

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

ANTHONY LUCCHESI, *Applicant*

vs.

**CITY OF FOSTER CITY, permissibly self-insured,
administered by THE CITIES GROUP, *Defendants***

**Adjudication Number: ADJ11267842
San Francisco District Office**

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

Defendant seeks reconsideration of the Findings and Award, (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 28, 2020, wherein the WCJ found in pertinent part that applicant was temporarily totally disabled for the period from May 16, 2018, through July 16, 2019, and that applicant's temporary disability indemnity rate was \$1,989.23.

Defendant contends that the parties stipulated to applicant's earnings of \$1,989.23 per week, warranting an indemnity rate of \$1,326.81 subject to the statutory maximum [\$1,172.57], that the trial record does not contain substantial evidence that applicant was temporarily totally disabled for the period from May 16, 2018, through July 16, 2019, and that California Association of Professional Firefighters (CAPF) did not meet its burden of proof regarding its lien for benefits paid to applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the Findings to correct the weekly temporary disability indemnity rate to \$1,326.15, and to otherwise deny reconsideration. We received an Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report regarding the proper temporary disability indemnity rate, and for the reasons discussed below, we will grant reconsideration and affirm the F&A except that we will

amend the F&A to defer the issues of: the period of applicant's temporary disability (Finding of Fact 4); applicant's entitlement to Labor Code section 4850 benefits (Finding of Fact 5); the lien of the California Association of Professional Firefighters (Finding of Fact 6); and the amount of attorney fees owed to applicant's counsel, based on the award of temporary disability indemnity and Labor Code section 4850 benefits (Finding of Fact 7). Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his neck and lumbar spine while employed by defendant as a firefighter during the period from July 14, 2002, through October 16, 2017.

On July 11, 2019, applicant was evaluated by the physical medicine and rehabilitation agreed medical examiner (AME) James B. Stark, M.D. (Joint Exh. AA, Dr. Stark, July 16, 2019.) Dr. Stark examined applicant, took a history, and reviewed the medical record. In the record review Dr. Stark summarized a January 3, 2019 QME report from James B. Shaw, M.D., that stated:

10/16/17, wrist and right index finger were numb. No unusual injury. On October 16th, complain of shoulder pain. He filed a worker's compensation claim on 2018. Saw Dr. Hong, a spine surgeon in January 2018 at which time, cervical spine surgery was recommended at C5- 6 with fusion. This was declined by the patient. ¶ ... 2018, Dr. McCormack, a neurological surgeon who recommended conservative care and surgery as a last resort. (Joint Exh. AA, p. 5, review of records.)

Dr. Stark diagnosed applicant as having cervical spondylosis, chronic low back pain and probable carpal tunnel syndrome. He concluded that, "Once Mr. Lucchesi declined surgical option, the cervical spine condition was permanent, stationary and rateable." (Joint Exh. AA, p. 7.)

On March 2, 2020, Dr. Stark submitted a supplemental report wherein he stated:

In my judgment, the cervical spine condition has been permanent and stationary since May 2018, I believe May 9th. There certainly has not been measurable improvement since that date. ¶ The lumbar spine condition was one of gradual onset. It has been permanent and stationary since discontinuation of work. (Joint Exh. CC, Dr. Stark, February 28, 2020, p. 1.)

The parties proceeded to trial on November 17, 2020. The WCJ's summary of applicant's testimony included:

Dr. Hong suggested surgery, but they tried conservative care first, which included chiropractic treatment, acupuncture, stretching exercises, and several other types of treatment for both lumbar and cervical spine problems. ¶ He finally decided not to undergo surgery in February of 2019 and he was released by Dr. Hong. ... ¶ He last worked as a firefighter in March of 2018, but he is not sure of the exact date.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), November 17, 2020, p. 5)

The issues submitted for decision included the period during which applicant was temporarily totally disabled. (MOH/SOE, p. 2.)

DISCUSSION

“A temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].) An injured worker’s condition is deemed permanent and stationary (P&S) when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [16 Cal.Comp.Cases 264].) A determination regarding whether an injured worker is temporarily disabled, or that the injured worker’s condition has become permanent and stationary, typically requires medical evidence. (*Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 867 [44 Cal.Comp.Cases 798]; *Bstandig v. Workers’ Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) The fact that an injured worker is receiving medical treatment is not in and of itself substantial evidence that the injured worker is temporarily totally disabled. It is quite common for an injured worker to be awarded lifetime medical treatment after the injury condition became permanent and stationary. (see e.g. DWC-WCAB form 10214(a) - Stipulations with Request for Award; F&A, p. 2.)

In the Opinion on Decision, the WCJ stated:

The report of the AME is rather equivocal on TTD periods. Dr. Stark says both that the Applicant did not become P&S until 7/16/2019, when the decision against surgery was taken, and also that in retrospect that he was at MMI from May of 2018. These conflicting statements are difficult to reconcile. (F&A, p. 3 Opinion on Decision.)

In his July 16, 2019 report, Dr. Stark stated when applicant declined surgery his cervical spine condition was permanent and stationary. (Joint Exh. AA, p. 7.) He did not specify a date, but at the trial, applicant testified that he decided not to undergo surgery in February of 2019. (MOH/SOE, p. 5.) In the February 28, 2020 report Dr. Stark stated that applicant's cervical spine condition had been permanent and stationary since May 9, 2018, and that applicant's lumbar spine condition had been permanent and stationary since "discontinuation of work." (Joint Exh. CC, p. 1.) Applicant testified that he last worked in March of 2018. (MOH/SOE, p. 5.)

We agree with the WCJ that different permanent and stationary dates identified by Dr. Stark are difficult to reconcile but having reviewed the trial record we see no substantial evidence that applicant was temporarily totally disabled for the period from May 16, 2018, through July 16, 2019. Further, although having been reviewed and considered by the WCJ, the reports from treating physicians Paul Hong and Alan Gruenefeldt are not evidence that applicant was temporarily totally disabled as a result of his injury. For example, we note that Dr. Hong's May 11, 2018 report indicates that applicant's condition is not related to his employment (App. Exh. 1, Dr. Hong, May 11, 2018) and Dr. Gruenefeldt's December 13, 2018 report states, "He [applicant] is being followed for illness." (App. Exh. 4, Dr. Gruenefeldt, December 13, 2018.) Clearly, these reports are not substantial evidence as to the issue of applicant's temporary disability status.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].)

In our *en banc* decision, *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board *en banc*), we stated, "Where the medical record requires further development either after trial or submission of the case for decision," the medical record should first be supplemented by physicians who have already reported in the case. "Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need

for development of the medical record, should other physicians be considered.” (*Id.*, at pp. 139, 142.) Thus, we recommend that upon return of this matter, the parties request that AME Dr. Stark submit a supplemental report to clarify his opinion as to when applicant reached permanent and stationary status and to clarify the period that applicant was temporarily totally disabled as a result of his industrial injury.

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to defer the issues of: the period of applicant’s temporary disability (Finding of Fact 4); applicant’s entitlement to Labor Code section 4850 benefits (Finding of Fact 5); the lien of the California Association of Professional Firefighters (Finding of Fact 6); and the amount of attorney fees owed to applicant’s counsel, based on the award of temporary disability indemnity and Labor Code section 4850 benefits (Finding of Fact 7). Based thereon we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the Findings and Award issued by the WCJ on December 28, 2020, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the December 28, 2020 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. All issues regarding the period of applicant’s temporary disability are deferred.
5. The issue of applicant’s entitlement to Labor Code section 4850 benefits is deferred.
6. The lien of the California Association of Professional Firefighters is deferred.
7. The amount of attorney fees owed to applicant’s counsel, based on the award of temporary disability indemnity and Labor Code section 4850 benefits is deferred.

* * *

AWARD

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2. The award of full salary pursuant to Labor Code section 4850 plus temporary disability indemnity is deferred; and the lien claim of the California Association of Professional Firefighters is deferred.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2021

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

**ANTHONY LUCCHESI
BROWN & DELZELL
LAUGHLIN, FALBO, LEVY & MORESI, LLP**

TLH/pc

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