

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

DARRELL TOLE, *Applicant*

vs.

**ZURICH AMERICAN INSURANCE COMPANY, administered by COTTINGHAM AND
BUTLER CLAIMS SERVICES, for its insured BIAGI BROTHERS INCORPORATED,
*Defendants***

**Adjudication Number: ADJ16120106
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant filed a Petition for Reconsideration (Petition) of the Findings, Award and Orders (FA&O) issued July 2, 2025, wherein the workers compensation judge (WCJ) found a closed period of temporary disability.

In the Petition, defendant asserts finding temporary disability requires contemporaneous medical reporting.

The WCJ's Report and Recommendation (Report) recommends the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons discussed below and for the reasons stated in the WCJ's Report, we will deny reconsideration.

I.

Former Labor Code section 5909¹ 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. (Former Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

- (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.

(Lab. Code, § 5909.)

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 July 29, 2025, and 60 days from the date of transmission is Saturday, September 27, 2025. The time limit is also extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, September 27, 2025, is a Saturday which by operation of law means this decision is due by the next business day, which is Monday, September 29, 2025. This decision issued by or on September 29, 2025, 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 shall be notice of transmission.

According to the proof of service, the Report was served on July 29, 2025, and the case was transmitted to the Appeals Board on July 29, 2025. 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 July 29, 2025.

II.

As found by the WCJ in the July 2, 2025, FA&O, applicant, while employed on February 18, 2022, by defendant as a truck driver, sustained injury to the bilateral knees.

“Defendant asserts that the WCJ erred in awarding temporary disability beyond Applicant’s August 3, 2023 MMI date through July 31, 2024 given that there is no contemporaneous medical evidence documenting Applicant’s ongoing entitlement to temporary disability.” (Petition, page 4, lines 2-4.) Defendant does not otherwise challenge the July 2, 2025, FA&O.

Defendant cites as authority for its position two panel decisions, both of which are easily distinguished from the present case.²

In *Howland v. Dep’t of Corr. Cal. Inst. For Men*, 2019 Cal. Wrk. Comp. P.D. LEXIS 472, the panel found that for a 1993 date of injury the prospective part of an award of temporary disability was not supported by substantial evidence when the prospective temporary disability period was after the Agreed Medical Examiner (AME) reported in January and February of 2019, and applicant’s treating physician last saw the applicant on July 2, 2019. The panel found no support for an award of temporary disability going beyond August 16, 2019, which was forty-five days from when applicant last saw the treating physician, because when continuing medical treatment is provided by a primary treating physician, a progress report shall be made no less than forty-five days from the last report. (Cal. Code Regs., tit. 8, § 9785(f)(8).)

In *Moore v. L.A. Clippers*, 2013 Cal. Wrk. Comp. P.D. LEXIS 567, a split panel found there was not substantial evidence of temporary disability stating “[h]ere, there is no contemporaneous medical evidence that applicant was temporarily disabled from October 11, 2004 through December 10, 2004. Dr. Einbund [AME] did not adequately explain how he determined applicant was temporarily disabled given the sparse evidence and applicant's lack of medical treatment during that time period.” The determining factor in *Moore* was the AME’s failure to explain the temporary disability in light of the facts of the case. Dissenting Commissioner Brass

² While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board en banc)].

would have upheld the temporary disability period stating “[a]pplicant's credible testimony and the medical opinion of the AME are substantial evidence that applicant sustained a period of temporary disability during a two month period after his release by the Clippers.”

In *Howland* and *Moore* the issue was not a lack of contemporaneous medical reporting, it was the lack of substantial evidence in the form of medical opinion to support the overturned findings.

In the present case there is a closed period of retroactive temporary disability occurring before the Panel Qualified Medical Examiner (PQME), chiropractor Michaels, evaluated the applicant on August 1, 2024. (Joint Exhibit 6.) The PQME then subsequently provided a February 1, 2025, supplemental report. (Joint Exhibit 7.)

If the parties have a medical issue such as temporary disability, “the parties, to the extent possible, shall utilize the same medical evaluator who prepared the previous evaluation to resolve the medical dispute.” (See Lab. Code § 4062.3(k) and §§ 4060 to 4062.2.) Here PQME chiropractor Michaels has previously issued reporting dated November 11, 2022, (Joint Exhibits 2 and 4 [duplicates]), and August 31, 2023, (Joint Exhibits 1 and 5 [duplicates]). Further, PQME chiropractor Michael was deposed on July 13, 2023. (Joint Exhibit 3.)

PQME chiropractor Michaels was the proper evaluator to resolve the parties’ medical dispute regarding temporary disability.

As stated by the WCJ in the Report:

In this case, Dr. Michael provided an initial permanent and stationary date for the right knee on August 3, 2023. (Joint Exh. 5.) However, a rating discussion for the left knee was not provided in that report. Thereafter, in Dr. Michael’s report dated August 30, 2024, both knees were found permanent and stationary as of the evaluation date, August 1, 2024. (Joint Exh. 6.) Moreover, additional disability was found for the right knee at that time, along with a new rating for the left knee. Dr. Michael reported, “The patient reports his condition deteriorating with altered gait patterns. It is with reasonable probability that the patient’s condition had *deteriorated* as outlined above.” (Id. p. 8, emphasis added.) Due to the deterioration of applicant’s condition between reporting, the additional impairment assigned, and both knees now being discussed by Dr. Michael, the applicant was most reasonably permanent and stationary on August 1, 2024, not August 3, 2023.

(Report, July 29, 2025, PDF page 4.) The WCJ concluded that “applicant’s testimony also corroborates the medical evidence regarding temporary disability.” (Report, July 29, 2025, PDF page 5.)

It is clear “the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. [citation].” (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].)

Here we agree PQME chiropractor Michaels provided a medical opinion which is reasoned and supported by the medical and testimonial evidence of record, and as such is substantial evidence to support the temporary disability period. In addition, we give 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, 319 [35 Cal.Comp.Cases 500].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2025

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

**DARRELL TOLE
KNOPP PISTIOLAS
MULLEN FILIPPI**

PS/oo

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