WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VINCE MILLER, *Applicant*

vs.

AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA;
OLD REPUBLIC INSURANCE, administered by CCMSI, *Defendants*

Adjudication Number: ADJ17092437
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings of Fact and Order (F&O) of November 14, 2024, wherein the workers' compensation judge (WCJ) found in relevant part that applicant had not yet reached maximum medical improvement (MMI) and was entitled to retroactive temporary disability benefits and attorney's fees for the retroactive benefits. Defendant contends that there was a lack of substantial medical evidence to support the finding of MMI status or entitlement to temporary disability and instead the WCJ should have relied on the qualified medical evaluator (QME)'s medical reporting; and that the WCJ should not have awarded the attorney's fees.

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied on the issue of MMI and temporary disability but granted on the issue of attorney's fees.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&O, and return this matter to the WCJ for further proceedings.

FACTS

Applicant while employed on September 1, 2022, as a field property estimator, by defendant, sustained injury arising out of and in the course of employment to his back and right knee, and claims to have sustained injury to his hips, sleep, and nervous system.

In his Report of January 29, 2024, QME Dr. Graham Purcell, an orthopedic surgeon, found that applicant had reached MMI status as of January 29, 2024. (Jt. Ex. A, Report of QME Dr. Purcell dated 1/29/24, p. 23.) Dr. Purcell confirmed his finding of MMI of January 29, 2024, in his supplemental report of February 21, 2024. (Jt. Ex. C, Supp. Report of QME Dr. Purcell dated 2/21/24, p. 3.)

On March 15, 2024, defendant notified applicant that it was terminating his temporary total disability payments as of January 29, 2024, based on QME Dr. Purcell's finding of MMI. (App. Ex. 4, UR Determination dated 3/15/24, p. 1.) The notice stated that defendant paid benefits from March 20, 2023 to March 3, 2024, and that it included an overpayment of benefits from January 29 to March 3, 2024. (App. Ex. 4, p. 1.)

On April 11, 2024, defendant filed a "Petition for Order Allowing Credit for TTD Overpayment Pursuant to Labor Code §4909 and CCR §10555," seeking credit for the overpayment of temporary total disability benefits for the period from January 29 to March 3, 2024. On May 24, 2024, applicant filed his objection to defendant's petition for credit.

Orthopedic surgeon Dr. Michael Kropf performed an evaluation of applicant's lumbar spine and lower extremity radiculopathy on July 8, 2024. (App. Ex. 10, Report of Dr. Knopf dated 7/8/24, p. 1.) In his Report of July 8, 2024, Dr. Knopf noted that:

> This patient returns for evaluation of his lumbar spine and lower extremity radiculopathy. He is status post two-level laminectomy, L4 to Sl. He has severe disk degeneration at L4-5 and L5-Sl. MRI scan shows neural foraminal stenosis, right side L4-L5 and L5-Sl and left side L5-Sl. We had asked for an epidural steroid injection bilateral at L4-Sl. To date, this has not been approved. We are, therefore, going to go ahead and re-request our findings. Overall, back pain is tolerable at this point. We discussed that in the future he may require lumbar fusion surgery. However, his activity level is fair to good at this point. Follow up will be in approximately 6-8 weeks.

(App. Ex. 10, p. 1.)

In a report dated July 29, 2024 by treating physician Dr. Fariborz Kharrazi, physician assistant Kevin Canlas stated that "Patient to remain temporarily disabled until next visit. Possible MMI next visit." (App. Ex. 5, Report of Dr. Kharrazi dated 7/29/24, p. 2.)

A trial was held on August 7, 2024, on the issues of whether applicant had reached MMI; if applicant was entitled to additional or retroactive total temporary disability benefits; and attorney's fees on any retroactive temporary disability benefits. (8/7/24 Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 2.) The parties stipulated that defendant has paid compensation as follows: temporary partial disability for various rates for the period September 4, 2022 through March 19, 2023; temporary total disability at the rate of $863.20 per week from March 20, 2023 through March 3, 2024; and permanent disability indemnity at the rate of $290 per week from January 29, 2024 and ongoing. (8/7/24 MOH/SOE, p. 2.)

At the trial on August 7, 2024, applicant testified that he is able to drive to visit his father and help him with chores. (8/7/24 MOH/SOE, pp. 4-5.) In the last six months, he has experienced pain and stiffness in his back. (8/7/24 MOH/SOE, p. 5.) He walks for as assigned by his physical therapist and in the past six months, he has walked 1.5 to 2.5 miles a few times per week. (8/7/24 MOH/SOE, pp. 5-6.) He is able to use a computer but has to take a break of about 20 minutes every hour due to stiffness in his back and knees. (8/7/24 MOH/SOE, p. 5.) He felt that his condition has mostly plateaued but has gotten worse in some aspects. (8/7/24 MOH/SOE, p. 6.)

In the Amended F&O issued on November 14, 2024, the WCJ found in relevant part that applicant had not reached MMI, applicant was entitled to retroactive temporary disability benefits, and that applicant's attorney was entitled to attorney's fees on the retroactive temporary disability benefits and for enforcing the benefits. (F&O, p. 2.)

Defendant filed its Petition for Reconsideration from the F&O on November 22, 2024,

DISCUSSION

I.

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 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 May 2, 2025, and 60 days from the date of transmission is July 1, 2025. This decision is issued by or on July 1, 2025, 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 May 2, 2025, and the case was transmitted to the Appeals Board on May 2, 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 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 May 2, 2025.

II.

Next, we turn to the issue of whether applicant reached maximal medical improvement, and thus became permanent and stationary, and correctly had his temporary disability benefits terminated. "'Permanent and stationary status' means the point when the employee has reached maximal medical improvement his or her condition is well stabilized and unlikely to change

substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, -§ 9811(k).)

There is a lack of substantial evidence to support the WCJ's finding that applicant had not reached MMI and was therefore not permanent and stationary. A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]*; Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

First, the WCJ did not make any finding regarding the disputed body parts of hips, sleep, and nervous system. (MOE/SOE, p. 2.) The parties only stipulated, and the WCJ found, that applicant had sustained industrial injury to his back and right knee. (MOE/SOE, p. 2; F&O, p. 1.) Without a finding as to the remaining body parts, it is not possible to determine if applicant had reached MMI.

Further, there is a lack of substantial evidence to support the WCJ's finding regarding MMI and that applicant was entitled to retroactive temporary disability benefits. The WCJ stated in the Amended Opinion on Decision that "Based upon Applicant's credible testimony, the stipulations of the parties, the evidence admitted at the time of trial, including but not limited to, the medical

reports of Dr. Kharrazi, Dr. Purcell, Dr. Kropf, Dr. Lebow, and the post-trial briefing of the parties, it is found that Applicant has not yet reached Maximum Medical Improvement." (11/14/24 Opinion, p. 3.) However, the WCJ did not point to any specific evidence or testimony to support this finding. Instead, QME Dr. Purcell found that applicant had reached MMI. (Jt. Ex. A, p. 23; Jt. Ex. C, p. 3.) The medical evidence and applicant's testimony do not provide substantial evidence otherwise. Thus, the finding regarding MMI and temporary disability benefits must be rescinded. As there was a lack of substantial evidence to support the finding regarding MMI and therefore the provision of temporary disability benefits, the attorney's fees based on this finding must be rescinded as well.

Therefore, we will grant defendant's Petition, rescind the F&O, and return this matter to the WCJ for further proceedings consistent with this decision. Upon return, we recommend that the WCJ determine whether the disputed body parts are due to industrial injury before making any determination related to MMI or temporary disability.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the November 14, 2024 Findings of Fact and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the November 14, 2024 Findings of Fact and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 1, 2025

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

VINCE MILLER
SENTRY LEGAL GROUP
PARKER & IRWIN

JMR/abs

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