

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

PABLO PEREZ, *Applicant*

vs.

**TAYLOR FARMS,
ZURICH NORTH AMERICA INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ10033983 (MF), ADJ11112700
Salinas District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, except as noted below, and otherwise affirm the January 7, 2022 Joint Findings, Awards and Order.

The WCJ recommended that we amend his decision to find a penalty "of up to 25%" of permanent disability delayed. Instead, we will defer the issue of penalties and allow the WCJ to determine the percentage of penalty in the first instance. Any party may file a Declaration of Readiness to Proceed (DOR) on this issue. We also amend the permanent and stationary date from December 21, 2016 to December 22, 2016 for consistency with the finding of an additional day of temporary disability on December 21, 2016.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the January 7, 2022 Joint Findings, Awards and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 7, 2022 Joint Findings, Awards and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

9. Applicant became permanent and stationary as of December 22, 2016; then TTD as of December 2, 2019; then permanent and stationary again on October 22, 2020.

10. Applicant was temporarily disabled from April 23, 2015 through December 21, 2016 and is entitled to temporary disability indemnity for that period, at the rate of \$424.03 per week, less sums paid to applicant as permanent disability indemnity during this same period, which is converted to temporary disability indemnity, less reimbursement to EDD, and less attorney's fees.

* * *

20. The issue of penalties is deferred.

AWARD

In ADJ10033983 (MF)

AWARD IS MADE in favor of PABLO PEREZ and against **ZURICH NORTH AMERICA INSURANCE COMPANY** as follows:

* * *

b. Temporary disability indemnity at the rate of \$424.03 per week from April 23, 2015 through December 21, 2016 and from December 2, 2019 through December 10, 2019, less sums paid to applicant as permanent disability indemnity during this same period, which is converted to temporary disability indemnity, less reimbursement to EDD, and less attorney's fees of 15% of the net recovery payable to the Law Office of Sprenkle & Georgariou & Dilles, whose lien is hereby allowed.

* * *

ORDERS

* * *

3. The issue of penalties is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 4, 2022

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

**PABLO PEREZ
SPRENKLE, GEORGARIOU & DILLES
BAVA & ASSOCIATES**

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Applicant has filed a timely, verified Petition for Reconsideration of the undersigned's 1/7/2022 Joint Findings, Awards, and Orders.

II FACTS

In ADJ10033983 (MF), Applicant, while employed on 12/11/14, as a laborer, at Salinas, California, by Taylor Farms, then insured by Zurich North America Insurance Company, sustained injury AOE/COE to his right wrist and to his right hand.

In ADJ11112700, Applicant, while employed on 4/24/13, as a laborer, at Salinas, California, by Taylor Farms, then insured by Zurich North America Insurance Company, sustained injury AOE/COE to his right wrist and did not sustain injury AOE/COE to his right hand.

Per Applicant's Petition for Reconsideration of 2/1/22, the following Findings of Fact are in dispute:

1. "Applicant disputes Finding of Fact #9 inasmuch as Applicant claims entitlement to temporary disability through the 104-week cap of Labor Code section 4656(c)(2)."
2. "Applicant disputes Finding of Fact #10 inasmuch as the WCALJ ordered that Defendant was entitled to credit for permanent disability paid during the period of temporary disability found, but failed to order that the permanent disability indemnity be converted to temporary disability indemnity during that same period."
3. "Applicant disputes Finding of Fact #13 and Finding of Fact #14 and contends that a single Award of 40% permanent partial disability is appropriate based upon the *Hikida* case."
4. "Applicant disputes Finding of Fact #20 and contends that Applicant is entitled to penalties and attorney's fees per Labor Code section 5814 for the unreasonable denial of temporary disability, permanent disability advances, and the Functional Capacity Evaluation."

III DISCUSSION

A. Whether Applicant is Entitled to a Full 104 Weeks of TD.

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.)) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

In ADJ10033983, the court awarded "temporary disability indemnity at the rate of \$424.03 per week from 4/23/15 through 12/20/16 and from 12/2/19 through 12/10/19, less sums paid to applicant as permanent disability indemnity during this same period, less reimbursement to EDD, and less attorney's fees of 15% of the net recovery payable to the Law Office of Sprengle & Georgariou & Dilles, whose lien is hereby allowed." (Joint FA&O, 1/7/22, Award.) The carrier paid temporary disability at the rate of \$424.03 during the period 3/10/15 through 4/22/15 and permanent disability at the rate of \$290.00 from 4/23/15 through 2/10/16. (Finding of Fact No. 5.) The periods from 3/10/15 through 12/20/16 and from 12/2/19 through 12/10/19 spans 661 days (approx. 94.43 weeks). Applicant is thus requesting about 9.57 weeks more.

Upon review, the only change the court would recommend would be an additional day of temporary disability through 12/21/16, the date of Dr. Don Williams' evaluation. (DEFT'S' EX. D-2: Report, Don Williams, M.D., 12/21/16.)

In a supplemental report, QME Dr. Ali Soozani found Applicant to be permanent and stationary as of 12/21/16. Dr. Soozani wrote, "Dr. Williams in his report dated 12/21/2016 opined that Mr. Perez is not a surgical candidate. Therefore, in my opinion, Mr. Perez should be considered permanent and stationary as of 12/21/2016. It is my understanding that Mr. Perez has been scheduled for a Panel QME reevaluation at my office on May 10, 2017. Therefore, I will address the applicable workers' compensation issues after the completion of this re-evaluation." (APPL'S EX. A-5: PQME Report, Ali Soozani, D.O., Ph.D., 2/18/17, p. 2.)

In a letter to Dr. Soozani, Applicant's attorney queried "2. Can You Confirm that Mr. Perez would have been temporarily (partially or totally) disabled from April 24, 2015, through December 11, 2016? Considering you actually evaluated Mr. Perez on May 10, 2017, would that be an appropriate permanent and stationary date? If he were to pursue surgery, would he remain temporarily disabled? In response, Dr. Soozani stated,

"Review of medical records indicates the following:

Mr. Perez came under the care of Don Williams, M.D., orthopedic surgeon, on 03/10/2015. Dr. Williams prescribed TTD through 04/21/2015. Dr. Williams prescribed work restrictions on 04/21/2015.

Mr. Perez's employment at Taylor Foods Inc. was subsequently terminated on 04/23/2015.

Mr. Perez came under the care of Lisa Kroopf, M.D., in Salinas, who continued to prescribe work restrictions.

Dr. Williams in his report dated 12/21/2016 opined that Mr. Perez was not a surgical candidate and prescribed work restrictions.

In this clinical setting, in my opinion, Mr. Perez *should be considered temporarily totally disabled from 04/24/2015 through 12/21/2016*. I agree that it is appropriate to consider Mr. Perez permanent and stationary for rating purposes at the time of my evaluation on 05/10/2017. He would indeed remain temporarily disabled *if he were deemed a surgical candidate by Dr. Williams and elected to pursue surgery.*" (APPL'S EX. A-1: PQME Report, Ali Soozani, D.O., Ph.D., 7/18/17, pp. 2-3; emphasis added.)

Again, Dr. Soozani indicated that the decisive factors were Applicant's need for surgery and whether Applicant were to pursue surgery. At the time of Applicant's reevaluation with Dr. Soozani on 5/10/17, Applicant was not a surgical candidate.

The waters were muddied, so to speak, when Dr. Soozani, without explanation, stated in his 1/25/18 deposition that Applicant was temporarily partially disabled until his reevaluation on 5/10/17. The exchange went thus:

Q. So when we are talking about appropriate permanent and stationary dates, and I asked you this in my June 29th, 2017 letter, wouldn't it be appropriate to consider the evaluation when you actually saw Mr. Perez on May 10, 2017 as a permanent and stationary date?

A. Based on what we just discussed, that is correct.

Q. Okay. And then the opinion that you provided in your July 18, 2017 report that he should be considered temporarily totally disabled from April 24, 2015 through December 21st, 2016, is that your opinion, as well?

A. Correct.

Q. And then for the period between December 21st, 2016 up until your permanent and stationary finding on May 10, 2017, would he have been temporarily partially disabled?

A. Partially disabled, correct.

Q. And would that be with the work restrictions that you outlined in your May 10, 2017 report?

A. That is correct.

(JOINT EX. J-3: Deposition Transcript, Ali Soozani, D.O., Ph.D., 1/25/18, p. 17, lines 22-25, and p. 18, lines 1-14.)

Dr. Soozani's opinion in this regard is unsupported by any analysis. His statements are conclusory. The basis for Dr. Soozani's opinion on P&S status--Applicant's surgical candidate status--had not changed since 12/21/16. "[Not] all medical opinion constitutes substantial evidence upon which the board may rest its decision. Medical reports and opinions are not substantial evidence if they are known to be erroneous... (*Hegglin v. W.C.A.B.* (1971) 4 Cal.3d 162, 169.)" As well, a conclusory opinion does not constitute substantial evidence. (See *Ins. Co. of No. America v. W.C.A.B.* (1981) 46 Cal. Comp. Cases 913, 917.) Based upon Dr. Don Williams' determination that Applicant was not a surgical candidate, he became permanent and stationary as of 12/21/16.

Applicant was due additional temporary disability indemnity when he proceeded with surgery on 12/2/19. In his 10/16/19 report, Dr. Soozani stated,

"As noted above, Mr. Perez was deemed not to be a surgical candidate by Don Williams, M.D., orthopedic surgeon on 12/21/2016. *The findings of the recent MRI of the right wrist dated 08/08/2019 are essentially unchanged from his prior MRI dated 02/19/2015.* However, the applicant's right wrist pain has persisted and his current PTP, Dr. Damore, has recommended surgical intervention as described above. As the demurrer noted above, *Mr. Perez has elected to further consider his treatment options and has not committed to surgery.* In this clinical setting, in my opinion, *if Mr. Perez chooses to proceed with the surgical procedure as recommended by Dr. Damore, he would then be considered TTD and should be reevaluated once declared permanent and stationary by Dr. Damore. If Mr. Perez chooses not to proceed with surgery, he would remain permanent stationary with impairment rating and permanent work restrictions as described in my report dated 06/22/2017.*" (APPL'S EX. A-11: QME Report, Ali Soozani, D.O., 10/16/19, p. 2, emphasis added.)

Per Dr. Soozani, Applicant would be TTD only if, and when, surgery were pursued. Thus, Applicant became temporarily totally disabled as of his surgery with Dr. Damore on 12/2/19. Dr. Soozani later declared Applicant to be P&S as of 10/22/20. (APPL'S EX. A-14: QME Report, Ali Soozani, D.O., 12/28/20, p. 3.)

Although Applicant was not yet permanent and stationary, the court awarded additional TD from 12/2/19 through 12/10/19 only. "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).) Applicant's last injury occurred on 12/11/14. The last day of the fifth year was 12/10/19.

B. Whether an Order to Convert PD to TD Should Issue.

The court believes that a conversion of PD indemnity to TD indemnity can be inferred from the allowance of a credit for PD paid against TD due. For basic accounting purposes, the money paid for PD must be debited (subtracted) from PD and credited (added) to TD. Each credit entry has to have a corresponding debit to balance the account. An order to convert the PD to TD seems

unnecessary, because Defendant cannot take credit for the PD it has paid under both TD and PD. However, if it clarifies matters for the parties, an order to convert PD to TD could be issued.

C. Whether Separate Awards Are Appropriate, in Light of the *Hikida* Case.

The court found there to be a basis for two Awards based upon Dr. Soozani's opinion apportioning PD to Applicant's two injuries. Dr. Soozani apportioned 5% of the resulting PD to the 2013 injury and 95% to the more significant injury in 2014. This resulted in two Awards, and also resulted in Applicant's entitlement to a second SJDB voucher.

"[T]he plain language of current sections 4663 and 4664, as well as the Supreme Court's holding in *Brodie*, make clear that apportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves. We agree with amicus curiae Zenith that the only relevant inquiry is whether separate and distinct industrial injuries have been sustained. 17 If so, "then each injury must stand on its own." (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1559; 74 Cal. Comp. Cases 113.)

In response to Applicant attorney's question regarding the *Hikida* case, Dr. Soozani stated, "Based upon the information and in the absence of evidence to the contrary, I do not believe that he has a permanent disability resulting from a medical treatment or surgery." (APPL'S EX. A-15: QME Report, Ali Soozani, D.O., 2/15/21, p. 3.) There is no indication that the scarring was a new injury either, per *Hikida*. "[A]n employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee." (*Hikida v. W.C.A.B.* (2017) 12 Cal.App.5th 1249, 1262; 82 Cal.Comp.Cases 679.)

D. Whether Penalties and Attorney's Fees per Labor Code Section 5814 Are Due on Temporary Disability, Permanent Disability Advances, and the Functional Capacity Evaluation.

Upon review, the court believes that Applicant is due penalties of up to 25% for Defendant's failure to pay temporary disability indemnity and for permanent disability advances. Labor Code section 5814(a) provides for an increase of up to 25% of the amount of the payment unreasonably delayed or refused.

Due to a confusion of dates, the court was mistaken regarding the reason that Defendant stopped TD payments as of 4/22/15. Dr. Williams found Applicant to be P&S in his 5/26/15 report. (DEFT'S' EX. D-1: PR-4 Report, Don Williams, M.D., 5/26/15.) It appears that Defendant stopped TD earlier than 5/26/15, because Applicant returned to modified work. However, Applicant was fired after a few days, per Applicant's un rebutted testimony at the first trial on 3/22/18. (3/22/18 Trial, Minutes of Hearing and Summary of Evidence, p. 6, lines 12-24.) Defendant did not establish good cause for the termination, so should have continued to pay TD until at least 5/26/15.

Applicant started seeing Dr. Lisa Kroopf as his PTP on 8/26/15. (APPL'S EX. A-7: PQME Report, Ali Soozani, D.O., Ph.D., 5/18/16, p. 6.) Dr. Kroopf declared Applicant to be temporarily disabled. On 5/18/16, Dr. Soozani declared Applicant to be TTD. (APPL'S EX. A-7: PQME

Report, Ali Soozani, D.O., Ph.D., 5/18/16, p. 14.) At this point, it is unknown why Defendant did not pay TD. No benefit notices were submitted into evidence.

It appears that Defendant actually paid Applicant TD for the period from 12/2/19 through 12/11/19 on 12/5/19. (DEFT'S' EX. D-4: Benefit Printout, Zurich North America (Claim No. 2010249386), 8/21/21, "40TTD," 2nd p. 1.) This portion was not delayed, so no penalty would apply.

On 7/19/18, Defendant also paid TD in the amount of \$3,332.58 in response to the court's 7/11/18 Findings, Award, and Orders, which was later rescinded after Petitions for Reconsideration. (DEFT'S' EX. D-4: Benefit Printout, Zurich North America (Claim No. 2010249386), 8/21/21, "40TTL," 2nd p. 1.)

Although Defendant paid PD from 4/23/15 through 2/10/16, the payment was not made until 4/10/2017. (DEFT'S' EX. D-4: Benefit Printout, Zurich North America (Claim No. 2010249386), 8/21/21, "45MPT," 2nd p. 1.) Dr. Williams' PR-4 report was ratable, with 12% WPI. (DEFT'S' EX. D-1: PR-4 Report, Don Williams, M.D., 5/26/15, p. 3.) Applicant was not working, so it is unknown why Defendant did not pay PD advances earlier. No self-imposed penalties are evident on the benefit printout.

The court maintains that no penalty is due on the FCE issue. The parties litigated the issue. The court found that the FCE was not a reasonable and necessary medical-legal expense. (Findings of Fact, 3/1/19, p. 1, Finding 1.) There was no definitive law on point, only panel decisions. Although the undersigned's decision was reversed by the Appeals' Board, the delay in authorizing the FCE prior to the WCAB's opinion was not unreasonable. "The only satisfactory excuse to delay or refuse payment is a 'genuine doubt from a medical or legal standpoint as to liability for benefits, . . .'" (*Kerley v. W.C.A.B.* (1971) 4 Cal.3d 223, 230.) The employer has the burden of presenting substantial evidence for a finding of such doubt. (*Ibid.*) A delay is not ordinarily excused by an employer's erroneous view of the law. (See *Argonaut Ins. Co. v. I.A.C.* (1962) 210 Cal.App.2d 267, 268-269.) However, a reasonable interpretation of unsettled law is a valid excuse. (*County of Los Angeles v. W.C.A.B.* (1980) 104 Cal.App.3d 933, 940-941.)" (*Ralphs Grocery Co. v. W.C.A.B.* (1995) 38 Cal.App.4th 820, 830; 60 Cal. Comp. Cases 840.)

**IV
RECOMMENDATION**

It is recommended that the Petition for Reconsideration be granted in part, as follows:

1. An additional day of temporary disability indemnity through 12/21/16;
2. An Order to convert permanent disability indemnity paid to temporary disability.
3. A penalty of up to 25% of the amount delayed for temporary disability indemnity for the period of 4/23/15 through 12/21/16, less an award of 15% attorney's fees;
4. A penalty of up to 25% of the amount delayed for permanent disability indemnity for the period of 4/23/15 through 2/10/16, which was paid on 4/10/17, less an award of 15% attorney's fees;

And, otherwise denied.

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge

Filed and served on 2/25/2022