

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

VANESSA FERNANDEZ. *Applicant*

vs.

**NORTHGATE GONZALEZ MARKET, INC.;
SAFETY NATIONAL CASUALTY CORPORATION, Administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11090497
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues. This is our decision after reconsideration.

Defendant seeks reconsideration of the March 16, 2022 Findings and Award issued by the workers' compensation administrative law judge (WCJ). The WCJ found that applicant sustained a cumulative trauma injury from August 10, 2013 through October 23, 2015 to her cervical spine, lumbar spine, and right wrist, while employed by Northgate Gonzalez Market. The WCJ also found that applicant is entitled to an award of 14% permanent disability indemnity.

The WCJ also found that applicant is entitled to an additional period of temporary disability from October 30, 2018 through December 1, 2020. The WCJ found that applicant achieved permanent and stationary status on December 1, 2020. The WCJ also found that applicant was entitled to future medical care.

Defendant contends that the WCJ erred in awarding the additional period of temporary disability, arguing that the WCJ failed to cite to the medical evidence and that the medical evidence does not support the award of an additional period of temporary disability or a permanent and stationary date of December 1, 2020. Defendant also contends that the WCJ erred in finding that the applicant was entitled to further medical care, arguing that the orthopedic panel qualified medical evaluator found that applicant did not require further medical care.

The workers' compensation administrative law judge (WCJ) prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be

granted and that the Findings and Award be amended to reflect a temporary disability rate of \$230.95 per week. We have reviewed the answer filed by applicant. For the reasons discussed below, we will grant reconsideration, rescind the findings regarding temporary disability and maximum medical improvement, and defer those issues. We will affirm the WCJ's award of future medical treatment. We will return this matter to the trial level for further development of the record on the deferred issues.

As an initial matter, on April 6, 2022, Defendant filed a timely petition for reconsideration of the March 16, 2022 Findings and Award. Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision, holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.*) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

We will briefly review the relevant facts. Applicant, while employed as a cashier through October 23, 2015, sustained an industrial injury to her cervical spine, lumbar spine, and right wrist.

Applicant was evaluated by Micah Hoffman, M.D. in the capacity of panel qualified medical evaluator (PQME) in the field of psychiatry. Dr. Hoffman opined that applicant's psychiatric issues were not caused by her employment. Applicant was evaluated by Timothy K. Ross, M.D. in the capacity of orthopedic PQME on December 1, 2020. Dr. Ross found that applicant was permanent and stationary as of the date of the report and stated that "Maximum Medical Improvement in this case, orthopedically speaking, was long ago attained...If in fact physical therapy was able to be prescribed and attended on a reasonable schedule, then perhaps a year or two of unnecessarily protracted treatment (perhaps interrupted) and disability may have transpired." (Exh. F, December 1, 2020, Orthopedic Qualified Medical Evaluation, Timothy K.

Ross, M.D., p. 24.) Despite the opinion of Dr. Ross, the WCJ found that applicant was temporarily disabled until December 1, 2020. (Report, p. 6.)

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

It is well established that all decisions by the WCAB requiring medical evidence must be supported by substantial medical evidence. Not all expert medical opinion constitutes substantial evidence. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc); *McAllister v. Workmen's Comp. Appeals Bd., supra*, 69 Cal.2d 408, 413, 416-417; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].)

In this case, the PQME did not offer an opinion on when applicant was permanent and stationary, other than to state it was "long ago." In addition, Dr. Ross stated that applicant was not disabled during the entire period she was not working, but did not offer an opinion on a reasonable period of temporary disability. If there is insufficient evidence to determine an issue, such as whether applicant was temporarily disabled during the disputed time period, the WCJ should order that the medical record be further developed. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ["principle of allowing full

development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc.) Therefore, we will return this matter to the trial level for further development of the medical record.

Finally, with respect to defendant's contention that applicant is not entitled to future medical care based on the reporting of the PQME, we disagree that the PQME's statement that "I find no indication for orthopedic future medical care in this matter," is a sufficient basis to refuse to award future medical care. An award of future medical care is limited to medically necessary treatment which is treatment that is "reasonably required to cure or relieve the injured employee of the effects of his or her injury" and is based on the guidelines of the Medical Treatment Utilization Schedule (MTUS) adopted in accordance with Section 5307.27. (Lab. Code, § 4600(b).) Any request for medical care would also be subject to utilization review and independent medical review. Therefore, we will affirm the award of future medical care.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 16, 2022 Findings of Fact 3, 4, and 7 and the Award subdivision (b) are **AMENDED** as follows:

FINDINGS OF FACT

3. The issue of whether applicant is entitled to additional temporary disability indemnity is deferred with jurisdiction reserved at the trial level.
4. The issue of applicant's permanent and stationary date is reserved with jurisdiction reserved at the trial level.
7. The issue of whether applicant's attorney is entitled to an additional fee from temporary disability is deferred with jurisdiction reserved at the trial level.

AWARD

(b) The issue of whether applicant is entitled to an award of additional temporary disability is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2022

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

**HINDEN & BRESLAVSKY
PEARLMAN BROWN & WAX
VANESSA FERNANDEZ**

MWH/oo

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