

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

RAUL UC, *Applicant*

vs.

**GCU TRUCKING and ZURICH NORTH AMERICA, administered by GALLAGHER
BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ10692197
Stockton District Office**

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

Defendant seeks reconsideration of the Findings of Fact, Award and Orders (F&A), issued by the workers' compensation administrative law judge (WCJ) on November 23, 2020, wherein the WCJ found in pertinent part that applicant was temporarily totally disabled for the period from August 15, 2016, through February 13, 2018, that the injury caused 28% permanent disability, and that no attorney fees had been paid.

Defendant contends the trial record does not contain substantial evidence that supports an award of temporary disability indemnity for the period from August 15, 2016, through February 13, 2018, and that the issue of applicant's attorneys' fees was submitted for decision and must be awarded.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be granted for the limited purpose of amending the Findings to find that reasonable attorney's fees are: \$5,165.00 based on the permanent disability awarded to applicant, and in an amount equal to 15% of the temporary disability indemnity awarded. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and affirm the F&A except that we will amend the F&A to find that applicant's condition became permanent and stationary/reached maximum medical improvement on February 13, 2018, and

defer the issue of temporary disability (Finding of Fact 7); to add a finding that attorney's fees are to be awarded in the amount of \$5,165.00, and to defer the issue of additional attorney fees pertaining to an award of temporary disability indemnity. (Finding of Fact 13). Based thereon we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his neck, bi-lateral shoulders, and mid-back, and in the form of headaches, as a result of an August 15, 2016 motor vehicle accident, that occurred while he was employed by defendant as a truck driver.

David Rollins M.D., was initially applicant's primary treating physician (PTP) and subsequently Daniel B. Dunlevy, M.D., was applicant's PTP. (see Def. Exh. B; App. Exh. 1.)

On February 13, 2018, applicant was evaluated by physical medicine and rehabilitation qualified medical examiner (QME) Tulsidas R. Gwalani, M.D. (Joint Exh. 104, Tulsidas R. Gwalani, M.D., March 12, 2018.) Dr. Gwalani examined applicant, took a history, and reviewed the medical record [record review pp. 5 – 17, missing pp. 12 – 13]. The diagnoses included cervical disc protrusion at levels C5-6 and C6-7 with dorsal rami [branch of spinal nerve] involvement and Dr. Gwalani concluded that applicant's condition had reached maximum medical improvement/permanent and stationary (MMI/P&S) status as of the date of the examination, February 13, 2018. (Joint Exh. 104, pp. 17 – 18.)

Applicant was re-evaluated by Dr. Gwalani on November 27, 2018. (Joint Exh. 102, Dr. Gwalani, December 17, 2018.) After re-examining applicant and reviewing the interval medical record, Dr. Gwalani stated:

It is my opinion that he has achieved maximum medical improvement (MMI – PR-4) for neck, headache, upper back, mid back, low back and shoulders as there may be no appreciable improvement or decline in his condition in near foreseeable future. He should be considered permanent and stationary as of 02/13/18. He has appropriate temporary disability until 02/13/18.
(Joint Exh. 102, p. 10.)

The parties proceeded to trial on October 29, 2019. Both parties "claimed" the permanent & stationary date to be February 13, 2018, "based on Dr. Gwalani" but the issue of temporary disability was disputed. (Minutes of Hearing and Summary of Evidence (MOH/SOE) October 29,

2019, p. 2.) The WCJ made a Finding of Fact that the reports from Dr. Dunlevy and Dr. Gwalani were not substantial evidence on the issues of temporary disability and permanent disability. The parties were ordered to further develop the record. (MOH/SOE, p. 4.)

On January 24, 2020, Dr. Gwalani submitted a supplemental report, wherein he stated:

In my initial evaluation report dated 02/13/18, I declared patient permanent and stationary. I also reported in my first report dated 03/12/18 on page 18 of 22 that patient has appropriate temporary disability until 02/13/18. Patient should be considered permanent and stationary as of 02/13/18. ¶ With reasonable medical probability, in my opinion, patient would be considered temporarily disabled until 02/13/18 unless primary treating physician has recommended him to return to work with modified job duties.

(Joint 105, Dr. Gwalani, January 24, 2020, p.2.)

The parties returned to trial on July 14, 2020. The stipulations and issues previously stated in the October 29, 2019 MOH/SOE remained unchanged except that the temporary disability issue was “clarified” and the parties provided their proposed permanent disability ratings. (MOH/SOE, July 14, 2020, p. 2.) The supplemental report from Dr. Gwalani was identified as an exhibit but it had not been filed. On September 21, 2020, defendant filed Dr. Gwalani’s January 24, 2020 report. The WCJ ordered the report admitted into evidence as Joint Exh. 105, and the matter was re-submitted for decision as of September 24, 2020.

DISCUSSION

We initially note that in the Report the WCJ stated that reconsideration should be granted and the F&A should be amended to award applicant’s attorney fees equal to 15% of the permanent disability indemnity award (\$5,165.00) and 15% of the temporary disability indemnity awarded. We agree with the WCJ as to the fees based on the permanent disability award, but for the reasons discussed below we will defer the issue of fees based on temporary disability indemnity.

As stated above, in his first report Dr. Gwalani concluded that applicant’s condition had reached MMI/P&S status as of February 13, 2018. (Joint Exh. 104, p. 18.) After re-examining applicant approximately ten months later, Dr. Gwalani reiterated his earlier opinion that applicant had reached MMI/P&S status on February 13, 2018. At the October 29, 2019 trial the WCJ found that the reports from Dr. Dunlevy and Dr. Gwalani were not substantial evidence on the issues of temporary disability and permanent disability. (MOH/SOE) October 29, 2019, p. 4.) Neither party sought review of the Finding.

In light of the fact that both parties asserted the P&S date was February 13, 2018, and that Dr. Gwalani repeatedly stated that applicant had reach P&S/MMI status as of February 13, 2018, we find that applicant's condition reached P&S/MMI status as of February 13, 2018. However, the fact that an injured worker's condition was permanent and stationary is not, in and of itself, evidence that the injured worker was temporarily totally disabled up to the P&S/MMI date.

“A temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].) A determination regarding whether an applicant is permanent and stationary or temporarily disabled typically requires medical evidence. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 867 [44 Cal.Comp.Cases 798]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

Here, Dr. Gwalani stated that applicant would be considered temporarily disabled until February 13, 2018, *unless* the, “... primary treating physician has recommended him to return to work with modified job duties.” (Joint 105, p.2.) As noted above, the WCJ previously made a Finding of Fact that the reports from Dr. Dunlevy and Dr. Gwalani, submitted at the October 29, 2019 trial, were not substantial evidence on the issue of temporary disability. Neither party sought removal regarding that finding and the issue was not raised in the Petition. That finding has become final and as a result, the reports from Dr. Dunlevy, the PTP, are not an appropriate basis for making a finding as to the issue of temporary disability. Review of the trial record indicates that there is no medical evidence addressing the issue of whether applicant had been recommended to return to work with modified duties, or whether defendant could have provided modified work. Thus, the record does not contain substantial evidence as to the issue of temporary disability.

It has long been established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter it is appropriate that we defer the issue of temporary

disability and return the matter to the WCJ for development of the record. Also, although it appears that the WCJ found applicant's condition was P&S as of February 13, 2018, there is no specific Finding as to that issue and we will amend the F&A to include that Finding.

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to find that applicant's condition became permanent and stationary/reached maximum medical improvement on February 13, 2018, and defer the issue of temporary disability (Finding of Fact 7); to add a finding that attorney's fees are to be awarded in the amount of \$5,165.00; and to defer the issue of additional attorney fees pertaining to an award of temporary disability indemnity. (Finding of Fact 13). Based thereon we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact, Award and Orders issued by the WCJ on November 23, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 23, 2020 Findings of Fact, Award and Orders, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

7. Applicant's condition became permanent and stationary/reached maximum medical improvement on February 13, 2018; the issue of applicant's temporary disability status is deferred.

* * *

13. Based on the permanent disability awarded herein, applicant's attorney has performed services with a reasonable value of \$5,165.00; the issue of attorney fees based on an award of temporary disability indemnity is deferred.

AWARD

A. The award of temporary disability indemnity benefits is deferred pending development of the record.

B. Applicant's 28% PD entitling him to 118.75 weeks of PD indemnity, \$290.00 per week starting February 13, 2018, less PD advances and less attorney fees in the amount of \$5,165.00; the issue of additional attorney fees based on an award of temporary disability indemnity is deferred.

* * *

IT IS FURTHER ORDERED that the matter is RETURNED to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 16, 2021

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

**RAUL UC
RATTO LAW FIRM
STOCKWELL, HARRIS, WOOLVERTON, HELPHREY**

TLH/pc

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