

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

LUCILA DICKSON, *Applicant*

vs.

**THE CROSSINGS AT CARLSBAD; PRAETORIAN INSURANCE COMPANY, *adjusted
by GALLAGHER BASSETT, Defendants***

**Adjudication Numbers: ADJ11064890, ADJ11064901
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration or in the alternative removal of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 2, 2021. By the F&A, the WCJ found that applicant is entitled to temporary total disability from March 5, 2020 to the present and continuing for the August 24, 2017 injury (ADJ11064901).

Defendant contends that applicant's temporary total disability for her two injuries overlap, she has already received 104 compensable weeks for aggregate temporary disability payments, and therefore she is not entitled to additional temporary disability for the August 24, 2017 injury.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration/Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as a food server by The Crossings at Carlsbad: 1) to the right wrist/carpal tunnel and bilateral upper extremities on April 28, 2017 (ADJ11064890), and 2) to the low back and left knee on August 24, 2017 (ADJ11064901).

Defendant has accepted the April 28, 2017 injury to the right wrist and the August 24, 2017 claim to the low back, but disputes compensability for the left knee on the latter claim.

The cases initially went to trial on September 19, 2019, at which time the cases were ordered consolidated with ADJ11064890 designated as the master file. (Minutes of Hearing; Order of Consolidation, September 19, 2019, p. 2.) The issue at that trial was whether applicant could designate Dr. Thompson as her primary treating physician (PTP). (*Id.* at pp. 2-3.) The WCJ issued a Joint Findings and Order on November 4, 2019, which included a finding that applicant had sustained an injury to her right wrist/carpal tunnel in ADJ11064890 and an injury to her back in ADJ11064901. The WCJ found that further development of the record was required to address the issues raised at trial. Neither party challenged the Joint Findings and Order.

Kent Karras, D.C. evaluated applicant as the chiropractic qualified medical evaluator (QME) in January 2018. Dr. Karras reported applicant's injury and treatment history as relevant herein:

The applicant reported that on April 28, 2017 while she was carrying a tray of food, she dropped a plate that she was going to serve to a customer. She related that she tried to grip the plate of food with her right hand but her thumb and middle finger did not respond and causing her to drop the plate and spill food all over her. She continued to work and asked the chef to give her another plate of food for the customer. She was carrying the tray with the new plate for the customer, as she tried to get the plate from the tray the same thing happened again and she dropped the second plate. She mentioned to her boss that something was wrong with her hand but her boss did not pay attention and did not offered [*sic*] medical treatment to her. She continued to work trying to avoid using the right hand. She stated that she purchased a carpal tunnel wrist brace at the local drug store and started to use it at work. She kept working until August 25, 2017.

The applicant reported that on August 24, 2017, she injured her lower left back while pushing and pulling tables and chairs for a special event at 6:30 am, she was using her wrist brace. She went to the human resources office and informed them that she had injured her back. She was sent to U.S. HealthWorks in Ocean Side. She was seen on August 24, 2017 and had x-rays of her back and was told that she had a sprain muscle in her left lower back and neck. The doctor at U.S. HealthWorks noticed that she was using a wrist brace and asked her about it. She told the doctor that she had injured her hand at work in April. She was advised by this doctor to ask her employer to refer her for treatment for the right hand. She was prescribed medication for pain and a back brace. She was sent back to work with limited duty of no lifting and no pulling more than 25 pounds as well as no stooping and had to take a 15 minutes break every 2 hours. She

went back to work the next day and she worked with restrictions. She got a referral paper from her employer for the right wrist.

The applicant reported that on August 25, 2017, she went back to U.S. HealthWorks and had x-rays of the right hand. She was diagnosed with tendinitis and was dispensed a better brace for the wrist and thumb. They also add restriction of no use of the right hand and must use brace at work. **She stated that when she went back to work with the restrictions her employer told her that she could not work with those restrictions. She was placed on temporary total disability.**

...

She was released to go back to work on regular duty on October 6, 2017 regarding her back injury but she still had restrictions for her right wrist so she did not go back to work.

The applicant sought legal help and she was referred to Glenn Nusbaum, D.C. **She started to treat with Dr. Nusbaum in October 2017 for her right wrist and back.** Dr. Nusbaum has recommended chiropractic treatment but it had not been approved. She was placed on temporary total disability.

(Defendant's Exhibit D, PQME Report of Dr. Karras, January 30, 2018, pp. 2-3, emphasis added.)

Dr. Karras' summary of the medical records reviewed includes the following:

08/25/17 - Work Status Report - US Healthworks Medical Group - Bruno Seemann, M.D.

The applicant was to return to work as of 08/25/2017 with restrictions of no use of right hand.

08/28/17 - Work Status Report - US Healthworks Medical Group - Kathryn Sears, M.D.

The applicant was to return to modified work as of 08/28/2017 with restrictions of frequent change of position as tolerated, limited stooping, bending, kneeling and squatting as well as limited lifting, pushing and pulling up to 15 pounds.

...

09/05/17 - Work Status Report - US Healthworks Medical Group - Susan L. Radoff, P.A.

The applicant was to return to work as of 09/05/2017 with restrictions of limited stopping and bending for 4 out of 8 hours per day, limited lifting, pushing and pulling up to 15 pounds. **She must wear back support and must take a stretch break for 10 minutes after every 90 minutes duties to ice/heat.**

...

10/24/17 - Primary Treating Physician's Initial Report - Mission Valley Chiropractic Clinic - Glenn C. Nusbaum, D.C.

Date of Injury: 04/28/2017. History of Injury: The applicant stated that in 04/2017, she was performing her normal job duties and was serving food to patrons when she dropped a plate of food. She was not sure if it was pain or weakness on her hand that caused her to drop the plate. This happened on a second occasion the same day. She indicated she had been experiencing some intermittent pain in her right upper extremity, which did radiate into her neck. She continued to perform her normal job duties for the next several months, reporting ongoing pain on her right upper extremity, particularly when lifting up plates of food, as well as when reaching with arm to pour water or coffee. History of Other Injuries: She stated that she sustained a prior industrial injury to her lower back on 08/24/2017 while lifting at work. Present Complaints: She reported intermittent frequent right sided neck pain that radiates into the right arm distal to the hand, terminating into the thumb and index fingers. Sustained extension of the neck produced increased neck pain, as well as increased right arm pain. Right thumb and hand pain increased with grasping and gripping. She reported pain predominantly over the thumb on the first dorsal compartment consistent with de Quervain's tenosynovitis. Past Medical History: Allergies: Strawberries. Physical Examination: There was tenderness to palpation along the posterior cervical paraspinal, upper trapezius, and levator scapular musculature on the right. Sustained cervical extension increased neck pain, as well as right arm pain. Spurling's maneuver was positive for neck pain and increased right arm pain. Cervical distraction test decreased both neck pain and right arm symptoms. There was decreased cervical spine range of motion in all planes. Examination of the wrists showed mildly positive Tinel's test with reported pain traveling onto the right thumb. Positive Finkelstein's test. Motor strength evaluation revealed 4/5 strength for right wrist flexors. Diagnostic Impression: 1) Right de Quervain's tenosynovitis. 2) Right carpal tunnel syndrome. 3) Cervical disc herniation with right upper extremity radiculopathy. Causation: It is reasonable to assume the applicant became asymptomatic with regard to her cervical spine and right upper extremity as a result of repetitive bending, lifting and carrying while working as a food server on a cumulative basis with a CT exposure period extending through 04/28/2017. Permanent and Stationary Status: The applicant had not reached maximum medical improvement. Apportionment: Deferred until she reached MMI. Treatment Plan/Request for Authorization: 1) Chiropractic therapy to the cervical spine. 2) MRI of the cervical spine. 3) Requested authorization for referral to an orthopedic upper extremity specialist. **Disability Status/Work Preclusions: She was precluded from lifting or carrying with the right arm. She had an overall lifting restriction of 10 pounds with the left arm. She was also precluded from forceful pushing and pulling.**

10/24/17 - Primary Treating Physician's Initial Report - Mission Valley Chiropractic Clinic - Glenn C. Nusbaum, D.C.

Date of Injury: 08/24/2017. Employer: The Crossings at Carlsbad. History of Injury: The applicant was performing her normal work duties and had to move 13 to 14 tables while lifting over 25 chairs as well as 2 food warmers. During this time, she experienced increasing onset of back pain and an industrial claim was filed. Present Complaints: The applicant reported low back pain which was activity dependent. Objective Findings: Positive Kemp's and Gaenslen's test. There was tenderness to palpation on the lumbar paraspinals as well as sacroiliac joints. There was decreased lumbar spine range of motion in all planes. Diagnosis: Lumbar sprain/strain injury. Permanent and Stationary Status: The applicant had not reached maximum medical improvement. Causation: Causation was unequivocal. She sustained specific injury on 08/24/2017 while lifting and moving multiple tables at work. Apportionment: Deferred until she reached MMI. Treatment Plan: Chiropractic therapy. **Work Status: Modified work with restrictions of no lifting and carrying more than 25 pounds and no repetitive bending.**

(*Id.* at pp. 15-18, emphasis added.)

The summary also included subsequent progress reports for both injuries dated November 7, 2017 and December 5, 2017, wherein Dr. Nusbaum continued to provide work restrictions for the upper extremities for the April 28, 2017 injury and for the back for the August 24, 2017 injury. (*Id.* at pp. 18-19.)

Dr. Karras' diagnoses included right wrist strain and lumbar strain. (*Id.* at p. 20.) He did not believe applicant's condition was permanent and stationary yet when he evaluated her in 2018. (*Id.* at p. 21.) He opined in relevant part:

PERIODS OF DISABILITY

All periods of disability were appropriate to date. Dates of disability started on August 25, 2017 until present and her employer refused to provide modified work.

WORK RESTRICTIONS

The applicant is currently working on modified. She should limit activities involving standing, walking and typing to no more than 1-2 hours a day as well as grasping, pulling and pushing more than 10 to 20 pounds to no more than 6-8 hours a day. She should have sitting and standing as needed and she should avoid prolonged walking and standing. She should avoid repetitive gripping, forceful grip and use of the right hand as well as no stopping, kneeling and climbing.

(*Id.* at p. 23.)

Both cases proceeded to a mandatory settlement conference on September 18, 2018. The matter was taken off calendar with the following in handwriting on the Minutes of Hearing:

Defendant will pick up TTD effective 9/4/2018 to present & continuing. Out of retro TTD a \$200.00 atty fee will be paid by defendant. All other issues deferred, including EDD lien. No order is necessary to terminate TTD.

IT IS SO ORDERED.

(Minutes of Hearing, September 18, 2018.)

The matter proceeded to trial again on May 21, 2020 with only ADJ11064901 (the August 24, 2017 injury) identified in the Minutes of Hearing. (Minutes of Hearing, May 21, 2020, p. 1.) The parties stipulated at trial that applicant's PTP is Dr. Anuj Gupta. (*Id.* at p. 2.) The issues were listed as:

1. Temporary disability, with the employee claiming the following period: March 5, 2020 to present and continuing.
2. Attorney fees.
3. Temporary disability, wherein defendants have paid temporary disability at a rate of \$532 a week from September 4, 2018 through March 30, 2020 on their master file, which is designated as ADJ11064890 with the Court, which is a bilateral upper extremity claim.

(*Id.* at pp. 2-3.)

Exhibits submitted at trial included reporting from Dr. Gupta dated March 2, 2020, April 16, 2020 and May 14, 2020. (*Id.* at p. 3.) The only other medical report in the record was the QME Dr. Karras' January 30, 2018 report. (*Id.* at p. 4.)

Defendant offered as an exhibit a lien settlement agreement with the Employment Development Department (EDD) reflecting a settlement amount of \$27,664.00 for a lien filed on December 14, 2017 in ADJ11064890. (Defendant's Exhibit A, EDD agreement, April 22, 2020.) Defendant's other exhibits included a benefits printout and its April 8, 2020 Notice Regarding Temporary Total Disability Benefits: Payment Termination. The Notice lists a date of injury of "4/28/2017" and stated that "[p]ayments are ending because of the 104 week rule." (Defendant's Exhibit C, Notice to applicant regarding the end of TD, April 8, 2020, p. 1.) The Notice also states

that benefits were paid at the rate of \$532.00 per week and were paid from “9/4/2018 through 3/30/2020.” (*Id.*)

On June 5, 2020, the WCJ issued an Order Vacating Submission and Setting for Status Conference (Order). The Order stated “that the medical reports proffered by the parties do not constitute substantial medical evidence upon which a Findings and Award can be made nor does the documentary evidence support defense’s arguments.” (Order, June 5, 2020, p. 1.) It was further ordered:

The Court finds the record must be developed on the following issues:

1. The letter dated April 8, 2020 from defendant needs clarification as to the actual 104 weeks it alleges it covers.
2. The PR-2’s from Dr. Gupta are inconsistent on their face in that the DOI stated on the report do not coincide with the body parts it discusses.
3. It is unclear what periods, if any, EDD was reimbursed for?
4. Parties are to come and be prepared to discuss *Foster v. Workers’ Compensation Appeals Bd., C. Overaa & Co.*, 73 Cal. Comp. Cases 466, 469, 2008 Cal. Wrk. Comp. LEXIS 140, 161 Cal. App. 4th 1505, 75 Cal. Rptr. 3d 272; *Dickerman v. San Joaquin* (2008), 2008 Cal. Wrk. Comp. P.D. LEXIS 823; and *Hernandez v. Precision Castparts Corp.*, (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 681

(*Id.* at pp. 1-2.)

Applicant sought removal or in the alternative reconsideration of the June 5, 2020 Order. On July 29, 2020, we issued an Opinion and Order Dismissing Petition for Reconsideration and Denying Petition for Removal.

At a subsequent trial on May 5, 2021, two additional reports from Dr. Gupta were admitted into evidence. In a March 5, 2020 report, Dr. Gupta stated regarding work restrictions: “Continue with current work restrictions as outlined by the QME report on 1/18 Dr. Karras.” (Court’s Exhibit No. 1, Report of Dr. Gupta, March 5, 2020, p. 4.) In a March 11, 2021 supplemental report, Dr. Gupta stated:

I have been asked to comment on medical records from her previous PTP Dr. Glenn Nusbaum and QME evaluation dated 1/30/18 by Dr. Karras to address TTD status of her lumbar spine. In my previous supplemental report, I stated that I was unaware of any previous TTD (temporary total disability) periods for

the 8/24/17 claim. I opined that the patient should have been placed on TPD (temporary partial disability) since my initial evaluation on 2/3/20. Upon review of the records (32 minutes including 51 pages), it appears that the patient was first evaluated by Dr. Nusbaum on 10/24/17 (for DOI 8/24/17) and was placed on TPD with restrictions of no lifting or carrying greater than 25 pounds, no repetitive bending. I do not have any subsequent records from Dr. Nusbaum regarding this claim. However, Dr. Karras in his QME evaluation did review Dr. Nusbaum consult note on 12/5/17 which also indicated similar TPD status. Given this new information, it appears there have been periods of TPD. However, at no point, was the patient placed on TTD. [*sic*] and therefore there have been no periods of TTD [*sic*]

(Court's Exhibit No. 2, Report of Dr. Gupta, March 11, 2021.)

The supplement to the Minutes of Hearing stated in relevant part:

After discussions with the parties as well as EDD, the following is determined: [...] EDD has been reimbursed the amount of \$27,664.00 as of May of 2020 in full and final satisfaction of their lien for 8/31/17 to 9/3/2018. EDD has again administered benefits from March 31, 2020 through March 29, 2021. EDD confirmed Applicant was certified for these benefits by Dr. Nusbaum, Dr. Akila and Dr. Gupta, for low back. In addition, certification was for the thumb and little finger, however, at all times it was inclusive of applicant's low back starting from August 31, 2017.

(Supplement to Minutes of Hearing, May 5, 2021.)

The WCJ issued the F&A as outlined above.

DISCUSSION

Both applicant's specific injuries occurred in 2017. Therefore, both injuries are subject to the statutory cap of 104 compensable weeks for aggregate temporary disability payments per Labor Code¹ section 4656(c)(2). (Lab. Code, § 4656(c)(2).)² It is further noted that her cases were consolidated in 2019 and thus, the relevant documentary evidence admitted in one is also part of the record in the other. (Cal. Code Regs., tit. 8, § 10396(e).)

¹ All further statutory references are to the Labor Code unless otherwise stated.

² Section 4656(c)(2) states:

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.

(Lab. Code, § 4656(c)(2).)

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. 847.)

In *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases 798], the Court of Appeal stated that:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.

(*Id.* at p. 868, emphasis and citations omitted.)

In this matter, the record indicates that applicant had work restrictions of "no use of right hand" as of August 25, 2017 per the QME Dr. Karras' summary of medical records. This restriction was presumably for her April 28, 2017 right hand injury. Defendant does not contest that it did not offer applicant modified work in accordance with these work restrictions. She thus would fall within the "odd lot" doctrine and presumably be entitled to temporary total disability in relation to her right hand injury as of approximately August 25, 2017. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417 [24 Cal.Comp.Cases 144].)

Dr. Karras in his history stated that applicant "was released to go back to work on regular duty on October 6, 2017 regarding her back injury but she still had restrictions for her right wrist so she did not go back to work." However, Dr. Karras' summary of medical records reflects that Dr. Nusbaum (applicant's PTP at the end of 2017 providing treatment for both claims) gave work

restrictions in relation to the right arm *and* back for each respective specific injury. There is no evidence that defendant offered modified work to accommodate the restrictions for applicant's back injury either. The record consequently suggests there may be overlapping periods of temporary disability for applicant's two injuries.

In *Foster v. Workers Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466], the Court of Appeal considered whether the statutory cap for temporary disability payments subject to section 4656(c)(1)³ runs concurrently for two injuries:

There is nothing in the language of section 4656(c)(1) suggesting the limitations period for a single injury causing temporary disability should be tolled for any period during which a worker is entitled to temporary disability benefits based on another injury. There is no language in the statute suggesting the limitations period will not run concurrently where multiple injuries cause an overlap, either partial or complete, during periods of temporary disability.

Nor have we found anything in the context of section 4656(c)(1) that suggests a different interpretation is required where multiple injuries result in temporary disability.

(*Id.* at pp. 1511-1512.)

The Court then detailed the legislative history and intent of statutory caps on temporary disability, ending its decision by stating: "In conclusion, we agree with the WCAB that '[w]here independent injuries result in concurrent periods of temporary disability, the 104[-]week/two[-]year limitation likewise runs concurrently.'" (*Id.* at p. 1513.)

Although the *Foster* decision analyzed section 4656(c)(1), the analysis of overlapping temporary disability outlined in *Foster* also applies to applicant's cases, which are subject to section 4656(c)(2). Pursuant to *Foster*, when temporary disability is concurrently caused by two or more injuries, the statutory cap under section 4656(c)(2) for those injuries runs concurrently. Thus, if applicant was temporarily totally disabled due to work restrictions provided for both specific injuries, the 104-week limitation for the injuries runs concurrently.

³ Section 4656(c)(1) states:

Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(Lab. Code, § 4656(c)(1).)

EDD paid disability benefits to applicant from August 31, 2017 to September 3, 2018, and defendant has settled its lien for those benefits. The time period covered by those reimbursed payments is credited towards the 104 compensable weeks in section 4656(c)(2). (See *Moreno v. American Sunroof Corp.* (March 7, 2011; ADJ7005764) [2011 Cal. Wrk. Comp. P.D. LEXIS 175].)⁴ Defendant subsequently paid temporary total disability from September 4, 2018 through March 30, 2020. If applicant has exhausted the 104-week statutory cap due to payments already made by EDD or defendant that were made concurrently for both injuries, she may not receive additional temporary disability for either injury.⁵

However, there is a significant gap in the medical reporting regarding whether applicant's work restrictions for both injuries remained in place subsequent to Dr. Nusbaum's 2017 reporting as summarized by the QME. Although the QME outlined work restrictions in his 2018 report, Dr. Karras did not specify for which body parts these restrictions apply. Moreover, there is no medical reporting in the record between the QME's 2018 report and Dr. Gupta's 2020 reports. The WCJ's May 5, 2021 Supplement states that EDD "certification was for the thumb and little finger, however, at all times it was inclusive of applicant's low back starting from August 31, 2017." This statement is not identified as a stipulation between the parties. (See Lab. Code, § 5702.) Dr. Gupta's March 11, 2021 supplemental report does not adequately clarify whether there were overlapping periods of temporary disability for both injuries.⁶ The record does not contain substantial medical evidence regarding whether applicant had work restrictions in place with respect to both injuries during the purported period of overlapping temporary disability.

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35

⁴ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

⁵ The WCJ in her Report found the facts in a panel decision, *Dickerman v. San Joaquin* (September 23, 2008; ADJ3951184, ADJ3081433) [2008 Cal. Wrk. Comp. P.D. LEXIS 82], to be similar to this matter. In *Dickerman*, the Appeals Board distinguished the facts in *Foster* to find the employer liable for up to two years of additional temporary disability where the applicant had an admitted specific injury (for which temporary disability up to the statutory cap had already been paid) and a separate denied cumulative trauma injury. The facts of this matter are inapposite to *Dickerman*. The record here indicates that defendant has accepted and provided benefits for both applicant's injuries.

⁶ Dr. Gupta may not be aware that when an employee is temporarily partially disabled and their work restrictions are not accommodated by the employer, the employee is entitled to temporary total disability as discussed in this decision.

Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers' Compensation Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The record indicates that applicant had work restrictions for both her right arm and back (i.e., for each specific injury) toward the end of 2017. However, we cannot determine based on the current record if the entire period during which she was paid temporary disability either by EDD or defendant for the April 28, 2017 injury (ADJ11064890) overlaps with period(s) during which she also had work restrictions with respect to the August 24, 2017 injury (ADJ11064901). Consequently, we will rescind the F&A and return this matter for further development of the record regarding whether the periods of temporary disability for the two injuries overlap.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on June 2, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 16, 2022

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

**LAW OFFICE OF MICHEAL K. WAX
LUCILA DICKSON
STOCKWELL HARRIS WOOLVERTON & HELPHREY**

AI/pc

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