

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

**ANTHONY CABRERA, *Applicant***

**vs.**

**PARTNERS PERSONNEL and STAR SPECIALTY INSURANCE COMPANY  
administered by CORVEL CORPORATION, *Defendants***

**Adjudication Number: ADJ15122456  
Pomona District Office**

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

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on May 31, 2022, wherein the WCJ found in pertinent part that applicant did not sustain the burden of proof that would entitle him to payment of temporary disability indemnity benefits for the period from February 18, 2022, and continuing.

Applicant contends that based on the reports of Nabil S. Dahi, M.D., applicant was temporarily totally disabled for the period from January 27, 2022, to the date of trial (March 29, 2022) and continuing.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**BACKGROUND**

Applicant claimed injury to his head, lumbar spine, and psyche, and in the form of right

ear hearing loss, loss of smell, and cognitive impairment, while employed by defendant as a forklift operator on March 4, 2021. As a result of the injury applicant was diagnosed as having:

- 1) Epidural hematoma
  - 2) Temporal fracture
  - 3) Parietal fracture [skull fracture]
  - 4) Intracranial hemorrhage
  - 5) Traumatic brain injury
  - 6) Ground level fall
  - 7) Syncope
  - 8) Leukocytosis [an increase in the number of white cells in the blood]
  - 9) Tachypnea [rapid breathing]
  - 10) Hypertension
  - 11) Cerebral edema.
- (Def. Exh. A, Yuriy Verpukhovskiy, M.D., February 11, 2022, p. 10 review of medical records.)

Applicant underwent a course of medical treatment from various providers. On January 27, 2022, he was seen by pain management treating physician, Nabil S. Dahi, M.D. Dr. Dahi's "Assessment" was:

1. The patient is status post Bilateral Occipital Nerve Block on January 18, 2022 with good relief from headaches. The patient has headaches with bilateral occipital neuralgia and a cervicogenic component.
2. The patient has post traumatic head injury with headaches and migraines. (App. Exh. 1, Dr. Dahi, January 27, 2022, pp. 2 - 3.)

As to applicant's "Work Status" Dr. Dahi stated, "Per patient reports the patient is currently not working and is temporarily disabled." (App. Exh. 1, January 27, 2022, p. 3; see also App. Exh. 1, Dr. Dahi, February 16, 2022, p. 3.)

Neurology qualified medical examiner (QME) Yuriy Verpukhovskiy, M.D., evaluated applicant on February 11, 2022. Dr. Verpukhovskiy examined applicant, took a history, and reviewed the medical record. In the Diagnoses section of his report, the doctor stated:

History of traumatic brain injury. ¶ Post traumatic headaches and dizziness. ¶ Spinal pain. I defer to a specialist in the field of orthopedic surgery. ¶ Depression, memory impairment, concentration difficulties. I defer to a QME in the field of psychology. (Def. Exh. A, p. 33.)

Regarding applicant's disability status, Dr. Verpukhovskiy said:

I consider the claimant's condition permanent and stationary from neurological perspective, in regard to headaches and dizziness. For the purposes of rating only, his conditions became permanent and stationary (MMI) on the day of my examination, 2/11/22.  
(Def. Exh. A, p. 34.)

In his February 18, 2022 progress report (PR-2), neurologist Frank P. Lin, M.D., diagnosed, “Traumatic brain injury with epidural hematoma, subdural hematoma, subarachnoid hemorrhage, and intraparenchymal hemorrhagic contusions” [bleeding around and into the brain] and he stated that “From neurology’s perspective” applicant’s condition could be considered permanent and stationary. (Def. Exh. B, Dr. Lin, February 18, 2022, p. 2 [EAMS p. 5].)

In otolaryngologist Pierre F. Giammanco, M.D.’s February 24, 2022 PR-2, the doctor diagnosed applicant as having anosmia [loss of sense of smell], and post-concussion syndrome. The PR-2 also states that, “per ptp [primary treating physician] discharged MMI.” (Def. Exh. C, Dr. Giammanco, February 24, 2022, p. 1.)

The parties proceeded to trial on March 29, 2022. They stipulated that applicant sustained injury AOE/OCE to his head, right ear in the form of hearing loss, and in the form of loss of smell. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 29, 2022, p. 2.) The issues submitted for decision included temporary disability/permanent and stationary date, and whether the reports from treating physician, Dr. Dahi, are substantial evidence. (MOH/SOE, pp. 2 – 3.)

## **DISCUSSION**

Temporary disability is an impairment resulting in an incapacity to work that is 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]; *Chavira v. Workers’ Comp. Appeals Bd. (Johns-Manville Sales Corp.)* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) A determination regarding whether an applicant’s condition is permanent and stationary or that the applicant is temporarily totally disabled, 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].) An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code § 5952; *Garza v. Workmen’s Comp.*

*App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, [35 Cal.Comp.Cases 16].)

Our review of the trial record indicates that applicant's "head injury" was a traumatic brain injury caused by a temporal fracture, a skull fracture, swelling of the brain and bleeding in and around the brain resulting in numerous conditions and/or symptoms. QME Dr. Verpukhovskiy and Dr. Lin both stated that from a "neurological perspective," applicant's condition is permanent and stationary. (Def. Exh. A, p. 34; Def. Exh. B, p. 2 [EAMS p. 5].) However, Dr. Verpukhovskiy also deferred to a "specialist in the field of orthopedic surgery" and "a QME in the field of psychology" (Def. Exh. A, p. 33) and Dr. Lin stated he would defer applicant's "official" work status to "his primary treating doctor, who is the pain management specialist." (Def. Exh. B, p. 2 [EAMS p. 5].) The opinions stated by Dr. Verpukhovskiy and Dr. Lin pertain only to applicant's neurological symptoms and they do not address any other symptoms or conditions that could affect applicant's disability status. Based thereon, the reports from Dr. Verpukhovskiy and Dr. Lin do not constitute substantial evidence as to the issue of applicant's disability status.

It has long been the law that in order to constitute substantial evidence, a medical opinion must be based on pertinent facts and it must set forth the reasoning behind the physician's opinion, not merely his or her conclusions; a mere legal conclusion does not furnish a basis for a finding. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660].) As noted above, Dr. Dahi is applicant's pain management treating physician, but in neither of his reports does the doctor explain the basis for his statements that "Per patient reports the patient is currently not working and is temporarily disabled." (App. Exh. 1, January 27, 2022, p. 3; App. Exh. 1, Dr. Dahi, February 16, 2022, p. 3.) Also, as noted by the WCJ, Dr. Dahi did not clearly state that it was his medical opinion that applicant was currently temporarily disabled. (Findings, p. 3, Opinion on Decision.) Thus, we agree that the reports from Dr. Dahi are not substantial evidence regarding applicant's disability status.

Finally, it appears there is no dispute that applicant continues to receive medical treatment for his March 4, 2021 industrial injury. But 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.)

As discussed herein, the trial record does not contain substantial evidence pertaining to the issue of whether applicant is temporarily totally disabled, as he claimed at the trial. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc)) However, under the complex circumstances of this matter, it may be in the parties' interest to have an agreed medical examiner or a regular physician (Lab. Code § 5701) review the entire medical record and submit a report addressing the issue of whether applicant was temporarily totally disabled for the period at issue.

Accordingly, we grant reconsideration, rescind the Findings, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on May 31, 2022, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 31, 2022 Findings of Fact is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**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**

**AUGUST 18, 2022**

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

**ANTHONY CABRERA  
FIORE LEGAL  
EMPLOYER DEFENSE**

***TLH/pc***

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

CS