WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDRA GIRON GUTIERREZ, *Applicant*

vs.

VENSURE HR, INC.;
CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ16961549
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of 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, we will deny reconsideration.

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 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 17, 2024, and 60 days from the date of transmission is Sunday, September, 15, 2024. The next business day that is 60 days from the date of transmission is Monday, September 16, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, September 16, 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 17, 2024, and the case was transmitted to the Appeals Board on July 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 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 17, 2024.

Accordingly, we deny the Petition for Reconsideration.

[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.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

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

September 16, 2024

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

SANDRA GIRON GUTIERREZ
LAW OFFICE OF FRED TANENBAUM
DABBAH & HADDAD

DLM/oo

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

I.

INTRODUCTION

1. **Applicant's occupation:** Hostess
2. **Applicant's age at injury:** 50
3. **Date of injury:** 11/11/2021
4. **Part(s) of body injured and the manner in which the injury occurred or was alleged to have occurred:** Slip and fall injury to left ankle, right knee and low back
5. **Identity of petitioner(s):** Applicant
6. **Timeliness:** The petition was timely filed as it was received on July 7, 2024.
7. **Verified:** Yes
8. **Date of Decision:** June 24, 2024
9. **Answer Filed:** No – not at this time.
10. **The petitioner(s)'s contentions:** That the undersigned's decision to find the applicant P&S/MMI per the PQME is erroneous and that the applicant continues to be temporarily partially disabled and as such entitled to temporary total disability benefits.

II.

FACTS

The matter came to trial before the undersigned on June 19, 2024 with respect to the applicant's assertion that she is not P&S/MMI by her doctors and as such remains temporarily partially disabled and entitled to temporary total disability benefits.

Applicant, Sandra Giron Gutierrez, was employed as a hostess by defendant, Vensure HR, when she sustained an admitted injury on November 11, 2021. The applicant injured her left ankle, right knee, low back as a result of a slip and fall. The applicant was relegated to sedentary work and continued to work as a receptionist for her employer. During COVID, the restaurant closed and then reopened and then finally closed permanently in November, 2022. The applicant received unemployment benefits from EDD only – no disability benefits were paid by EDD. The parties confirmed this on the day of trial.

At the prior Expedited Hearing held on 3/28/2024, the parties informally resolved retro-TTD *vis a vis* a Stip/Order/Award and stated: "Defendants agree to issue retro-TTD from 11/15/2022 through 7/31/2023, minus the unemployment lien amount, and 15% to AA in attorneys fees. Payable within 2 weeks. Applicant reserves jurisdiction over the remaining TTD subject to cap." The parties relied

upon the PQME report (Court Exhibit X, Osep Armagan, MD) who found the applicant P&S/MMI on 7/31/2023 with a period of temporary partial disability prior thereto.
Applicant filed for another Expedited Hearing on the issue of TTD from 8/1/2023 and continuing. The applicant introduced the following evidence:

Applicant's Exhibit 1 – Dr. Deborah Castenda dated 8/3/2023- a few days after the PQME exam, the applicant went to see Dr. Castaneda for her ankle. The applicant told the doctor about her evaluation with the PQME and the tests he suggested. Dr. Castaneda did not indicate that the applicant was TTD or TPD. The applicant could return to work with restrictions of sedentary work.
Applicant's Exhibit 2 – Dr. Michael Bahk dated 8/14/2023 – a few days after seeing Dr. Castenada, the applicant saw Dr. Bahk for her knee. Dr. Bahk did not find the applicant either TTD or TPD. The applicant could work modified duties of sedentary work. A knee MRI was recommended.
Applicant's Exhibit 3 – Dr. Michael Bahk dated 9/18/2023 – the applicant saw the knee doctor again and the doctor did not find the applicant either TTD or TPD and indicated she could perform modified duties of sedentary work.

Applicant's Exhibit 4 – Dr. Michael Bahk dated 3/03/2024 – after a several months gap, the applicant returned to Dr. Bahk who discussed the knee MRI and indicated the applicant was working modified duties and did not indicate applicant was either TTD or TPD. A torn meniscus was discussed and no surgery was scheduled.

Applicant's Exhibit 5 – Dr. Joseph Mandelis dated 3/5/2024 – this is the spine consult. This is the only report that indicated the applicant was TPD and not MMI. However, this is a 2 page report and the first page indicated that the work status is deferred to the PTP who is not known and was not identified by the parties (See Minutes of Hearing/Summary of Evidence, June 24, 2024 wherein no PTP was identified.) Applicant was to return in 6 weeks. A narrative was to follow. Applicant did not introduce a narrative report. Applicant did not return in 6 weeks based upon the evidence.

Applicant's Exhibit 6 – Dr. Michael Bahk/Jiami Uy dated 5/20/2024. Applicant was neither TTD or TPD and okay to work modified duties.
Applicant's Exhibit 7 and 8 are MRI's of the right knee dated 10/25/2023 and low back dated 1/09/2024.

Not one of the doctors have identified themselves as the applicant's PTP nor have their reports comported with the Labor Code and associated regulation requirements.

Defendant relied on Court Exhibit X – PQME report of Osep Armagan dated 7/31/2023. In that report, the PQME reviewed the evidence and indicated the applicant was MMI/P&S on the date of the exam. The PQME did not find any period of TTD but did find a period of TPD. Dr. Armagan indicated in his report that the applicant informed him that she was able to work although she wanted to wait. The PQME provided PD for her back and work restriction as well as future medical care. As stated in the Opinion, the "PQME indicated that the applicant told him that she continued to work light duty from 12/2021 until 11/15/2022 when the employer's business closed. Thereafter she received EDD unemployment. The applicant indicated to the PQME that she is able to return to work but she wanted to wait to start a new job until her leg felt better. The PQME indicated that

the applicant had reached P&S/MMI status on that day and provided work restrictions as well as future medical care to include MRI's but no surgery."

III.
CONTENTION
APPLICANT ASSERTS THAT SHE IS NOT YET P&S AND AS SUCH IS ENTITLED TO TTD

Applicant asserts that the medical evidence that was submitted shows a continuing entitlement to TTD. The undersigned reviewed the evidence and indicated that the applicant did not meet their burden of proof. The party with the affirmative on the issue has the burden of proof. *Tyler, McClune and McDuffie* does not apply as the PQME report is substantial. The reports submitted by the applicant did not demonstrate a change in the applicant's condition to merit further review by the PQME as the PQME already indicated that the MRI's should be provided under future medical.

Applicant proceeded at their own peril with "reports" from three different doctors that did not contain a correct history nor did they review any evidence. None of the reports supported a finding of TTD. Not one of the doctors identified who the treating physician is in this case. At trial, the parties did not stipulate to the identity of the PTP. Applicant did not treat with any of the doctors on a regular basis. There is a huge time gap between Applicant's Exhibits 3 and 4 of several months – from September 2023 to March, 2024. Further, even if surgery was discussed with the applicant, no surgery has been requested or scheduled. In addition, no doctor ever deemed the applicant TTD in the entire time post injury in November, 2021. The PQME found no periods of TTD and deemed the applicant permanently *partially* disabled until the date of MMI. The medical evidence in this case has always indicated that the applicant could return to work. Applicant indicated to the PQME that she could return to work but wanted to wait. That statement was not rebutted by the applicant at trial. As was stated in the Opinion, applicant did not meet their burden of TPD to shift to defendant to show an offer of work was made under the "odd lot" doctrine.

Maximum medical improvement/permanent and stationary status is defined as the "point when the employee has reached maximum medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." CCR section 9785(a)(8). In this case, we have the 20-20 vision of hindsight as in the nearly one year since the PQME has evaluated the applicant, the applicant has not had any substantial change to merit TTD/TPD benefits. No surgery has been requested or scheduled. Second, applicant has attended medical appointments on a sporadic and meandering basis with various doctors none of whom identify themselves as the PTP in this case. Third, not one of the medicals has ever placed the applicant on TTD. Only one report from a spine consult places the applicant on temporary *partial* disability and defers to the PTP whose identity is unknown. In addition, that report stated that a narrative would follow and it did not. None of the reports contains any record review and they have the incorrect work history. None of the doctors provided any type of rebuttal to the PQME report. Without a demonstrable change or substantial evidence of TPD, additional benefits are not due. Without applicant meeting their burden of proof, the burden did not shift to defendant. The PQME was deemed substantial in this case. The PQME reviewed the medical evidence that was obtained at the time including Dr. Molnar's EMG study. The PQME has the correct history of the applicant's injury including work. The PQME found the applicant was MMI on the date of the

exam with work restrictions. Additional testing was provided for under future medical care. Applicant obtained the testing but nothing further was done, i.e. surgery was never requested or provided. The applicant's testimony indicating that she told the spine consult that she wanted an injection before determining if she wanted surgery was not credible nor does it have any impact as to whether the applicant is TPD.. The undersigned followed the opinion of the PQME in this case. No evidence of TTD was provided nor did applicant provide any substantial evidence of TPD in this case. The applicant did not meet their burden of proof and applicant is P&S/MMI and able to work with work restrictions.

IV.

CONCLUSION

It is respectfully requested that the petition for reconsideration be denied.

Dated: July 17, 2024

DIANE BANCROFT
Workers' Compensation
Administrative Law Judge