

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

MELIDA DE MAGANA, *Applicant*

vs.

**ABM ONSITE SERVICES WEST, INC, permissibly self-insured, administered by ESIS,
INC., *Defendants***

**Adjudication Number: ADJ10992726
Los Angeles District Office**

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

Applicant seeks reconsideration of the Findings, Award & Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 8, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her left knee only, that there was no period of temporary total disability, and that the injury caused 18% permanent partial disability.

Applicant contends that the August 22, 2018 report from primary treating physician (PTP) Waleed Jean Kattar, D.C., should be admitted into evidence,¹ and that applicant is entitled to temporary disability indemnity benefits for the period from June 3, 3017, through August 22, 2018.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the Findings to find that:

The parts of body injured for this date of injury were the left knee and bilateral shoulders but not the right knee, bilateral wrists, cervical or lumbar spine.
(Finding of Fact 2)

¹ We note that there is no Finding or Order in the F&A as to the admissibility of the report from Dr. Kattar. Statements in an Opinion on Decision are not findings of fact, their purpose is to explain the basis for the decision. (See Lab. Code § 5313; *Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd.*, (1983) 41 Cal.App.3d 778 [48 Cal.Comp.Cases 275].)

Applicant is 24% permanently disabled, warranting 95.5 weeks of benefits for a total indemnity of \$27,695.00. (Finding of Fact 5)

The reasonable value of the services of Applicant's attorney is \$4,154.00. (Finding of Fact 8)
(Report, p. 5.)

The WCJ recommend that the Award be amended based thereon. The WCJ also noted that since the reports from chiropractic qualified medical examiner (QME) Mark S. Johnson, D.C., and PTP Dr. Kattar are not substantial evidence regarding the issues of temporary disability and/or apportionment, it may be appropriate to return the matter to the WCJ for further development of the record. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her cervical spine, lumbar spine, bilateral shoulders, bilateral knees, bilateral wrists, right fingers, and to her psyche and neurological system, while employed by defendant as janitor during the period from June 2, 2016, through June 2, 2017.

QME Dr. Johnson evaluated applicant on January 16, 2018. Dr. Johnson examined applicant, took a history, and stated:

Ms. Magana's condition cannot be considered permanent and stationary at the present time. She continues with left knee pain and motion limitation. She continues with right shoulder pain and motion limitation. In the absence of medical records, it is not possible to know the extent of medical treatment she has received to date. ¶ ... Following a review of the medical records from Kaiser and the recommended MRI scans of the right shoulder and left knee, a more well informed recommendation with regard to her status and need for additional treatment will be possible. ¶ The patient was working up until the time of her dismissal. She has subsequently continued working as a housekeeper as she has done during the past 17 years. She indicates that she would have continued working absent her termination. She is not considered temporarily disabled and would be able to return to the work she was performing with ABM Services.

(Def. Exh. C, Dr. Johnson, January 18, 2018, p. 11.)

In his supplemental report, after reviewing the requested medical records from Kaiser Permanente, Dr. Johnson concluded that applicant had sustained an industrial injury to her knees and that she had not sustained an industrial injury to her wrists, shoulders, and/or lumbar spine. (Def. Exh. B, Dr. Johnson, November 2, 2018, p. 9) Dr. Johnson was later provided additional medical records to review and in his July 12, 2019 supplemental report he concluded that applicant had not sustained injury to her cervical or lumbar spine, nor did she have a carpal tunnel syndrome/wrist injury. (Def. Exh. A, Dr. Johnson, July 12, 2019, pp. 7, 9.) Regarding applicant's shoulder injuries, he reiterated his earlier opinion that applicant had no left shoulder impairment, and then stated:

On examination, I found limited motion of the right shoulder by goniometry of 6% UEI that converts to 4% WPI (p.439, Table 16-3). ... ¶ ... I have changed my opinion regarding industrial causation of the right shoulder injury. I do feel there was industrial causation by way of the CT claim dated 6/2/2016-6/2/2017. With regard to apportionment, considering the evidence of arthritis in both shoulders and evident in multiple other areas as well, indicating a propensity for generalized degenerative arthritis, it would with reasonable medical probability, be accurate to apportion 25% to an underlying arthritic condition and 75% to cumulative trauma by way of her work duties with ABM. (Def. Exh. A, Dr. Johnson, July 12, 2019, p.8.)

In reference to applicant's knees, Dr. Johnson stated:

The most significant impairment is based on weakness of flexion and extension motions of the left knee resulting in 10% WPI for the left knee. ¶ ... Based on the marked arthritis evident in the patient's left knee by MRI, 25% is apportioned to non-industrial arthritis and 75% is apportioned to the industrial CT injury claim from 6/2/2016-6/2/2017. ¶ ... With regard to the right knee, there is mention of arthritis in the right knee. There was no limitation of motion or weakness involving the right knee on January 16, 2018. ... She should have weight-bearing x-rays of both knees and depending on the cartilage interval, may qualify for an impairment rating based on arthritis. (Def. Exh. A, Dr. Johnson, July 12, 2019, p. 10.)

The parties proceeded to trial on November 12, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), November 12, 2019.) The matter was continued on several occasions and was tried on January 5, 2021. At the trial, applicant testified about the physical demands of her work as a janitor. She stated that defendant terminated her employment in June 2017, and that

she would have continued to work for defendant had her employment not been terminated.² (MOH/SOE, January 5, 2021.) The parties agreed that applicant's condition became permanent and stationary on August 22, 2018, (see Issues #3) and the issues submitted for decision included injury AOE/COE, temporary disability, permanent disability/apportionment, and the Labor Code section 3600(a)(10) post termination defense. (MOH/SOE, November 12, 2019, pp. 2 – 3.)

DISCUSSION

It has long been the law that once reconsideration has been granted, the Appeals Board has the authority to address issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (Lab. Code, §§ 5906, 5908; (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]); *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) In his Report, the WCJ discussed parts of body injured and permanent disability. Although applicant did not raise these issues in the Petition, injury AOE/COE and permanent disability were included in the issues submitted for decision and will be addressed herein.

Applicant argues that based on the provisions of AD Rules 9781 and 9785, the August 22, 2018 report from PTP Dr. Kattar would properly have been admitted into evidence. In the Report, the WCJ states that the report from Dr. Kattar should have been admitted. We agree with the WCJ that the report is admissible but as noted above (Footnote 1) there is no Order in the F&A admitting or not admitting the report into evidence. (see also MOH/SOE, November 12, 2019, p. 3, lines 9 – 20.) Upon return of this matter to the WCJ, this issue should be more fully addressed.

When an industrial injury causes an employee to be restricted from working, either totally or partially, the employee may be entitled to receive temporary disability indemnity. (Lab. Code §§ 4650, 4653, 4655 and 4656). The employer's obligation to pay temporary disability benefits is the result of the employee's inability to perform the tasks usually required by his or her employment, and the wage loss resulting therefrom. (*Meeks Building Center v. Workers' Comp. Appeals Bd.*, (2012) 207 Cal.App.4th 219 [77 Cal.Comp.Cases 615].) It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz*

² Page 4, line 1 of the MOH/SOE indicates applicant's employment was terminated in June 2016. This appears to be a clerical error in that applicant's prior testimony and the medical records admitted into evidence state that her last day of work was June 2, 2017, when her employment was terminated. (see e.g. Def. Exh. C, p. 2.)

v. Workers' Comp. Appeals Bd. (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289.) Here, our review of the trial record indicates that the only medical report that addresses the issue of applicant's disability status during the period from June 3, 2017, through August 22, 2018, is the January 18, 2018 report from Dr. Johnson, wherein he stated that after review of additional records and diagnostics, "... a more well informed recommendation with regard to her status and need for additional treatment will be possible." (Def. Exh. C, p. 11.) Dr. Johnson then stated that applicant had continued working until the date, "... of her dismissal. She has subsequently continued working as a housekeeper..." and that she would have continued working for defendant had her employment not been terminated. (Def. Exh. C, p. 11.) Although applicant testified that she would have continued working for defendant had her employment not been terminated, she testified that her last day of work was in June 2017, and she did not testify that she subsequently worked as a housekeeper. (MOH/SOE, January 5, 2021.) There is no dispute that applicant's condition became permanent and stationary on August 22, 2018. However, due to the inconsistencies with Dr. Johnson's report and applicant's trial testimony, and based on to his statement that on review of additional records and diagnostics he could provide, "... a more well informed recommendation with regard to her status..." Dr. Johnson's report is not substantial evidence regarding the issue of applicant's disability status.

Further, "An employee is considered temporarily partially disabled if he [or she] is able to earn some income during his [or her] healing period but not his full wages. The disability payment in such event is [two-thirds] of the employee's weekly wage loss." (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].) An injured employee whose employment is terminated for good cause is not entitled to temporary partial disability benefits and the defendant has the burden of proving that the termination was for cause. (*Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999 W/D) 65 Cal.Comp.Cases 61.) An employer remains liable for temporary disability benefits after terminating an employee if it fails to establish good cause by showing employee misconduct. (*Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006 W/D) 71 Cal.Comp.Cases 1614.) In this matter, if it is ultimately determined that applicant was temporarily partially disabled as a result of her injury, it will be defendant's burden of proof to show that applicant's employment was terminated for good cause. The only evidence currently in the trial record on that issue is applicant's testimony that as a result

of an altercation she had with another employee, her employment was terminated in June 2017. (MOH/SOE, January 5, 2021, p. 4; see also Footnote 2 above.) The record as it now exists does not contain substantial evidence addressing the issue of whether applicant's employment was terminated for good cause.

As noted above, in the Report the WCJ recommended that the F&A be amended to include a finding of injury to applicant's shoulders and to include the 4% right shoulder impairment for a total of 24% permanent partial disability. The WCJ also stated that since none the doctors' reports in the trial record adequately discuss or explain apportionment, "[T]he Appeals Board may want to consider developing the record on the issue of apportionment and/or TTD." (Report, p. 4.)

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].) 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].) Based on our review of the trial record as discussed above, we agree with the WCJ that the trial record does not contain substantial evidence upon which a decision can be made, and therefore further development of the record is necessary. The record needs further development on the issues submitted for decision, including the issues of body parts injured, permanent disability/apportionment, applicant's temporary disability status, and whether applicant's employment with defendant was terminated for good cause.

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter, it may be in the parties' interest to have applicant evaluated by an agreed medical examiner or in the alternative, for the WCJ to appoint a regular physician. (Lab. Code § 5701.)

Accordingly, we grant reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings, Award & Order issued by the WCJ on February 8, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 8, 2021 Findings, Award & Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 27, 2021

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

**MELIDA DE MAGANA
GARRETT LAW GROUP
MICHAEL SULLIVAN & ASSOCIATES**

TLH/pc

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