

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

CARLITA MIRACO, *Applicant*

vs.

**COUNTY OF MONTEREY – NATIVIDAD MEDICAL CENTER, permissibly self-insured, administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC.,
*Defendants***

**Adjudication Number: ADJ12012894
Salinas District Office**

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 2, 2021, wherein the WCJ found in pertinent part that applicant was not entitled to temporary disability indemnity during the period from February 21, 2019, through March 4, 2019; that applicant was entitled to temporary partial disability indemnity on a wage loss basis during the period from March 5, 2019, through July 6, 2020; and that applicant was entitled to a Supplemental Job Displacement Benefit (SJDB) voucher.

Defendant contends that applicant voluntarily ended her employment with defendant, that applicant received a "higher compensation package" from her subsequent employer, and that she voluntarily ended her employment with subsequent employer, so defendant is not liable for temporary partial disability benefits or an SJDB voucher.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from applicant.

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 and affirm the F&A, except that we will amend the F&A to defer the issues of applicant's entitlement to temporary partial disability benefits (Finding of Fact 5), applicant's entitlement to an SJDB voucher (Finding of Fact 6), and applicant's

attorney's fees (Finding of Fact 7). 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 her cervical spine and right shoulder while employed by defendant as a sonographer/ultrasound technologist during the period ending August 20, 2018. Defendant paid temporary disability benefits for the period from August 28, 2018, through December 4, 2018. (See Def. Exh. D2, benefit printout.) Applicant received treatment from Timothy Wilken, M.D., and on December 4, 2018, Dr. Wilken recommended a “trial of regular work duties.” (App. Exh. 3, Richard Gravina, M.D., September 1, 2019, p. 6, review of medical records.) On December 4, 2018, applicant sent an email to defendant stating:

I have been released by the doctors to return to work on a trial basis. If my symptoms re-develop or increase, I will need more treatment. ¶ After much consideration, I have decided to step back from ultrasound and pursue work that will not tax my shoulder to a further degree. I have notified Jason Beaton, my claims adjuster.
(Def. Exh. D1, Carlita Miraco, December 4, 2018.)

In late December 2018, applicant started working for Sunrise Senior Living, in a management position. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 20, 2021, p. 5.) In his January 22, 2019 progress report (PR-2), Dr. Wilken stated that, “She has returned to regular work” and that applicant was instructed to, “Return to full duty on 1/15/2019 with no limitations or restrictions.” (App. Exh. 8, Timothy Wilken, M.D., January 22, 2019.)¹ In the next PR-2, Dr. Wilken stated, “Patient is seen in follow up. She has returned to regular duty. Her shoulder has gotten worse, more pain less range of motion. ... Modified work until next scheduled appointment.” (App. Exh. 7, Dr. Wilken, February 12, 2019.) Applicant stopped working for Sunrise Senior Living on February 21, 2019. (MOH/SOE, p. 5.) She started working as a mammographer at the Mammography Center of Monterey on March 5, 2019. (MOH/SOE, p. 5.) In his March 14, 2019 PR-2, Dr. Wilken indicated that applicant was, “Unable to work: Off starting February 18th 2019...” (App. Exh. 6, Dr. Wilken, March 14, 2019, p. 2.) The June 13,

¹ Based on applicant's December 4, 2018 email (Def. Exh. 1), Dr. Wilken's statement that applicant had returned to regular work appears to be inaccurate.

2019 PR-2 also states that applicant was, “Unable to work: Off starting February 18th 2019...” (App. Exh. 4, Dr. Wilken, June 13, 2019.)

On August 5, 2019, applicant was evaluated by neurology qualified medical examiner (QME) Richard F. Gravina, M.D. After examining applicant, taking a history, and reviewing the medical record, Dr. Gravina determined that applicant’s condition had not reached permanent and stationary status. (App. Exh. 3, p. 18.)

Dr. Gravina re-evaluated applicant on July 6, 2020. He re-examined applicant, took an interim history, and reviewed additional medical records. Dr. Gravina concluded that applicant’s cervical spine and right shoulder symptomology was permanent and stationary, and that applicant’s “symptomology is 100% due to industrial cumulative trauma.” (App. Exh. A2, Dr. Gravina, July 15, 2020, p. 12.)

The parties proceeded to trial on May 20, 2021. (MOH/SOE, May 20, 2021.) The WCJ’s summary of applicant’s testimony, relevant to the issues herein, includes the following:

The doctor took her off work but released her to return to work on a trial basis to regular duty on 12/4/18. Applicant decided not to try to return to work because her right shoulder was too uncomfortable to be able to return to do her work. ... ¶ She did return to work for a different employer in late December of 2018, Sunrise Senior Living, in a management position, which was completely different than the role she had at Natividad. The physical requirements at Sunrise were entirely different and less strenuous. ¶ ... She stopped working there on 2/21/19 because the job was not a compatible fit in terms of the work environment. She did not stop working there because she was physically unable to keep doing the job. At that time, she was still under the treatment of Dr. Wilken, who had her on work restrictions. ¶ She then found a new job at the Mammography Center of Monterey as a mammographer on 3/5/19, and in this position, she positions, predominantly, women for cancer screenings. ... ¶ She still works at the Mammography Center, but it is fewer hours than she did at Natividad. In general, this was a part-time position with irregular hours, but the hours have become more regular post-Covid. When she worked irregular hours, she earned less than she earned at Natividad.

(MOH/SOE, p. 5.)

When calculated yearly, she made more per year at Sunrise than she did at Natividad.

(MOH/SOE, pp. 6 – 7.)

The only reason she left the Sunrise job was because it was not a good fit. Had it been a good fit, she would have continued working there. ¶ Her last day at

Sunrise was 2/21/19. She was not asked to leave Sunrise. Had she decided to stay, her position at Sunrise would have been compatible with her shoulder condition.

(MOH/SOE, p. 7.)

The issues submitted for decision included temporary total disability indemnity, temporary partial disability indemnity, and applicant's entitlement to an SJDB voucher.

DISCUSSION

We first address the issue of temporary partial disability. If an employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. (Lab. Code, § 4657.) "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 [or her] 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].)

Applicant testified that as of March 5, 2019, she has been working at the Mammography Center, and that initially it was a part-time position with irregular hours, but the hours have become more regular. When she worked irregular hours, she earned less than she earned at Natividad. (MOH/SOE, p. 5.) Review of the record indicates that it is unclear whether there was simply a lack of work, or whether applicant's shoulder injury kept her from working more hours and earning more income. Also, it is not clear at what point, if at all, applicant's income at the Mammography Center was comparable to her income at Natividad.

Further, there is no evidence in the record that addresses applicant's disability status between August 5, 2019, and July 6, 2020. For example, Dr. Gravina's statement that applicant's condition was permanent and stationary at the time of the re-evaluation is not evidence that the date of the re-evaluation was the permanent and stationary date. (App. Exh. A2, p. 12.) The fact that an injured worker is receiving medical treatment is not in and of itself substantial evidence that the injured worker is temporarily disabled. It is quite common for an injured worker to be awarded lifetime medical treatment after the injury condition became permanent and stationary. (See e.g. DWC-WCAB form 10214(a) - Stipulations with Request for Award.) An injured worker's condition is deemed permanent and stationary when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139];

Sweeney v. Industrial Acc. Com. (1951) 107 Cal.App.2d 155 [16 Cal.Comp.Cases 264].) The treatment notes from Annu Navani, M.D., indicate, “She denies any changes in signs or symptoms since last visit.” (See App. Exhs. 12 – 19, Annu Navani, M.D., July 24, 2019 - June 25, 2020.)

As discussed herein, the trial record does not contain substantial evidence that enables us to determine the period or periods of applicant’s temporary partial disability. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) 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).) Upon return of this matter to the WCJ, it would be appropriate for the parties to provide QME Dr. Gravina with the relevant medical records and request that he submit a supplemental report to clarify his opinions as to the periods of temporary partial disability and the maximum medical improvement/permanent and stationary date.

In regard to the issue of applicant’s entitlement to an SJDB voucher, Labor Code section 4658.7 states in part:

- (a) This section shall apply to injuries occurring on or after January 1, 2013.
 - (b) If the injury causes permanent partial disability, the injured employee shall be entitled to a supplemental job displacement benefit as provided in this section unless the employer makes an offer of regular, modified, or alternative work, as defined in Section 4658.1, that meets both of the following criteria:
 - (1) The offer is made no later than 60 days after receipt by the claims administrator of the first report received from either the primary treating physician, an agreed medical evaluator, or a qualified medical evaluator, in the form created by the administrative director pursuant to subdivision (h), finding that the disability from all conditions for which compensation is claimed has become permanent and stationary and that the injury has caused permanent partial disability. ...
 - (2) The offer is for regular work, modified work, or alternative work lasting at least 12 months. ...
- (Lab. Code, § 4658.7.)

As discussed above, the trial record needs to be further developed as to the issue of applicant’s maximum medical improvement/permanent and stationary date. Absent evidence

identifying the permanent and stationary date, there is no factual basis for determining whether applicant is or is not entitled to an SJDB voucher. 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].) Again, we have discretionary authority to develop the record when necessary to address a threshold issue. *Tyler v. Workers' Comp. Appeals Bd., supra*; *McClune v. Workers' Comp. Appeals Bd., supra*.) Under the circumstances of this matter it is appropriate to defer the issue of applicant's entitlement to an SJDB voucher, pending further development of the record.

Accordingly, we amend the F&A to defer the issues of applicant's entitlement to temporary partial disability benefits (Finding of Fact 5), applicant's entitlement to an SJDB voucher (Finding of Fact 6), and applicant's attorney's fees (Finding of Fact 7). 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 and Award issued by the WCJ on July 2, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 2, 2021 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. The issue of applicant's entitlement to temporary partial disability indemnity is deferred.
6. The issue of applicant's entitlement to a Supplemental Job Displacement Benefit voucher is deferred.
7. The issue of attorney fees based on an Award of temporary partial disability indemnity is deferred.

AWARD

* * *

(A) The award of wage loss temporary disability benefits, and attorney fees based thereon, is deferred pending development of the trial record.

(B) The award of a Supplemental Job Displacement Benefit voucher, and attorney fees based thereon, is deferred pending development of the trial record.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 17, 2021

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

**CARLITA MIRACO
SPRENKLE, GEORGARIOU & DILLES
LUNA, LEVERING & HOLMES**

TLH/pc

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