WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGELIO CHAVEZ VALENZUELA, ***Applicant***

vs.

BERBERIAN NUT COMPANY, LLC; AIG INSURANCE COMPANY, as adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, ***Defendants***

Adjudication Numbers: ADJ8031364; ADJ8033255
Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Joint Findings, Award And Order (F&A) issued by a workers' compensation administrative law judge (WCJ) on November 20, 2018, which found that applicant sustained injury to his head and cervical spine, and not in the form of seizures and Chiari malformation, on May 22, 2010 (ADJ8031364) sustained injury to his left shoulder, trapezius muscle and cervical spine on December 4, 2010 (ADJ8033255), while employed as a machine operator by defendant; that applicant was not entitled to temporary disability indemnity payments for the period of August 13, 2011 to November 16, 2011, "as temporary disability cannot be awarded over five years from the date of injury"; that applicant's injuries caused permanent disability of 2% in ADJ8031364 and 14% in ADJ8033255, payable beginning November 16, 2011; and that applicant is entitled to a 15% increase pursuant to Labor Code section 4658[2] and a Supplemental Job Displacement Benefits voucher of $4000.00 for each date of injury within 30 days of the issue of the F&A.

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[1] Commissioner Lowe, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. Another panelist was appointed in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

Applicant contends that the agreed medical evaluator (AME) in neurology did not consider that applicant was taking medication while seizure free for four years, and that the AME's opinion that the May 22, 2010 head injury did not cause seizures is not substantial evidence. Applicant further contends that the AME recommended an evaluation by a specialist in epilepsy and the medical record should be developed. Applicant also contends that the panel qualified medical evaluator (PQME) in orthopedics reported that applicant's injury reached maximum medical improvement on November 16, 2011, and that the WCJ erroneously determined that temporary disability benefits from August 13, 2011 to November 16, 2011 may not be awarded after five years from the date of injury.

We received an Answer from defendant.

The WCJ issued a Report And Recommendation (Report) recommending that we deny reconsideration.

We have reviewed the record, and the allegations of the Petition for Reconsideration and the Answer and the contents of the WCJ's Report. For the reasons we shall explain, as our decision after reconsideration, we will affirm the F&A, except that we will amend Finding of Fact 3 to remove the phrase "as temporary disability cannot be awarded over five years from the date of injury."

FACTS

Applicant sustained injury to his head and neck and claimed seizures and Chiari malformation while employed as a machine operator for defendant on May 22, 2010 (ADJ8031364). Applicant also sustained injury to his neck, left shoulder and trapezius and claimed left brachial plexus injury while employed as a machine operator for defendant on December 4, 2010 (ADJ8033255).

In a treating physician's report dated May 27, 2010, Mark Bohlander, M.D., indicated that applicant had sustained a head contusion and cervical strain in a fall at work and was released to full duty without restrictions. (Ex. C.)

In a report dated August 15, 2011, Dr. Bohlander indicated that applicant had been treating for eight months for left cervical trapezial strain and shoulder pain due to an injury at work on December 4, 2010. (Ex. D, pp. 1-2.) Because Dr. Bohlander was concerned that applicant's subjective complaints did not match the objective findings, a cervical MRI was performed, and it indicated genetic Chiari malformation and cervical syrinx. Dr. Bohlander released applicant to his

normal work duties with follow-up treatment for the nonindustrial conditions by the primary care provider. (Ex. D, pp. 1-2.)

Applicant was examined by PQME Mohinder Nijjar, M.D on date. Dr. Nijjar indicated in a report dated November 16, 2011 that applicant "felt a little knocked out for about 20 to 30 seconds after his fall at work" on May 22, 2010. (Ex. F, p. 2.) Dr. Nijjar also reported that applicant experienced neck and left shoulder pain while pulling a large pallet at work on December 4, 2010, and received treatment, returned to modified work after four weeks off, and was laid off on July 16, 2011. (Ex. F, p. 3.) Dr. Nijjar's diagnoses included contusion of the head and headaches caused by the injury of May 22, 2010, and cervical spine and left shoulder sprain/strain with impingement syndrome caused by the injury of December 4, 2010. (Ex. F, pp. 11-13.) He indicated that applicant's injuries had reached maximum medical improvement on November 16, 2011, and that applicant had whole person impairment (WPI) of 2% for headaches, 7% for the cervical spine, and 2% for the left shoulder. (Ex. F, pp. 12-13.) Dr. Nijjar further indicated that applicant could return to his regular work although he should avoid repetitive overhead work, and that he might require future treatment for the neck and left shoulder but not for the head trauma. (Ex. F, pp. 13-14.)

In a report dated June 4, 2012, Dr. Bohlander summarized emergency medical records that indicated applicant may have had seizures on April 10, 2012 and May 12, 2012. (Ex. E, pp. 1-2.) He also reviewed medical records which raised an issue of whether applicant lost consciousness when he hit his head at work on May 22, 2010. Dr. Bohlander indicated that the seizures were probably not caused by applicant's industrial injuries, and that applicant's treatment after the report of August 15, 2011 was due to the preexisting nonindustrial Chiari malformation. (Ex. E, p. 2.)

In a report dated July 18, 2012, Dr. Nijjar summarized medical records that indicated applicant had tonic-clonic seizures on April 10, 2012. (Ex. 1, pp. 2-4.) He recommended evaluation by a neurologist to determine whether applicant's seizures were caused by the head trauma and industrial injuries. (Ex. 1, p. 4.)

In an extensive report, the AME in neurology, Michael Kasman, M.D., indicated that the history and medical records conflicted as to whether applicant lost consciousness, and for how long, after he struck his head in the fall at work on May 22, 2010. (Ex. 2, pp. 5, 15-18, 32-33, 46-51.) A co-worker apparently informed applicant that he had lost consciousness and reported the injury. (Ex. 2, pp. 5, 46-47.) Following the injury at work on December 4, 2010, applicant received

treatment, returned to modified work after several weeks off, and was laid off in July 2011 and looked for other work. Applicant's work had been seasonal from August to January, although medical records indicated that he did modified work from January to mid-July 2011. He collected unemployment in the off season and went to a two year college during the spring and fall semesters. (Ex. 2, pp. 6-8, 19-27, 47, 49-51.) He had his first seizure at school on April 10, 2012, and the second major seizure at home on August 27, 2012. He was taken to the hospital after each seizure, and was provided diagnostic testing and treatment, which included medications Dilantin or Phenytoin and Keppra. (Ex.2, pp. 8-11, 29-39, 44-57.)

Dr. Kasman further reported that applicant's head injury of May 22, 2010 was minimal or mild and not indicative of causing seizures because there was no bleeding, "goose egg", skull fracture, intracranial hemorrhage, focal or generalized neurological symptoms, or post-traumatic changes. (Ex. 2, pp. 50, 57.) There was also a question of whether applicant lost consciousness, and the duration was brief for a minute or less and he manifested very brief traumatic amnesia. In addition, he lost only a few weeks from work and returned to function fully without treatment until the next work injury in December. (Ex. 2, pp. 50, 57.) Dr. Kasman also noted that more than 50% of post-traumatic seizures occur within the first year, and 90% within two years, and that applicant's seizure occurred within one month of the two year period. (Ex. 2, p. 58.)

Dr. Kasman reported that the diagnoses included seizure disorder (epilepsy or recurrent seizures), and Chiari malformation and syrinx, which are incidental and unrelated, and not producing current symptoms. (Ex. 2, pp. 56, 59.) He could not exclude with certainty the absence of a causal connection with work injury, although it was improbable absent a more serious head injury, brain contusion or neurological symptoms over two years. He requested additional diagnostic testing to determine the origin of the seizures including a cerebrospinal fluid exam, a dermatology exam if abnormalities in skin changes on the abdomen are café au lait spots, a sleep deprivation EEG, a cardiology consultation with repeat EKG, an independent neuroimaging review of all CT and MRI scans, electro-diagnostic studies of the upper extremities, and possible hospitalization to capture a seizure on video EEG (although improbable). (Ex. 2, pp. 58-60.) He also requested a copy of Dr. Bohlander's August 15, 2011 report, which was referenced in the records and not provided. (Ex. 2, pp. 33, 59.)

In a report dated May 14, 2013, Dr. Kasman summarized and quoted Dr. Bohlander's August 15, 2011 report that applicant was released to his normal duties at work and his primary

care provider. (Ex. 1, pp. 2-3.) He agreed with Dr. Bohlander's report that applicant's Chiari malformation and syrinx were not related to the work injuries. (Ex. 1, p. 3.) He did not change his opinion that it was medically improbable that the seizures were related to the work injuries, but he recommended further testing to confirm his opinion as stated in the previous report. (Ex. 1, p. 3.)

On October 14, 2013, applicant and defendant proceeded to hearing to determine whether discovery should be closed. The WCJ determined that Dr. Kasman's opinion that applicant's seizures were not caused by work injury pending further testing was not substantial evidence. On October 21, 2013, the WCJ issued a Findings And Order to develop the medical record.

In a report dated August 19, 2014, Dr. Bohlander reviewed Dr. Kasman's report and indicated that applicant was permanent and stationary as previously determined and could continue with normal duties with regard to his cervical and shoulder injuries. (Ex. N, p. 3.)

In a report dated February 3, 2016, Dr. Kasman indicated that applicant was working part time cleaning and driving cars at an auto center, going to college and taking medications including Phenytoin and Levetiracetam. (Ex. 6, pp. 21-24.) He also summarized additional medical records, which indicated that applicant had been provided most of the testing previously requested and was taking medications including Dilantin and Keppra. (Ex. 6, pp. 40-51.) That is, the brain MRI revealed no intracranial abnormalities or calcification, the dermatologist indicated that the skin abnormality did not show neurocutaneous syndrome, the EEG was in a sleeping state but not sleep deprived, and the Holter monitor, EKG and spinal fluid exam were normal. (Ex. 6, p. 52.) He requested independent review of all CT and MRI studies of the brain and cervical spine, and a cardiac consultation and echocardiogram. (Ex. 6, p. 52.)

Dr. Kasman further reported that abnormalities of the EEG appeared to be left-sided or predominantly left-sided, which suggested some past insult to the brain. (Ex. 6, p. 53.) However, the May 2010 head injury had extreme benignity with a two year latency period and absence of focal aura to attribute to electrographic abnormalities. In addition, applicant was seizure free for almost four years and compliant concerning medications. Medical reports indicated that anticonvulsant levels were therapeutic, and that all reports thus far showed sub-theraputic Phenytoin. (Ex. 6, p. 53.) He determined that applicant's seizures were not related to work injury within reasonable medical probability. (Ex. 6, pp. 53-54.) He also concluded that applicant's syrinx/Arnold-Chiari Type I continued to have no relation to his industrial injuries and were probably incidental findings. (Ex. 6, p. 55.)

Dr. Kasman also reported that applicant's seizure disorder has reached maximum medical improvement, and that applicant has 5% WPI and should not work at heights, on ladders, with dangerous machines or do comparable risk like swimming. (Ex. 6, pp. 54-55.) He noted that applicant has been going to school without cognitive decline and was working part time without difficulty. He stated that future medical care included monitoring by a neurologist, and quarterly to biannual lab studies including anticonvulsant levels and comprehensive blood panels. He added that because of the burden to applicant, the trier of fact may want to go the "extra mile" in evaluating applicant at a tertiary care center or by Paul Garcia, M.D., University of California, San Francisco Epilepsy Center, for inpatient hospitalization with medication and video EEG monitoring because the evaluation might provide a greater degree of probability whether the seizures are related to the work injury. (Ex. 6, p. 54.)

In a report dated September 14, 2016, Dr. Nijjar indicated that he had examined applicant and reviewed records that were provided for the previous report. (Ex. 3, pp. 1-8.) He reported that applicant had reached maximum medical improvement for both work injuries on October 16, 2011, and that the diagnoses included contusion of the head status post possible concussion and cervical spine and left shoulder strain/sprain with impingement syndrome. (Ex. 3, p. 8.) He also indicated that applicant's WPI for the head trauma should be based on the neurological consultation, and the cervical spine WPI of 7% and left shoulder WPI of 2% are due to the December 4, 2010 injury. (Ex. 3, pp. 8-9.) He noted that applicant returned to his regular work and was able to perform his regular work functions. (Ex. 3, p. 10.)

In a report dated October 21, 2016, Dr. Nijjar indicated that he reviewed medical records including reports from Dr. Bohlander dated August 19, 2014, and Dr. Kasman dated March 12, 2013, February 17, 2014, and February 3, 2016. (Ex. 4, pp. 1-11.) He indicated that 1% WPI should be added for left shoulder pain considering the effect on the activities of daily living. Dr. Nijjar did not change otherwise his opinion expressed in his previous report. (Ex. 4, p. 12.)

On March 16, 2017, applicant and defendant proceeded to trial. The parties stipulated that applicant reached maximum medical improvement on November 16, 2011, based on the reporting of Dr. Nijjar. As relevant herein, in case ADJ8031364, applicant raised the issues of his claimed injury in the form of seizures, Chiari malformation and syrinx, and entitlement to temporary disability benefits from August 13, 2011 to November 16, 2011. The parties stipulated that

temporary total disability payments were made from May 26, 2010 to May 27, 2010, December 5, 2010 to December 20, 2010, and July 16, 2011 to August 12, 2011.

Applicant testified in relevant part as follows:

He lost consciousness after he slipped and fell and hit his head at work on May 22, 2010. (March 16, 2017, Minutes of Hearing, Summary Of Evidence (SOE), p. 4, lines 17-20.) After the second work injury on December 4, 2010, he received temporary disability until December 20, 2010, and returned to modified work and was terminated after the season ended around July 16, 2011. (SOE, p. 4. line 22 to p. 5, line 7.) He has headaches ever since he hit his head at work, and he told Dr. Nijjar. (SOE, p. 5, lines 9-24.) He had his first seizure at college on April 10, 2012, and had a second less severe seizure and one loss of consciousness. (SOE, p. 5, line 25 to p. 6, line 6.) He takes 300 milligrams Dilantin and 1000 milligrams Keppra two times a day, which keep seizures under control. (SOE, p. 6, lines 7-9.) He never had a seizure before the head injury at work. (SOE, p. 6, lines 9-10.) He underwent diagnostic tests recommended by Dr. Kasman for the heart and head, and by the dermatologist, and had a very painful spinal tap that caused so much head pain it felt like it would explode. (SOE, p. 6, lines 11-21.) He would undergo the treatment at UCSF Epilepsy Center suggested by Dr. Kasman if ordered to do so. (SOE, p. 6, lines 22-24.) He did not know if anyone requested the treatment at UCSF, or whether it would have been authorized. (SOE, p. 7, lines 13-14.)

He is currently working at Wittmeier Auto Center, and went to Butte College and is going to Chico State, and will become a social worker after graduating in May. (SOE, p. 6, line 25 to p. 7, line 2.) He remembered going to school even while working at Berberian, and would turn off the machine at work and go to college. (SOE, p. 8, lines 4-8 and 14-15.) When the work season ended, he applied for unemployment and looked for work and certified that he was ready, willing and able to work. (SOE, p. 7, line 23 to p. 8, line 12.) After the termination in July 2011, he may have received unemployment benefits and looked for work including at Smucker's in sales and other nut companies. (SOE, p. 8, lines 8-17.)

On April 26, 2017, the WCJ issued an Order Vacating Pending Submission And Developing the Medical Record. The order provided that Dr. Kasman's report dated February 3, 2016 is not substantial evidence regarding causation of applicant's seizure disorder because his opinion was preliminary. In the Minutes Of Hearing dated May 23, 2017, the parties were directed to send a joint letter to Dr. Kasman with a copy of the order asking whether he could provide a

final opinion based on reasonable medical probability regarding causation of the seizure or what may be further required.

In a report dated October 26, 2017 in response to the parties' letter and the WCJ's order, Dr. Kasman explained the preliminary aspect of his opinion that within reasonable medical probability 100% of the seizures are nonindustrial and 0% is industrial. (Ex. 7, p. 3.) He stated that: "The reason for this statement is that in individuals where there are sometimes greater ramifications of a particular diagnosis, it can be helpful to have a specialist in that particular branch of neurology weigh in an opinion. The "preliminary" statement was solely if the parties had wished to proceed in that direction." He also stated with respect to his final opinion that: "Now, almost two years after my last report, I assume, from the absence of any medical records from U.C. San Francisco or requests for me to arrange a consultation with Paul Garcia, M.D., that the parties wish to resolve the case without Dr. Garcia's (or another epileptologist) opinion. In that case, I can state within reasonable medical probability that Mr. Valenzuela-Chavez' seizures are not industrial in origin, and this is not a preliminary but a final opinion. Within reasonable medical probability, 100% of his seizures are nonindustrial and 0% is industrial." (Ex. 7, p. 3.)

In a telephonic appearance by applicant and defendant on March 20, 2018, Dr. Kasman's October 26, 2017 report was entered into evidence as Joint exhibit 7. (MOH, March 20, 2018, p. 2.) Applicant argued that Dr. Kasman's report regarding causation is not substantial evidence because he failed to consider that applicant had been taking medications while seizure free for four years. In addition, Dr. Kasman incorrectly assumed that applicant did not want to pursue the examination by a seizure specialist. (MOH, p. 2, line 14 to p. 3, line 7.) Defendant argued that Dr. Kasman's reporting that applicant's seizures are not industrial is within reasonable medical probability, is final and is substantial evidence. In addition, Dr. Kasman was the AME for years and issued numerous reports and the medical record has been developed numerous times. (MOH, p. 3, lines 8-18.)

After several stipulations between applicant and defendant, the WCJ issued a Joint Order Approving Stipulation Of The Parties Regarding Clarification Of Body Parts And Order Of Submission dated October 3, 2018. The joint order provided that the parties stipulated that applicant sustained injury to the head and cervical spine, and that seizures are denied in ADJ8031364. In addition, the claimed Chiari malformation and Syrinx can be deleted from the record. The parties also stipulated that applicant sustained injury to the left shoulder, trapezius

and cervical spine, and that brachial plexus can be deleted in ADJ8033255. The matter was ordered submitted.

DISCUSSION

A decision must be supported by substantial evidence such as medical opinion and/or testimony considering the entire record. (§§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (*Garza*) (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence when based on incorrect facts, history, examination or legal theory, or surmise, speculation, conjecture or guess. (*Place v. Workers' Comp. Appeals Bd.* (*Place*) (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) A medical opinion should also be based on reasonable medical probability and logical and persuasive reasoning, which is consistent with the record. (*McAllister v. Workmen's Comp. Appeals Bd.* (*McAllister*) (1968) 69 Cal.2d 408, 413, 416-417 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (*Escobedo*) (2005) 70 Cal.Comp.Cases 604, 620-621.) The parties generally select an AME for expertise and neutrality, and the AME's opinion is generally followed unless there is good reason that it is incorrect or not persuasive. (*Power v. Workers' Comp. Appeals Bd.* (*Power*) (1986) 179 Cal.App.3d 775, 782-784 [51 Cal.Comp.Cases 114].) The record may be ordered developed when required for a decision or award to be based on substantial evidence and due process. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (*Tyler*) (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McDuffie v. L.A. County Metropolitan Transit Authority* (*McDuffie*) (2002) 67 Cal.Comp.Cases 138, 141-143.)

Applicant contends that Dr. Kasman did not consider that applicant was taking seizure medications while seizure free for four years, and his opinion that the seizures were not caused by the work injury is not substantial evidence. We disagree.

Dr. Kasman examined applicant, reviewed his medical records and issued several extensive and detailed reports, which chronicled applicant's use of Dilantin or Phenytoin and Keppra or Levetiracetam during the four years following his seizures in 2012. Dr. Kasman noted that the medical records indicated that the anticonvulsant levels are therapeutic and showed sub-therapeutic Phenytoin. Dr. Kasman explained that applicant experienced only two seizures approximately two years after his May 22, 2010 head injury at work, and was very compliant concerning the medications and seizure free for four years. Moreover, applicant testified at trial that he only had the two seizures in 2012, and that he takes 300 milligrams Dilantin and 1000

milligrams Keppra two times a day which controls seizures. Thus, applicant's use of medications following his seizures was considered by Dr. Kasman in forming his opinion that applicant's seizures were not caused by his head injury at work. Accordingly, we find that Dr. Kasman's opinion is based on correct facts and history and is substantial evidence in this regard as reported by the WCJ. (*Place*, *supra*, 3 Cal.3d at p. 378; *Garza*, *supra*, 3 Cal.3d at pp. 317-319; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.)

Applicant also contends that Dr. Kasman's opinion regarding causation of the seizures is not based on reasonable medical probability and substantial evidence because he recommended an evaluation by a specialist in epilepsy to enable a greater degree of probability. Applicant further contends that Dr. Kasman incorrectly assumed the evaluation was not wanted, and that applicant testified at trial that he would undergo the evaluation if ordered. Applicant contends that the medical record should be further developed and the specialist evaluation obtained as he argued at the hearing in April 2018.

In addition to examining applicant multiple times and reviewing his records, Dr. Kasman recommended various diagnostic tests and reported extensively how the results helped form his opinion that applicant's head injury at work did not cause his seizures. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.) Dr. Kasman also explained that the head injury did not result in bleeding, "goose egg", skull fracture, intracranial hemorrhage, post-traumatic changes or focal or generalized neurological symptoms, and was extremely benign to have caused the seizures. Dr. Kasman reported that his opinion is based on reasonable medical probability and final without the evaluation by the specialist in epilepsy, which is consistent with the extensive and accurate examinations, record review, testing, reporting and explanations by Dr. Kasman. (*McAllister*, *supra*, 69 Cal.2d at pp. 413, 416-417; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.) He also explained that he suggested the specialist evaluation because the treatment for seizures is a significant burden for applicant if unrelated to the work injury. Although Dr. Kasman indicated that the evaluation may provide a greater degree of probability whether applicant's seizures are related to his head injury at work, a greater degree than reasonable medical probability or certainty is not required as reported by the WCJ. (*Rosas v. Workers' Comp. Appeals Bd.* (*Rosas*) (1993) 16 Cal.App.4th 1692, 1701, 1705 [58 Cal.Comp.Cases 313].) Moreover, Dr. Kasman was the AME in neurology and his opinion is based on the correct facts and is well explained and persuasive. (*Power*, *supra*, 179 Cal.App.3d at pp. 782-784; *Escobedo*, *supra*, 70 Cal.Comp.Cases at pp. 620-

621.) Accordingly, we conclude that Dr. Kasman's opinion that applicant's seizures were not caused by the May 22, 2010 head injury is based on reasonable medical probability and substantial evidence without the evaluation. We observe that applicant has also been afforded due process by the WCJ's orders pertaining to developing the medical record further even after hearings. Thus, we decline to order further development of the medical record, and we do not disturb the WCJ's finding that the claimed seizure injury was non-industrial.

Section 4656 provides in part,

> "(c)(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury."

Generally, temporary disability payments are paid by the employer or insurer to compensate the injured employee for lost wages during the period that the employee is temporarily disabled from performing work, undergoing medical treatment and is healing due to the work injury. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (*Nickelsberg*) (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476]; see also *Huston v. Workers' Comp. Appeals Bd.* (*Huston*) (1979) 95 Cal.App.3d 856, 868-870 [44 Cal.Comp.Cases 798].) Temporary disability payments are paid weekly at the applicable statutory rate until the injured employee reaches maximum medical improvement or a permanent and stationary status, returns to work, or is deemed able to return to work, subject to statutory limits. (§§ 4453, 4653 et seq.; *Dept. of Rehabilitation v. Workers' Comp. Appeals Bd.* (*Lauher*) (2003) 30 Cal.4th 1281, 1291-1292 [68 Cal.Comp.Cases 831]; *Huston, supra*, 95 Cal.App.3d at p. 868; *Brower v. David Jones Construction* (*Brower*) (2014) 79 Cal.Comp.Cases 550, 560-562.) Applicant has the burden of proof to establish entitlement to temporary disability payments with substantial evidence. (§ 3202.5; *Lauher*, *supra*, 30 Cal.4th at pp. 1290-1291; *Huston, supra*, 95 Cal.App.3d at pp. 867-871.)

Applicant contends that he is entitled to temporary disability payments from August 13, 2011 to November 16, 2011 because Dr. Nijjar reported that applicant's work injuries reached maximum medical improvement as of November 16, 2011.

However, although Dr. Nijjar reported that applicant's work injuries attained maximum medical improvement on November 16, 2011, Dr. Nijjar did not state that applicant was temporarily disabled during the period claimed. Dr. Nijjar reported that applicant returned to modified work after the December 4, 2010 work injury until he was laid off on July 16, 2011, and

had not worked since then. However, applicant had been released to regular work duties by the treating physician according to Dr. Bohlander's August 15, 2011 report, and the record indicates that Dr. Nijjar never reviewed Dr. Bohlander's August 15, 2011 report. Dr. Nijjar also did not review Dr. Kasman's report dated May 14, 2013, which summarized Dr. Bohlander's August 15, 2011 report that was requested in Dr. Kasman's previous report.

In addition, the medical record and applicant's trial testimony indicate that he received unemployment benefits, sought employment and attended college after his lay-off from work in July 2011. Dr. Nijjar did not address these facts in his reports, which further indicates that applicant was able to work and not temporarily disabled during the period claimed. Dr. Nijjar's opinion regarding the claimed temporary disability benefits is based on inaccurate facts, history and legal theory, and is not substantial evidence. (*Lauher*, *supra*, 30 Cal.4th at pp. 1290-1291; *Place*, *supra*, 3 Cal.3d at p. 378; *Huston, supra*, 95 Cal.App.3d at pp. 867-871.) In short, applicant did not sustain his burden of proof that he is entitled to temporary disability payments from August 13, 2011 until he was reported to have reached maximum medical improvement on November 16, 2011.

We note that for work injuries on or after January 1, 2008, temporary disability payments may not be awarded for periods of disability more than five years from the date of injury. (§ 4656(c)(2); *County of San Diego v. Workers' Comp. Appeals Bd.* (*Pike*) (2018) 21 Cal.App.5th 1, 8-16 [83 Cal.Comp.Cases 465].) For work injuries occurring on or after January 1, 2008, temporary disability payments may be awarded after five years from the date of injury for periods of disability within five years of the date of injury. (§ 4656(c)(2); *Pike*, *supra*, 21 Cal.App.5th at pp. 8-16.) Applicant claimed temporary disability payments from August 13, 2011 to November 16, 2011, which is a period of disability within five years of the May 22, 2010 date of injury. Therefore, we agree that the *Pike* decision did not preclude the WCJ from awarding the claimed temporary disability payments more than five years from the date of injury. However, as we have already explained, Dr. Nijjar's opinion is not substantial evidence that applicant was temporarily disabled from August 13, 2011 to November 16, 2011, and applicant did not sustain his burden of proof that he is entitled to temporary disability payments for the claimed period.

Although the WCJ ultimately based denial of the claimed temporary disability payments on the *Pike* decision, if the result is correct based on the same lack of substantial evidence and another applicable theory of law, we note that the result will be sustained. (*Belair v. Riverside*

County Flood Control Dist. (*Belair*) (1988) 47 Cal.3d 550, 568; *Ladas v. California State Auto Assn.* (*Ladas*) (1993) 19 Cal.App.4th 761, 769.) Thus, we agree that applicant was not entitled to the claimed temporary disability benefits.

Accordingly, as our decision after reconsideration, we affirm the F&A, except that we amend Finding of Fact 3 to remove the phrase "as temporary disability cannot be awarded over five years from the date of injury."

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings, Award & Order issued by a workers' compensation administrative law judge on November 20, 2018 is **AFFIRMED** except that Finding of Fact 3 is **AMENDED** as follows:

FINDINGS OF FACT

3. Applicant is not entitled to further temporary disability indemnity benefits for the period from August 13, 2011 to November 16, 2011.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2023

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

ROGELIO CHAVEZ VALENZUELA
FREDERICK GIBBONS, ATTORNEY AT LAW
PARK GUENTHART
COOK & GUSHI

AS/*ara*

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