

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

JHONNY ARTURO AREVALO NAVARRO, *Applicant*

vs.

SANTA ANA CORPORATION FITNESS/GOLD'S GYM; THE HARTFORD, *Defendants*

**Adjudication Number: ADJ10199818
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant, appearing in pro per, seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 21, 2021, wherein the WCJ found in pertinent part that based on the reports from orthopedic agreed medical examiner (AME) Yuri Falkinstein, M.D., applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and bilateral wrists, that applicant did not sustain an injury AOE/COE to his lower extremities or his psyche, that applicant had been adequately compensated for all periods of temporary total disability, and that applicant's injury caused 40% permanent disability.

Applicant contends that he was not compensated for his periods of temporary disability, that he was not awarded disability for his lower extremities, and that he is entitled to a life pension.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the 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 affirm the F&A except that we will amend the F&A to defer the issues of whether applicant has been adequately compensated for all periods of temporary total disability, and the issues regarding payment of the

EDD lien, (Finding of Fact 2). 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 head, psyche, nervous system, cervical spine, thoracic spine, lumbar spine, shoulders, wrists, and lower extremities while employed by defendant as a maintenance manager during the period from February 1, 2014, through October 5, 2015. His employment with defendant was terminated on October 5, 2015.

Applicant underwent a course of medical treatment and was evaluated by qualified medical examiner (QME) Satish S. Kadaba, M.D. (See App. Exhs. 2 – 9.) The parties proceeded to trial on March 7, 2017. The parties stipulated that applicant's earnings were \$720.00 per week and that he had been adequately compensated for all periods of temporary disability through December 15, 2016. The issues submitted for decision included injury AOE/COE, temporary disability starting December 25, 2016, Labor Code section 3600(a)(10), and the lien of the EDD for benefits paid during the period from December 17, 2015, through December 15, 2016. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 7, 2017, pp. 2 – 3.)

By the April 28, 2017 Findings and Order, the WCJ found that applicant sustained injury AOE/COE but the injury claim was barred by Labor Code section 3600(a)(10). Applicant filed a Petition for Reconsideration. With our April 25, 2019 Opinion and Decision After Reconsideration, we rescinded the Findings and Order and returned the matter to the WCJ for further development of the record and for further proceedings as appropriate.

Orthopedic AME Dr. Falkinstein evaluated applicant on February 7, 2020. Dr. Falkinstein examined applicant and took a history but he was not provided medical records to review. (Joint Exh. 3, Dr. Falkinstein, February 7, 2020, p. 7.) The doctor diagnosed cervical, thoracic, and lumbar strain; bilateral shoulder strain; and bilateral elbow/wrist pain. (Joint Exh. 3, pp. 16 – 17.)

Dr. Falkinstein was later provided the medical record including diagnostics. (Joint Exh. 2, Dr. Falkinstein, March 31, 2020, pp. 2 – 18.) After reviewing the medical record he concluded:

The narrated mechanism of cumulative trauma corroborated by medical evidence would support industrial causation of injuries to the cervical, thoracic, and lumbar spine, bilateral shoulder, bilateral elbow, and bilateral wrist secondary to the claimed industrial CT.
(Joint Exh. 2, p. 19.)

Regarding applicant's disability status Dr. Falkinstein stated:

For all intents and purposes, he can be considered as having-reached maximal medical-improvement (MMI) and was [sic] permanent and stationary no more than one year from the end of the CT exposure on October 5, 2015, or as of October 5, 2016. I realize over time there may be some changes to his overall state; however, further significant recovery or deterioration is not anticipated. (Joint Exh. 2, p. 21.)

Dr. Falkinstein then assigned whole person impairment (WPI) to the injured body parts as follows: 7% cervical spine, 5% thoracic spine, 7% lumbar spine, 3% right shoulder, 2% left shoulder, and 2% for each wrist. (Joint Exh. 2, pp. 22 – 24, and p. 27.)

After reviewing additional medical records Dr. Falkinstein submitted his second supplemental report wherein he stated:

It would now be reasonable to apportion 10% of the present bilateral shoulder impairment to the pre-existing down sloping abnormal acromion morphology. The remaining 90% will be considered due to the cumulative traumatic industrial exposure of October 5, 2014 through October 5, 2015. This will now supersede my previously submitted conclusion on apportionment of the bilateral shoulder impairment as stated in the report of March 31, 2020. (Joint Exh. 1, Dr. Falkinstein, June 12, 2020, p. 5.)

The parties again proceeded to trial on December 21, 2020. The stipulations included applicant's earnings were \$720.00 per week warranting a temporary disability indemnity rate of \$480.02 per week, and that applicant had been adequately compensated for all periods of temporary disability "claimed through the present." (MOH/SOE, December 21, 2020, p. 2.) The issues submitted for decision included injury AOE/COE, temporary disability with applicant "claiming the following period: October 5th, 2015, through October 5th, 2016," and the EDD lien as "outlined" in the MOH/SOE from the March 7, 2017 trial. (MOH/SOE, December 21, 2020, pp. 2 - 3.)

DISCUSSION

We first note that in the Report the WCJ stated:

On June 17, 2021, this WCJ was informed the Applicant, now in pro per, filed a Petition for Reconsideration dated January 26, 2021. The Petition appears to have been sent to the Los Angeles District office, but did not contain the correct ADJ number. The number on the Petition for Reconsideration is listed as

ADJ1019918, but the correct ADJ number is ADJ10199818. The Petition was not brought [to] this WCJ's [sic] attention in January and it was not in the system. ¶ ... The Petition appears to have been filed timely per the postal receipt, but not uploaded into FileNet as the Petition contained an incorrect ADJ number. (Report, pp. 2 – 3.)

Therefore, the Petition is deemed to have been timely filed and will be addressed on the merits. We also note that the Petition has several exhibits attached which is in violation of Appeals Board Rule 10945(c). (Cal. Code Regs., tit. 8, §10945.)

The F&A was based on “applicant's un rebutted testimony and the medical findings of the AME, Dr. Falkinstein...” (F&A, p. 3, Opinion on Decision. As an AME, Dr. Falkinstein was presumably chosen by the parties because of his expertise and neutrality. As such, his opinions should be followed unless there is a good reason to find the opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) 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, 635-637 [35 Cal.Comp.Cases 16].) When a physician's report is well-reasoned, is based on an adequate history and examination, and sets forth the reasoning behind the physician's opinion not merely his or her conclusions, the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 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]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*.)

Our review of the three reports from Dr. Falkinstein indicate that he examined applicant, took a history, and reviewed the extensive medical record. He explained his analysis and the reasons for his conclusions. We agree with the WCJ that Dr. Falkinstein's reports are substantial evidence regarding the issues of injury AOE/COE, parts of body injured, and permanent disability. Thus, we will not disturb the F&A as to those issues.

As noted above, at the December 21, 2020 trial the parties stipulated that applicant's earnings were \$720.00 per week warranting a temporary disability indemnity rate of \$480.02 per week, and that applicant had been adequately compensated for all periods of temporary disability “claimed through the present.” The issues submitted for decision included temporary disability with applicant “claiming the following period: October 5th, 2015, through October 5th, 2016,” and

the EDD lien. (MOH/SOE, December 21, 2020, pp. 2 – 3.) In the Petition applicant asserts that he was not paid temporary disability benefits that he was owed. Clearly, the stipulation that applicant was compensated for all periods of temporary disability is inconsistent with the issue of applicant claiming he was owed temporary disability benefits being an issue submitted for decision. Dr. Falkinstein stated that applicant's condition had reached maximum medical improvement/permanent and stationary status as of October 5, 2016. (Joint Exh. 2, p. 21.) Also, the EDD paid applicant benefits from December 17, 2015, through December 15, 2016, at the rate of \$396.00 per week (L.C. Exh. 1, payment history) and it appears that although the EDD lien was an issue submitted for decision, it is not addressed in the F&A. Further, the parties stipulated that applicant's earnings warranted a temporary disability indemnity rate of \$480.02 week, which equals \$84.02 per week more than the EDD benefits paid. That raises the issue as to whether applicant is entitled to payment from defendant that would raise the indemnity rate (during the period that he received the EDD benefits) to the actual temporary disability indemnity rate.

Although there is no evidence in the record that is inconsistent with the stipulation that applicant's earnings were \$720.00 per week,¹ as discussed herein, the record is quite inconsistent as to the issues of applicant's entitlement to temporary disability indemnity benefits and whether the EDD lien has been resolved. It appears that the record as it now stands is not adequate to make a final determination on these issues.

The Appeals Board has the discretionary authority to develop the record 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].) Upon return of this matter, we recommend that the parties develop the record so that it contains substantial evidence to support a determination of the issues discussed above. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Compensation Appeals Board., supra*; *McClune v. Workers' Comp. Appeals Bd., supra*.)

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of whether applicant has been adequately compensated for all periods of temporary total disability,

¹ We agree with the WCJ that since earnings are based on an average weekly income, a one week work schedule and one paycheck stub, if submitted into the trial record, would not rebut the stipulation regarding applicant's earnings.

and the issues regarding payment of the EDD lien, (Finding of Fact 2). 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 as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 21, 2021 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issue of whether applicant has been adequately compensated for all periods of temporary total disability, and the issues regarding payment of the EDD lien, are deferred.

* * *

AWARD

* * *

d. The award of temporary disability indemnity owed to applicant, if any, is deferred pending development of the record.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 10, 2021

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

**JHONNY ARTURO AREVALO NAVARRO
LAW OFFICES OF MANNING & KASS**

TLH/pc

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