

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

GAYLE GRANT, *Applicant*

vs.

**SAN MATEO COUNTY TRANSIT DISTRICT,
permissibly self-insured, *Defendant***

**Adjudication Number: ADJ12212593
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, we will affirm the November 3, 2020 Findings and Award.

Moreover, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 3, 2020 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 17, 2022

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

**GAYLE GRANT
BRIAN J. THORNTON, A LAW CORPORATION
AGM LAW OFFICES
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/abs

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Date of Injuries/Body Parts: 11-09-2018/left knee
Occupation: bus driver
Petitioner: Defendant
Timeliness: The petition, filed on 11-23-2020, is timely
Verification: The petition is not verified

Petitioner's Contention: Defendant San Mateo County Transit District contests the finding that applicant retired on 06-23-2020 as the result of her left knee injury and instead contends that applicant's service retirement disqualified her from ongoing total temporary disability.

II. FACTS

This case proceeded to trial as an Expedited Hearing on 10-01-2020 wherein applicant Gayle Grant testified credibly on her own behalf and no other witnesses were present. Applicant worked a bus driver for defendant San Mateo County Transit District, or Sam Trans, for 34 years. On 11-09-2018, applicant sustained injury to the left knee and her claim is accepted. (Applicant has four cases with defendant, but only in case number ADJ12212593 for date of injury 11-09-2018 is at issue.) She retired on 06-23-2020.

Findings and Award issued on 11-03-2020 with regard to a Request for Authorization (RFA) for left knee surgery dated 08-11-2020, temporary disability entitlement, and on the issue of applicant's retirement. Defendant filed a timely Petition for Reconsideration asserting that there is not substantial evidence to support that applicant was forced to retire because of her left knee injury. Instead, defendant characterizes applicant's retirement as voluntary and contends applicant should not be entitled to temporary disability indemnity subsequent to the time of her retirement. Defendant contends that applicant chose to retire and withdraw from the labor market and she has no plans to return to gainful employment.

Applicant filed an Answer dated 12-01-2020.

III. DISCUSSION

As stated in the Opinion on Decision, the concept of temporary disability is based on an injured worker's earnings or earnings capacity, her ability to work, and her willingness to work. If a worker retires, however, she arguably removes herself from the labor market thus eliminating her earnings capacity and willingness to work. The factual analysis in this case must be whether the worker is retiring for all purposes, or only from the particular employment and whether the

decision to retire was related to the work injury. *Gonzalez v. Workers' Comp. App. Bd.* (1998) 63 Cal.Comp.Cases 1477.

In the Petition for Reconsideration, defendant argues that there is no evidence to support the finding that applicant would have continued to work but for her left knee injury and need for surgery. This is incorrect. In uncontroverted testimony, applicant testified that she retired because she was not able to perform the duties of her job as a bus driver due to her left knee injury. (See Minutes of Hearing/Summary of Testimony 10-01-2020, hereinafter "MOH/SOE," at p. 6, lines 1-5 and lines 23-24; p. 7, lines 4-8.) Applicant testified that as the result of the left knee injury, she cannot climb stairs or "get on her knees to fully do her job." (Id., at 7, lines 1-6.) She wants the left knee surgery prescribed by her treating physician Dr. Donald Pang. (Id., at 5, lines 5-8.) The denial of the knee surgery by defendant which was requested by Dr. Pang in an RFA of 08-11-2020 was an issue for trial. At the time of trial, the surgery remained denied.

Defendant contends that because applicant did not articulate any plans for reentering the workforce, she has taken herself out of the workforce. However, this is not the criteria set forth in *Gonzalez, supra*. The criteria is whether the injury caused applicant to retire. In this case, applicant quite simply could not do her job as the result of the left knee injury. In addition to testimony at trial, this is supported by the medical record. Dr. Peter Mandell is the AME in this case. Dr. Mandell reevaluated applicant on 07-01-2020 and in the supplemental report, the AME adopts the history given by applicant. Specifically, after her right knee surgery, applicant tried to return to work full time in December of 2019 but this lasted only about seven days. On 12-11-2019, Dr. Pang took her off work because of her left knee. (Ex. 105 at 2.) Moreover, according to the AME, further medical treatment is required in form of injections, medications, physical therapy and "[s]he will probably need surgery on her LEFT knee as well, and a provision should be made for that." (Ex. 105 at 5.)

Applicant has 34 years of service to defendant. She testified that she is 62 years old and had planned to work until "full retirement" which for her would have been about age 66. Because she retired early as the result of this injury, her pension is \$1,000 to \$1,500 *less per month* than it would have been at full retirement. (MOH/SOE at p.6, lines 1-5.) That is, her current income is substantially less in retirement than working. In addition, her pension is substantially less than it would be had she met her personal goal of retiring at age 66. Applicant's loss of pension income is a compelling factor to show that the left knee injury forced her to retire early.

There is insufficient evidence to show that applicant has taken herself out of the workplace on a permanent basis. Defendant conveniently omits crucial testimony from its petition. Defendant is cautioned in this regard. At trial, applicant testified she is not receiving Social Security; she needs the surgery, and until then, she has no plans. (MOH/SOE at 7, lines 15-18.) Applicant also testified that she has not attempted to find other employment as she is waiting on surgery for her knee, that she will attempt to obtain the surgery from her private insurance if necessary, and afterward, she may do real estate or event planning "for extra money to fill in those gaps" of lost income. (Id., at 6, lines 5-8.)

Defendant contends that applicant received SDI benefits subsequent to her retirement but this is a red herring. EDD expressly did make claim to no benefits after 06-02-2020. (See Issue number 2, MOH/SOE at p. 2, line 19-20.) Applicant testified she had received EDD benefits after

her retirement, and she may have received a check after her retirement, however, there is not enough evidence to show what periods were covered. In any case, the EDD lien is deferred as this case was already expanded beyond scope of an Expedited Hearing in terms of issues and exhibits.

Finally, applicant is entitled to temporary disability despite her retirement. In the AME supplemental report of 4-19-2020, Dr. Mandell reviewed Dr. Pang's report of 3-12-2020 and agrees that the left knee has resulted in a period of total temporary disability pending surgical intervention. (Ex. 102 at 2.)

IV. RECOMMENDATION

Based on the foregoing, it is respectfully requested that Petition for Reconsideration be **DENIED**.

DATE: 12-14-2020

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Applicant Gayle Grant worked a bus driver for defendant San Mateo County Transit District, or Sam Trans, for 34 years. She retired 06-23-2020. Applicant appeared at trial via teleconference and she testified very credibly on her own behalf.

By way of background, applicant has the following cases with defendant San Mateo County Transit District:

- Case number ADJ12212593 for date of injury 11-09-2018 to the left knee;
- Case number ADJ9223664 for date of injury 11-07-2013 to the left knee and ankle;
- Case number ADJ10564539 for date of injury 05-16-2016 to the back, neck and shoulder, and;
- Case number ADJ1147502 for cumulative trauma date of injury 07-13-2017 to 07-13-2018 to the right knee.

All of applicant's cases are listed above for the sake of completeness. However, only case number ADJ12212593 was submitted. This trial was the result of applicant's Declaration of Readiness (DOR) in case number ADJ12212593 filed on 09-02-2020 which alleges that defendant failed to respond to a Request for Authorization (RFA) by treating physician Dr. Donald Pang dated 08-11-2020 for treatment in form of left knee surgery and defendant's alleged failure to perform Utilization Review (UR) should result in the court's award of the surgery. The DOR also alleged entitlement to total temporary disability based on the reporting by the treating physician and the AME Dr. Peter Mandell.

On 09-05-2020, defendant filed an objection letter to the DOR. Numerous exhibits were filed and considerable trial time was spent organizing the exhibits, yet joint exhibit 108 and exhibit D are duplicates. All of the arguments on the issues above were briefed by the parties.

1. Request for Authorization dated 08-11-2020 for Left Knee Surgery

In the objection to the DOR and its post-trial brief, defendant contends that the RFA of 08-11-2020 from Dr. Pang's office was incomplete and there was insufficient information for the claims adjuster to act upon it. Exhibit H consists of 28 pages of faxed documents from 08-11-2020 and 08-12-2020 which supports defendant's contention that the RFA at issue was not legible because the bottom half of each page was cut off or did not print. Therefore, at least have of the information is missing. Facsimile tattoo date stamps from Dr. Pang's office on the third page of exhibit H onward appear to show the request was resent on 08-12-2020 from (510)793-1713 (Dr. Pang's office) beginning at 10:13, but again these pages were half blank. The first two pages of exhibit H show that the repeat transmission was not successful and the adjuster attempted twice, at 11:20 a.m. and then again at 4:35 p.m., to send the faxes back to the doctor in order to illustrate the problem. Thereafter, the treating physician did not respond.

There are provisions in the law governing what a claims adjuster must do if a RFA is incomplete or otherwise lacks sufficient information. In accord with Labor Code section 4610 and under Board Rule 9791.9.1, if there is a decision to deny a medical service is due to incomplete or insufficient information, the decision must specify the information that is lacking and there must be evidence of an attempt to obtain the missing information. (Lab. Code §4610(i)(5); Cal. Code. Regs, tit. 8, §9791.9.1(e)(5)(F); Cal. Code. Regs, tit. 8, § 9792.9.1(g)). Exhibit H shows that the claims adjuster attempted to do this on 08-12-2020 at 11:20 a.m. and then again at 4:35 p.m. and thus fulfilled the obligations and the RFA should have been denied for lack of evidence.

Subsequently, applicant's attorney attempted to seek authorization for the RFA. Exhibit 8 is a cover letter dated 08-21-2020 by applicant's attorney with a demand letter to defense counsel in reference to an enclosed the RFA of 08-11-2020. Applicant's attorney requested authorization as the result of no UR. Applicant's exhibit 9 was introduced as the enclosure to exhibit 8 and a copy of the RFA dated 08-11-2020; however, it is the RFA form with no supporting medical report. Apparently, applicant's attorney was unaware of the failed fax communications of 08-11- 2020 and 08-12-2020. Exhibits 8 and 9 are insufficient to show that there was enough information for defendant to act in response to the attorney's demand of 08-21-2020.

Applicant offers a RFA denial of 08-18-2020 as exhibit 10. The subject of the denial was post-operative medication, but it was an exercise in futility as no surgery was authorized. But, it shows that Dr. Pang's office was successful in transmitting requests electronically after failed RFA Perhaps Dr. Pang's office had no idea its fax pages were half blank and, as shown from exhibit 10, subsequent fax transmissions were successful. It is not apparent that Dr. Pang's fax equipment was faulty, but it is apparent that they could do nothing to fix the transmission problem.

Defendant raises the theory that Dr. Pang was attempting a "go-around" of the UR process by requesting the knee surgery in two claims. Labor Code section 4610(k) bars a treating physician from submitting a repeat RFA within 12 months of a UR denial, absent a change in material facts. There was an RFA for left knee surgery was first submitted on 01-23-2020 under the claim for date of injury 11-07-2013, case number ADJ9223664, and this was denied on 01-24-2020. (Ex. C.) In his report of 03-12-2020, Dr. Pang states that unbeknownst to him, applicant had a new left knee injury in November 2018 as the result of a slip and fall at the bathroom at work. (Ex. 1, report of 03-12-2020.) This report was generated at the request of defense counsel, and until this time, Dr. Pang had been issuing reports only in case number ADJ9223664. It is fair to infer that Dr. Pang interpreted the request for the supplemental report as an invitation to submit another request for the knee surgery. And despite Dr. Pang's intention to clear up the confusion as to what claim to bill under, subsequent his reports of 09-03-2020, 07-16-2020, 07-18-2020, 05-14-2020, 04-23-2020, 03-25-2020 as well as that of 08-13-2020 continues to reference only case number ADJ9223664, which is for the older date of injury 11-07-2013 and claim number 2018023. (Ex. 1 and Ex. 2.) Applicant contends that this is because Dr. Pang never received express authorization to treat under the 2018 claim. This could be, but there is insufficient evidence to draw any conclusion except that given applicant's several cases for the same and overlapping body parts and confusion on all sides, it is determined that Dr. Pang did not intend to skirt the prohibition in Labor Code section 4610(k).

It is relevant that the AME Dr. Mandell issued a supplemental report on 4-19-2020, admitted as Exhibit 102. Therein, the AME reviewed Dr. Pang's report of 3-12-2020 and agrees

that the left knee has resulted in a period of total temporary disability pending surgical intervention. (Ex. 102 at 2.) Dr. Mandell reevaluated applicant on 07-01-2020. The AME adopts the history given to the AME by applicant, that she tried to return to work full time in December of 2019 but this lasted only about seven days and that on 12-11-2019, Dr. Pang took her off work because of her left knee. Applicant testified credibly and without contradiction to these same facts at trial. According to the AME, an MRI shows a tear in the left medial meniscus. (Ex. 105 at 2.)

Based on the record, I agree with Defendant's conclusion in its brief that the appropriate remedy is for Dr. Pang to resubmit his RFA of 08-11-2020. Applicant testified that is it her intention to have surgery. It is recommended that he rewrite his RFA taking the AME reports into account and providing an update of applicant's condition. Then, UR should consider the entire medical record including the AME's reports to date, which are part of the trial record.

2. Total Temporary Disability

AME Dr. Mandell issued the first report for the 11-9-2018 left knee injury on 11-20-2019. (Ex. 101.) He opines that applicant sustained a fall on 11-8-2018 and injured her left knee. She received treatment and the injury caused time off from work.

Dr. Mandell issued a supplemental report on 4-19-2020, admitted as Exhibit 102. He reviewed Dr. Pang's report of 3-12-2020 and agrees that the left knee has resulted in a period of total temporary disability pending surgical intervention. (Ex. 102 at 2.) Subsequently, the AME issued supplemental report issued on 05-9-2020 and then on 05-30-2020, wherein the AME stated he is aware of questions pending regarding applicant's temporary disability status, but believes that a reevaluation would be worthwhile. (Ex. 103 and 104.)

Dr. Mandell reevaluated applicant on 7-1-2020. As set forth above, the history given to the AME by applicant was adopted: after her right knee surgery, applicant tried to return to work full time in December of 2019 but this lasted only about seven days. On 12-11-2019, Dr. Pang took her off work because of her left knee. (Ex. 105 at 2.) Further medical treatment is required in form of injections, medications, physical therapy and "[s]he will probably need surgery on her LEFT knee as well, and a provision should be made for that." (Ex. 105 at 5.)

Finally, in a report of 8-29-2020, Dr. Mandell makes it clear that causation of the left knee condition is the 11-9-2018 injury. (Ex. 107.) Moreover, temporary disability is "extended" from the time she went off of work until she retired. (Id.) That is, applicant is entitled to temporary disability as the result of the left knee from when she went off of work in December of 2019. Finally, Dr. Mandell provided an AMA Guides rating of the left knee in his report of 8-15-2020 but this has no impact on his temporary disability findings and applicant is not permanent and stationary due to section 1 above. (Ex. 106.)

3. No Effect of Retirement on Temporary Disability Status

Defendant contends that applicant is not entitled to temporary disability subsequent to her retirement on or about 06-23-2020 as she voluntarily removed herself from the labor market. The concept of temporary disability is based on an injured worker's earnings or earnings capacity, her ability to work, and her willingness to work. If a worker retires, however, she arguably removes

herself from the labor market thus eliminating her earnings capacity and willingness to work. The factual analysis in this case must be whether the worker is retiring for all purposes, or only from the particular employment and whether the decision to retire was related to the work injury. *Gonzalez v. Workers' Comp. App. Bd.* (1998) 63 Cal.Comp.Cases 1477.

Defendant argues that applicant removed herself from the labor market due possibly due to frustration with the litigation process and/or because she no longer wished to work, however, these arguments are unsupported by the record. At trial, applicant testified that she retired because she was not able to perform her duties because of her injuries and that she notified the employer that she is retiring *because of* her injuries. Her testimony was reiterated on cross-examination, is uncontroverted, and accepted as fact. Applicant, a 34 year employee, is 62 years old and had planned to work until "full retirement" which for her would have been about age 66. Because she retired this year, her pension is \$1,000 to \$1,500 less more per month than it would have been at full retirement. As a 34 year employee, applicant's testimony on the estimation of lost pension payments is credible.

Defendant raises contentions that applicant has considered work as an event planner or a realtor, the inference being that she is not motivated to work. These arguments rejected. Despite taking event planner classes in 2010, applicant has never worked in this field. Applicant expressed interest in realtor school, but has never taken any steps toward this. Instead, it was applicant's testimony that she was unable to work due to her left knee and this is supported by the medical reports of the AME and Dr. Pang. Applicant testified that she has not attempted to find other employment because she is still waiting for the surgery on her knee, which she will pursue from private insurance if it cannot be accomplished through workers' compensation.

In fact, defendant has contested applicant's entitlement to temporary disability to date. EDD has asserted a lien, but the period claimed 05-14-2019 to 06-02-2019. There is no evidence that applicant received SDI after 06-02-2019. It appears that after applicant was unable to continue working in December of 2019, she had no income. The retirement was premature of what was planned but it was necessary for applicant to draw her pension for income.

In sum, applicant did not retire due to the prospect of other employment or because she no longer wanted to work. It is determined that *but for* the left knee injury and need for surgery, applicant would have continued to work. Therefore, applicant is entitled to temporary disability continuing after her retirement date and forward, according to her treating physician reports or the AME and/or until 104 weeks is exhausted in case number ADJ12212593. It appears that as long as applicant is in need of the left knee surgery and as long as she desires the same, she is entitled to temporary disability according to Dr. Pang.

In addition, it appears that EDD is entitled to full reimbursement for its lien for the period of 05-14-2019 to 06-02-2019. This matter was an expedited trial where lien matters are not usually decided. To avoid further delay in retroactive payments to applicant, defendant should withhold retroactive payment for the EDD period and the parties should attempt to adjust the lien informally.

4. Future Medical Treatment

The AME supports the need for future medical treatment. At a minimum, the AME supports the request for knee surgery.

5. Attorney Fee

Applicant's attorney has performed valuable services in this case. As such, he is entitled to a 15% attorney fee on amounts awarded herein. All amounts are to be adjusted by the parties, with jurisdiction reserved.

DATE: 11-03-2020

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE