**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**LUIS RAMIREZ DE PAZ, *Applicant***

**vs.**

**PRIORITY BUSINESS SERVICES, INC., dba PRIORITY WORKFORCE, Administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ15780886**
**Marina del Rey District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the 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, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the August 14, 2024 Findings of Fact and Award.

Preliminarily, we note that 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.

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

> (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."

Here, according to Events, the case was transmitted to the Appeals Board on September 17, 2024 and 60 days from the date of transmission is Saturday, November 16, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, November 18, 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 17, 2024, and the case was transmitted to the Appeals Board on September 17, 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 17, 2024.

Turning to the merits and for the reasons stated in the Report, we agree with the WCJ that the opinion of panel qualified medical evaluator (PQME) Lee Silver, M.D., is substantial medical

[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.

evidence supporting a finding of temporary disability. (*Hegglin v. Workers' Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions].)

Finally, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.) We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the August 14, 2024 Findings of Fact and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 14, 2024 Findings of Fact and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

* * *

2. It is found that, in the absence of a proper offer of modified work, applicant was temporarily totally disabled during the period of December 16, 2023 through June 26, 2024, and continuing, subject to Labor Code section §4656, and entitling him to TTD/TPD benefits at the weekly rate of $576.50, less reasonable attorney's fees set forth under Findings of Fact 3, less credit for amounts earned from January 2024 and continuing under Labor Code section 4654, with jurisdiction reserved at the trial level if there is any dispute.

* * *

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 18, 2024**

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

**LUIS RAMIREZ DE PAZ**
**LESTER J. FRIEDMAN**
**BOBER, PETERSON & KOBY**

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

**REPORT AND RECOMMENDATION**
**ON PETITION FOR RECONSIDERATION;**
**NOTICE OF TRANSMITTAL TO THE WCAB**

## I
## INTRODUCTION

| | |
|---|---|
| Date of Injury: | January 15, 2022 |
| Age on DOI: | 39 |
| Occupation: | Packer/warehouse worker |
| Parts of Body Injured: | Low back |
| Identity of Petitioner: | Defendant, Priority Business Services, Inc. dba Priority Workforce |
| Timeliness: | The petition was timely filed on September 3, 2024 |
| Verification: | The petition was verified |
| Date of Award: | August 14, 2024 |
| Petitioner's Contentions: | Petitioner contends that this WCJ erred in finding the following:<br>1.) Applicant is not MMI<br>2.) PQME Dr. Silver reporting to be substantial medical evidence in support of a TTD finding<br>3.) Applicant is entitled to TTD and no modified work was offered to applicant<br>4.) The Order of Temporary Disability Benefits fails to take into account Applicant's earned income during the disputed period. |

## II
## JURISDICTIONAL FACTS

The relevant facts are as follows: Applicant, Luis Ramirez De Paz, while employed on January 15, 2022, as a packer/warehouse worker, Occupational Group Number 460, at Los Angeles, California, by Priority Business Services, Inc., dba Priority Workforce, sustained injury arising out of and in the course of employment to the low back. (MOH/SOE, p. 2, lines 3-6). The matter commenced trial on June 26, 2024, on the issue of temporary disability, with the employee claiming the following period: December 16, 2023, through June 26, 2024, and continuing, subject to the 104 week cap per the Labor Code and less attorney fees from period of temporary disability. Defendant argued no temporary disability was owed because defendant offered alternative work on January 4, 2024. (MOH/SOE 6/26/24 p. 2, lines 19-24). The parties submitted documentary

evidence, and the Applicant was the only witness to testify at trial. After testimony, the Parties requested time to submit post-trial briefs. The matter was submitted on July 16, 2024.

The undersigned WCJ issued her F&A on August 14, 2024. Defendant filed a timely Petition for Reconsideration on September 3, 2024. Applicant has not yet filed an Answer as of the date of this Report and Recommendation.

For the following reasons the Petition for Reconsideration should be denied in part and granted in part: It should be granted in part to allow credit for earned income during the disputed period and denied as to the finding of Applicant not yet reaching MMI status, that no alternative work duty was offered, and that applicant is TTD.

## III
## DISCUSSION

### *A. PETITIONER ARGUES THAT THE ORDER FOR TEMPORARY DISABILITY BENEFITS FAILS TO TAKE INTO ACCOUNT APPLICANT'S EARNED INCOME DURING THE DISPUTED PERIOD.*

Petitioner is correct in asserting that Findings of Fact #2 fails to address and account for the fact that Applicant was receiving partial wages from January 2024 through the present by reselling goods at a swap meet, making about $200 per week (MOH/SOE 6/26/24 p. 5 lines 21-23). To that extent the award should be changed to reflect credit for these earnings.

The Remainder of the Petition should be denied for the following reasons:

### *B. PETITIONER ARGUES APPLICANT WAS PROPERLY FOUND MMI BY PTP DR. ELIAS ON 8/3/2023*

Petitioner asserts that Applicant was properly found MMI by PTP Dr. Elias on August 3, 2023, and that this court's finding of TTD status is not supported by the evidence and was made in violation of various provisions of the Labor Code related to what constitutes an MMI finding. Defendant's argument confuses MMI status and treatment issues. *Denial of treatment does not control disability status and as such this court cannot rely upon an MMI finding whose sole basis is that medical treatment is denied by UR because a UR denial is not an actual assessment of applicant's medical condition.* The PQME Dr. Silver, has addressed applicant's medical condition and finds applicant not yet MMI. UR denials are not a finding of MMI status as those doctors have not examined the applicant. Thus, UR denial of treatment cannot be a determination of MMI status, but instead is focused solely on treatment modality.

This court finds PQME Dr. Silver to be substantial medical evidence over PTP Dr. Elias. Based on applicant's credible testimony and the existing medical record, it is clear applicant's condition is not well stabilized. The earliest medical report provided as evidence by the parties is dated February 2, 2023, by Panel Qualified Medical Examiner (PQME) Dr. Lee Silver (Exhibit 5). In that supplemental report PQME Dr. Silver reviews correspondence and an MRI study of the lumbar spine of July 19, 2022. In his discussion he states that Applicant is not yet Permanent and Stationary (P&S) or at a Maximum Medical Improvement (MMI) (Exhibit 5 p. 2). On June 15, 2023, PQME Dr. Silver issued a supplemental report reviewing a variety of records. In his Discussion section Dr. Silver noted that the EMG and nerve conduction studies are normal. However, he observed that applicant has complaints of lumbosacral radiculopathy and positive MRI findings at the L4-L5 and L5-S1 levels including stenosis. Applicant was not MMI or P&S (Exhibit 4 p.2).

On August 3, 2023, Primary Treating Physician (PTP) Dr. Ramy Elias saw applicant for P&S evaluation. In said report Dr. Elias notes that applicant has exhausted conservative treatment and is not interested in surgical treatment and thus will be discharged with permanent restrictions. Dr. Elias's diagnosis of applicant was that of a L4-5-disc herniation with right leg radiculopathy (Exhibit X3). Dr. Elias does not state that applicant is well stabilized, nor does he explain the reason for finding applicant MMI other than applicant exhausting all conservative treatment and not wanting surgery. In review of the subsequent reporting, it is evident that applicant's condition is not well stabilized since he is, in fact, getting worse with diagnosis of *acute left lumbar radiculopathy* just 3 months after Dr. Elias's MMI report (Exhibit X2 p. 4).

On May 2, 2024, PQME Dr. Silver issued a supplemental report in which he reviews correspondence, Dr. Elias's Deposition Transcript, MRI of the Lumbar Spine dated July 19, 2022, UR and IMR denials, and updated medical reports from Dr. Elias and Dr. Mattar. Under his discussion section, Dr. Silver states that he has now had the opportunity to review the deposition testimony of Dr. Elias and the medical record that includes the more recent records pertaining to the applicant's evaluation and treatment. He disagrees with Dr. Gart on the UR denial as Dr. Silver explains that, based on the MRI and the subjective complaints, two dermatomal levels of L4-L5 and L5-S1 are involved. In his most recent examination of the applicant, he found a significant atrophy in the right calf. Given the entirety of the file, he believes applicant is a candidate for injections and surgery and therefore not yet MMI unless the parties stipulate to not proceed with

additional intervention at this time (Exhibit 1). In this court's opinion, Dr. Silver better explains how applicant's condition is not well stabilized and, in fact, getting substantially worse.

Additionally, petitioner argues that the facts and the law do not support this court's finding that Dr. Elias has an erroneous interpretation of what MMI means, pursuant to CCR 10152 and CCR 9785(a)(8). Petitioner focuses the argument on the claim that applicant's worsening does not arise to the level of a *substantial change* warranting temporary disability and the fact that Applicant may still require ongoing treatment does not change the MMI status. To support this argument Petitioner cites Industrial *Indem.Exchange v. Industrial Acci.Com., 14 Cal.Comp. Cases 25* and *County of Sacramento v. WCAB, 47 Cal. Comp. Cases 750*. This last case is an unpublished and uncitable decision. As to *Indem Exchange v. Industrial Acci.Com*, it's distinguishable from the present matter. In *Indem Exchange* applicant had a small piece of steel lodged in the wall of his heart between the right and left ventricles. Doctors opined it was impossible to remove the metal as the chances of surviving such an operation would be only about 5 to 10 percent. As such, all doctors that saw applicant opined and agreed that his condition would worsen as there was no treatment available to cure the effects of the injury. *In the instant case, the applicant's condition is not well stabilized and there are competing opinions as to the status of disability of the Applicant*.

Further, Petitioner argues that reliance on the PQME reporting, which fails to consider the utilization review determinations, is inappropriate. He asserts that PQME Dr. Silver is making treatment recommendations and rendering opinions outside of his role as the PQME. *This argument confuses the issue of disability status and treatment. The only issue before this court is the status of disability of Applicant*. Both the PTP and PQME were deposed by the parties and asked extensively about their reasons for finding applicant MMI (in the case of the PTP) and not yet MMI (in the case of the PQME). Both doctors expressed their opinions regarding the UR/IMR process, and both continued to stand by their disability status findings. Again, denial of treatment does not control disability status.

Therefore, *this court continues to find that the reporting of PQME Dr. Silver is more persuasive than the reporting of PTP Dr. Elias and applicant is not yet MMI*.

### *C. PETITIONER ARGUES THERE IS NO SUBSTIANTIAL MEDICAL EVIDENCE TO SUPPORT ONGOING TEMPORARY DISABILITY BENEFITS TO APPLICANT*

Petitioner asserts that there is no substantial medical evidence to support ongoing temporary disability benefits to the applicant for the period of December 16, 2023, through June 26, 2024, and continuing. It is up to the trier of fact to determine substantiality of the medical reports. This court found the medical reports of PQME Dr. Silver to be substantial medical evidence and more persuasive than the reporting by PTP Dr. Elias. PQME Dr. Silver examined the Applicant on two occasions; has reviewed all medicals, diagnostic studies; was deposed by the parties; and continues to opine that applicant is not yet MMI. During his deposition testimony, PQME Dr. Silver stated he considers applicant to be temporarily partially disabled (TPD), but he states that whether applicant is entitled to TTD benefits is more of a legal question (Exhibit 6 p.22 lines 1-3). Therefore, this court has found that, in the absence of applicant's work restrictions being accommodated by the employer, the applicant is TTD.

### *D. PETITIONER ARGUES THAT APPLICANT IS NOT ENTITLED TO TEMPORARY DISABILITY BENEFITS FOLLOWING HIS FAILURE TO APPEAR FOR HIS ALTERNATIVE WORK ASSIGNMENT ON JANUARY 4, 2024.*

Petitioner asserts that Applicant is not entitled to TTD benefits due to his failure to appear for his alternative work assignment on January 4, 2024. The applicant credibly testified as to his address, which conforms to the one on the official address record. He testified that he lives in an apartment building of about 60 units (Minutes of Hearing and Summary of Evidence page 5 lines 9-10). He additionally testified he does not recall receiving the Offer of Alternative Work neither in English nor Spanish. He stated that neither letter has his correct address and he did not receive either letter (Minutes of Hearing and Summary of Evidence page 5 lines 12-15).

The Offer of Modified/Alternative Duty dated 01/04/2024 addressed to applicant has the incorrect city and no apartment number is indicated (Defendant Exhibit A Pg.3). Additionally, the proof of service attached to this offer of Modified/Alternative Duty is dated 01/19/2024 and it only has Applicant Attorney's address (Defendant Exhibit A Pg.1). Therefore, this court finds that there was no proper service of the offer of Modified/Alternative Duty to applicant. In his argument petitioner implies Applicant Attorney, and not Defendant, has a duty to inform applicant of the modified work offer. However, Defendant fails to provide case law or labor code sections to support said implication.

Based upon the credible testimony of the applicant, this court found and continues to find that no proper offer of alternative work was served on applicant. Therefore, applicant is TTD.

## IV
## RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in part and granted in part and the findings of fact #2 regarding credit for earned income should be **AMENDED** to read as follows:

> 2. It is found that, in the absence of a proper offer of modified work, Applicant was temporarily totally disabled during the period of December 16, 2023, through June 26, 2024, and continuing, subject to LC §4656, and entitling him to TTD/TPD benefits at the weekly rate of $576.50, less reasonable attorney's fees set forth under #3, less credit for amounts earned from January 2024 and continuing under LC 4654, with jurisdiction reserved.
>
> The Remainder of the Petition should be denied for the reasons stated above.

DATE: 9/17/2024

**Paulina S. Ozeda**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE