Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264, 269].) We are thus unable to concur with the statement made by the WCJ because "the principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in

connection with workers' compensation claims." (*Tyler v. Workers Compensation Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

A finding of the Workers' Compensation Appeals Board (WCAB) must be supported by substantial evidence in light of the entire record, and a finding by the WCJ that is not supported by substantial evidence will be rejected by the Appeals Board upon reconsideration. (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [54 Cal.Comp.Cases 349]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal. 3d 627 [35 Cal.Comp.Cases 16]; *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

Accordingly, we will rescind the F&O and substitute new findings of fact that applicant is entitled to temporary total disability for a period of 45 days commencing December 21, 2023, at the weekly rate of $545.31, less attorney fees of 15 percent payable to Occupational Injury Law Center.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of August 13, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of August 13, 2024 is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Jose Medina sustained injury arising out of and in the course of employment to his right wrist while employed as a dairy worker by Foster Dairy Farms on August 10, 2022.
2. Applicant's earnings were $817.97 per week, warranting a weekly temporary disability rate of $545.31.
3. Applicant is entitled to temporary total disability for a period of 45 days commencing December 21, 2023.
4. The reasonable value of services rendered by applicant's counsel is 15 percent of the indemnity awarded herein.

AWARD

AWARD IS MADE in favor of **JOSE MEDINA**, against **FOSTER DAIRY FARMS**, permissibly self-insured, of:

(a) Temporary Total Disability for a period of 45 days commencing December 21, 2023, in the weekly amount of $545.31, less attorney fees of 15 percent of the total unpaid, accrued indemnity, payable to Occupational Injury Law Center, in an amount to be determined by the parties with jurisdiction reserved to the WCJ in case of dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 7, 2024

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

JOSE MEDINA
OCCUPATIONAL INJURY LAW CENTER
SHAW LAW ASSOCIATES

SAR/abs

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