

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

GREGORIO HERNANDEZ MONTOR, *Applicant*

vs.

**ADVANCED CONSTRUCTION SOUTHWEST, INC. and OLD REPUBLIC
INSURANCE COMPANY administered by GALLAGHER BASSETT SERVICES INC.,
*Defendants***

**Adjudication Number: ADJ12525621
San Francisco District Office**

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

Defendant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on November 15, 2021, wherein the WCJ found in pertinent part that the opinion of chiropractic qualified medical examiner (QME) Justin F. Frieders, D.C. is not substantial evidence that applicant's condition became permanent and stationary on April 22, 2021, and that applicant remained temporarily totally disabled from April 23, 2021, through the present and continuing.

Defendant contends that the reports from QME Dr. Frieders (including the October 1, 2021 report)¹ are substantial evidence that applicant's condition reached maximum medical improvement/permanent and stationary status on April 22, 2021, and that the evidence submitted by applicant limits the period of temporary total disability to July 2, 2021.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. 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, and for the reasons discussed below, we will grant reconsideration, and affirm the F&A except that we will amend the

¹ On August 3, 2021 defendant requested a supplemental report from Dr. Frieders (Def. Exh. F.) The report was served on October 21, 2021, and defendant attached a copy of the report to the Petition as newly discovered evidence.

F&A to find that applicant remained temporarily totally disabled for the period from April 23, 2021, through July 2, 2021, and to defer the issue of whether applicant remained temporarily totally disabled for any period after July 2, 2021, (Finding of Fact 6); we will amend the Award based thereon.

BACKGROUND

Applicant claimed injury to his neck, right shoulder, and back, while employed by defendant as carpenter during the period ending June 14, 2019.

QME Dr. Frieders evaluated applicant on June 23, 2020. (Def. Exh. A, Dr. Frieders, July 22, 2020.) Dr. Frieders examined applicant and took a history, but he stated that, "... [N]o records were provided for my review." (Def. Exh. A, p. 1.) He concluded that:

Given the length of time as well as his usual & customary physical activities as a laborer with Advanced Construction Southwest, I am of the opinion these activities were sufficient to lead to the development of the symptom complex described by the applicant. ¶ Unfortunately, at the time of the composition of this report, the records from Highland Hospital have not been made available for my review.

(Def. Exh. A, p. 8.)

Dr. Frieders was provided medical records to review, and in his supplemental report he stated:

Following my review of the additional medical records, I continue to be of the opinion his employment activities with ACS were sufficient to contribute to the symptom complex he has detailed as part of the 06/14/19 claim.

(Def. Exh. B, Dr. Frieders, October 26, 2020, p. 4.)

Applicant underwent a course of treatment by Samuel M. Graves, D.C. In the Patient Disability Status page of his February 4, 2021 Progress Report (PR-2), Dr. Graves stated that applicant would "remain on Total Temporary Disability until May 7, 2021." (App. Exh. 1, Dr. Graves, [EAMS p. 3].) In his March 26, 2021 PR-2 Dr. Graves indicated that applicant would "Remain off-work until 5/7/21" and he referred to the February 4, 2021 Patient Disability Status form. (App. Exh.1, [EAMS p. 6].)

On April 22, 2021, Dr. Frieders re-evaluated applicant. He initially noted:

Despite timely notification to the parties regarding the applicant's 04/22/21 PQME re-evaluation, no additional records were provided for my review in advance of the evaluation or upon the composition of this report. ¶ Records

reviewed in conjunction with the composition of this report were limited to the following source and content-

A) The office of Justin Frieders, DC, QME

1. QME-related reports dated: 01/16/2021, 10/26/2020 & 07/22/2020.

(Def. Exh. C, Dr. Frieders, May 18, 2021, p. 1.)

He later stated:

The applicant's condition has reached a permanent & stationary status as of my 04/22/2021 PQME evaluation. ¶ Please don't ask me to change this date based upon speculation, conjecture guess in the absence of an earlier PR4 or similar report from Dr. Graves. I am aware TTD was still being provided prior to his PQME evaluation. ¶ Given the missing, personal injury and industrial treatment records from Dr. Graves as well as the outstanding MRI reports, I have no choice but to defer comment on portions of this report.

(Def. Exh. C, p. 10.)

If the applicant's current condition prevents him from working in a full capacity and if his employer is unable to accommodate industrially-related work restrictions, he should be placed on TTD.

(Def. Exh. C, p. 12.)

Applicant was again seen by Dr. Graves on May 19, 2021, and in the PR-2 Dr. Graves stated applicant would remain temporarily totally disabled until July 2, 2021. (App. Exh.1, [EAMS p. 12].)

On May 13, 2021, applicant filed a Declaration of Readiness to Proceed and on August 16, 2021, the parties proceeded to an Expedited Hearing. The issues submitted for decision included the permanent and stationary date and applicant's entitlement to temporary disability indemnity benefits for the period from April 23, 2021, to the date of trial, and continuing. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 16, 2021, p. 2.)

DISCUSSION

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].) To be substantial evidence a medical opinion must not be speculative, it must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) A medical opinion is not substantial evidence

if it is based on an inadequate medical history. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93].)

In his May 18, 2021 report, QME Dr. Frieders stated that applicant's condition had reached a permanent and stationary status as of the April 22, 2021 re-evaluation. (Def. Exh. C, p. 10.) He then stated that, "If the applicant's current condition prevents him from working in a full capacity and if his employer is unable to accommodate industrially-related work restrictions, he should be placed on TTD." (Def. Exh. C, p. 12.) These two statements are inconsistent and the doctor did not provide any explanation of his reasoning or analysis in reaching his conclusions. Also, earlier in the report Dr. Frieders stated that no additional records were provided for his review and the only medical records he reviewed were his prior reports. (Def. Exh. C, p. 1.) Based thereon, it appears that his opinions are not based on an adequate medical history. For these reasons, his reports do not constitute substantial evidence as to applicant's disability status.

Regarding the October 21, 2021 report from Dr. Frieders, in his Report, the WCJ states:

[T]he contention that the report containing Dr. Frieders's review of the MRI reports and recent treatment records could not have been discovered and produced, despite due diligence, prior to trial, is not factual.... [T]he MRI reports were issued in March, while Dr. Frieders saw applicant in April and issued his report in May, indicating at the time that he was not provided with any updated records. According to exhibit F, defendants waited until August to request the report from the QME and they have not offered any justification for their apparent failure to supply the treatment reports and MRI studies to Dr. Frieders prior to the April reevaluation. This is not consistent with the "due diligence" argument.

(Report, p. 5, footnote omitted.)

Having reviewed the trial record, we agree with the WCJ that defendant did not submit any evidence explaining why the supplemental report from Dr. Frieders could not with reasonable diligence, have been discovered and produced at the hearing. (Lab. Code, § 5903.) Also, we note that had the report from Dr. Frieders been timely obtained and submitted, as to "P&S status" the report states, "To clarify my earlier opinion regarding P&S status, yes, the applicant should be considered permanent & stationary as of 04/22/21." Clearly, this is Dr. Frieders' conclusion and there is no explanation as to the basis for his conclusion. Thus, if admitted into evidence, the report would not constitute substantial evidence.

As to the award of temporary disability indemnity benefits, the WCJ noted that in each of his PR-2 reports, Dr. Graves stated that applicant was temporarily totally disabled. Dr. Graves had requested right shoulder and lumbar spine MRI studies and in his May 19, 2021 report “in light of the positive MRI results,” he requested that applicant be evaluated by an orthopedic physician. (See App. Exh. 1, May 19, 2021, [EAMS pp. 10 - 11.]) We agree with the WCJ that Dr. Graves’ opinions as to applicant’s disability status were supported by objective findings and that they are an appropriate basis for awarding temporary disability indemnity benefits. However, pursuant to AD Rule 9785:

(f) A primary treating physician shall, unless good cause is shown, within 20 days report to the claims administrator when any one or more of the following occurs: ... (8) When continuing medical treatment is provided, a progress report shall be made no later than forty-five days from the last report of any type under this section even if no event described in paragraphs (1) to (7) has occurred. If an examination has occurred, the report shall be signed and transmitted within 20 days of the examination. ¶ Except for a response to a request for information made pursuant to subdivision (f)(7), reports required under this subdivision shall be submitted on the “Primary Treating Physician's Progress Report” form (Form PR-2) contained in Section 9785.2, or in the form of a narrative report. ... (Cal. Code Regs., tit. 8, § 9785(f)(8).)

The last report in evidence, from Dr. Graves, is dated May 19, 2021, and it states that applicant would remain temporarily totally disabled until July 2, 2021, (i.e. 45 days after the May 19, 2021 treatment report) and that, “[H]is work status will be updated as his condition improves.” (App. Exh. 1, May 19, 2021, [EAMS p. 12.]) Although, as discussed above, Dr. Graves’ report is substantial evidence that applicant was temporarily totally disabled for the period through July 2, 2021, it is not evidence that he was temporarily totally disabled thereafter. It is important to note that we are not addressing the issue of whether applicant is or is not entitled to temporary disability indemnity benefits after July 2, 2021. We are simply saying that in order for applicant to be entitled to those benefits, there must be timely medical reports (per AD Rule 9785(f)(8), noted above) addressing his disability status. Under the circumstances of this matter it is appropriate that the issue of applicant’s entitlement to temporary disability indemnity benefits after July 2, 2021, is deferred.

Accordingly, we grant reconsideration, and affirm the F&A except that we amend the F&A to find that applicant remained temporarily totally disabled for the period from April 23, 2021,

through July 2, 2021, and to defer the issue of whether applicant remained temporarily totally disabled for any period after July 2, 2021, (Finding of Fact 6); we amend the Award based thereon.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on November 15, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 15, 2021, Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

6. Applicant remained temporarily totally disabled for the period from April 23, 2021, through July 2, 2021; the issue of whether applicant remained temporarily totally disabled for any period after July 2, 2021, is deferred.

* * *

AWARD

AWARD IS MADE in favor of applicant GREGORIO HERNANDEZ MONTOR against defendants ADVANCED CONSTRUCTION SOUTHWEST and OLD REPUBLIC INSURANCE COMPANY of temporary disability indemnity for the period from April 23, 2021, through July 2, 2021, in accordance with Findings of Fact No. 6 and 7, payable at the weekly rate of \$386.97 in accordance with Finding of Fact No. 3, less credit to defendants for all sums heretofore paid on account thereof and subject to all statutory limitations, and less an attorney fee of 15 percent of the retroactive amount awarded hereby payable to LAW OFFICES OF NADEEM MAKADA in accordance with Finding of Fact No. 9, the amount of said fee to be informally adjusted by and between the parties herein with jurisdiction reserved; the issue of applicant's entitlement to an award of additional temporary disability indemnity benefits is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 14, 2022

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

**GREGORIO HERNANDEZ MONTOR
LAW OFFICES OF NADEEM MAKADA
COLEMAN CHAVEZ & ASSOCIATES**

TLH/pc

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