

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

BEDFORD PALMER, *Applicant*

vs.

**SAN DIEGO GAS & ELECTRIC/SEMPRA ENERGY;
permissibly self-insured, self-administered *Defendant***

Adjudication Numbers: ADJ1750055 (SDO0289470 ADJ184723 (SDO0289471)

San Diego District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Joint Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 29, 2020, wherein the WCJ found in pertinent part that no temporary disability indemnity was owed to applicant for the period from June 4, 2003, through August 4, 2003; that applicant received vocational rehabilitation temporary disability (VRTD) from August 5, 2003, through January 12, 2004; that applicant was temporarily totally disabled during the periods from June 7, 2005, through July 22, 2005, and from August 9, 2005, through September 6, 2005; that defendant paid applicant temporary disability indemnity benefits from September 28, 2005, to May 18, 2007; that applicant had been adequately compensated for his temporary disability during the period from September 12, 2007, through May 18, 2008, that applicant was not temporarily totally disabled at any time as a result of his psychiatric condition; that the record contains no substantial evidence indicating applicant was temporarily totally disabled at any time after May 18, 2008; and because applicant retired as of October 1, 2009, he is not entitled to any temporary disability indemnity benefits thereafter.

Applicant contends that he is entitled to temporary disability indemnity after his retirement; that on an orthopedic basis he is owed temporary disability indemnity for the periods from June 3, 2003, through July 1, 2008, from August 2008, through February 1, 2010, and from November 10, 2016, through April 30, 2019; that on a non-orthopedic basis, he is owed temporary disability indemnity for the period from September 28, 2005, to the present and continuing; that temporary disability indemnity is to be paid at the rate in effect on the date of payment; that defendant is not entitled to take credit for long-term disability indemnity or temporary disability indemnity previously paid to applicant; and that he is entitled to the Labor Code section 5814 increase in benefits for all periods of his temporary disability that the indemnity payments were withheld.

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

We have considered the allegations in the 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 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 his neck, right shoulder, right upper extremity, low back, psyche, and internal system (in the form of hypertension), while employed by defendant as a fleet training and inspection administrator on September 25, 1997 (ADJ1750055). Applicant also claimed injury to his neck, right shoulder, right upper extremity, low back, psyche, and internal system (in the form of hypertension), while employed by defendant as a fleet training and inspection administrator during the period from August 5, 1968, through October 25, 2001 (ADJ184723). The claims of injury to applicant's internal system were denied; the injury claims to the other body parts were accepted.

Applicant underwent an extensive course of treatment and was examined by various medical-legal evaluators, including orthopedic agreed medical examiner John G. Lane, M.D.

The parties proceeded to trial before Judge Ellison at various times in 2014. Judge Ellison subsequently retired and the matter was assigned to the present WCJ. At the June 19, 2019 trial,

the cases were consolidated, and the parties stipulated that in both cases, applicant claimed injury to his “internal” [system in the form of hypertension]. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 19, 2019, pp. 2 and 4.) The issues identified by the parties as to both cases, included, “Parts of body injured: Internal,” temporary disability with applicant claiming various periods, and defendant’s contention that applicant was not entitled to temporary disability benefits after the date he retired. (MOH/SOE, June 19, 2019, pp. 3 – 5.) At the February 27, 2020 trial the matter was ordered submitted for decision as of April 3, 2020. (MOH/SOE, February 27, 2020, p. 15.)

DISCUSSION

We first note that pursuant to Appeals Board rule 10940, a Petition for Reconsideration shall not exceed 25 pages; however, upon a showing of good cause, the Appeals Board may allow the filing of a petition that exceeds the page limitations. A request to exceed the page limitations must be made by a separate petition that sets forth reasons why the request should be granted. (Cal. Code Regs., tit. 8, § 10940.) Although applicant’s Petition exceeds the page limitations, we did not receive a request from applicant’s counsel as to that issue. It appears that counsel requested an Order from the San Diego District Office Presiding Judge, permitting him to exceed the 25-page limit. The Presiding Judge does not have the authority to make such an Order, and counsel is reminded that failure to comply with Appeals Board rules may be deemed sanctionable conduct.¹

As to the merits of the Petition, applicant argues that he is entitled to temporary disability indemnity from September 28, 2005, to the present and continuing, based on his “non-orthopedic” conditions, including his hypertension. (Petition, p. 10.) In his initial consultative report, internal medicine physician Stuart B. Kramer, M.D., diagnosed applicant as having, “Hypertension with hypertensive heart disease” and he stated that, “Mr. Palmer cannot be considered permanent and stationary from an internal medicine standpoint as he is in need of aggressive blood pressure control.” (App. Exh. 23, Dr. Kramer, October 16, 2009, pp. 62 and 64.) Subsequently, Dr. Kramer again diagnosed, “Hypertension with hypertensive heart disease” and he stated, “The patient

¹ Counsel is also reminded that citing the unpublished decision, *Borges v Workers’ Comp. Appeals Bd.*, is a violation of California Rules of Court 977(a).

[applicant] remain[s] temporarily totally disabled.” (App. Exh. 16, Dr. Kramer, March 21, 2013, p. 3.)

Applicant is correct that Dr. Kramer’s reports could be considered evidence that he was temporarily totally disabled during the period from October 16, 2009, through March 21, 2013. However, the hypertension is an aspect of the “internal” system injury claim that has not been accepted. Further, the June 19, 2019 MOH/SOE clearly states that “Parts of body injured: Internal” was an issue submitted for decision in both injury claims; but the F&A does not include a Finding as to whether applicant did or did not sustain an injury arising out of and occurring in the course of employment (AOE/COE) to his internal system in the form of hypertension. Absent a Finding of injury, applicant’s hypertension is not evidence that he was temporarily totally disabled, as a result of his injuries, for the various periods claimed. Thus, we have no factual basis for determining the issues regarding applicant’s disability status, as raised in the Petition.

Additionally, our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that the summary of applicant’s testimony at the July 21, 2014 trial includes:

When asked why he waited until October 2009 to retire, he states he did not plan to retire but needed the money. He did not consider his physical or psychiatric limitations when he retired. He was supporting others at the time of his retirement including his daughter and grandchildren who were living with him.

(MOH/SOE, July 21, 2014, p. 11.)

When he took his retirement money in 2009, he did not feel mentally or physically able to go back to work. He would have, had he felt physically and mentally able to do so.

(MOH/SOE, July 21, 2014, p. 13.)

It has long been established that if an injured worker plans to continue working but retires due to the industrial injury, then the worker cannot be said to be unwilling to work and they would have an earning capacity diminished by the injury. Therefore, the injured worker may establish that they intended to continue working but instead had to retire because of the job-related injury. Under those circumstances, the worker would be entitled to temporary disability benefits. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *Pham v. Workers' Comp. Appeals Bd.*, (2000) 78 Cal.App.4th 626 [65 Cal.Comp.Cases 139]; *King*

v. Anaheim Police Dept. (2014) 2014 Cal.Wrk.Comp. P.D. LEXIS 153 (Appeals Board panel decision).)

Again, based on our review of the record, it is not clear whether applicant is not entitled to temporary disability benefits because he voluntarily left work and chose to retire, or whether he was forced to retire as a result of his injuries, and as such may be entitled to temporary disability benefits. (*Gonzales v. Workers' Comp. Appeals Bd., supra.*)

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 submitted for decision. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

For these reasons, upon return of this matter to the WCJ, it is important that the parties determine how best to develop the record pertaining to the reasons for applicant's retirement. We also recommend that the WCJ schedule a status conference to meet with the parties and discuss whether the record needs further development to enable the WCJ to issue a finding regarding the issue of injury AOE/COE to applicant's internal system in the form of hypertension.

Accordingly, we 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, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 29, 2020 Joint Findings, Award and 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 24, 2023

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

**BEDFORD PALMER
LAW OFFICES OF PHILIP M. COHEN, APC
PURINTON LAW**

TLH/mc

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