

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

**MARIA RUIZ, *Applicant***

**vs.**

**LION FARMS, permissibly self-insured, administered by TRISTAR, *Defendants***

**Adjudication Number: ADJ12681295  
Fresno District Office**

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

Defendant seeks reconsideration of the Findings of Fact, Award and Opinion on Decision (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 12, 2022. By the F&A, the WCJ found in relevant part that applicant is entitled to temporary total disability from August 23, 2020 to November 17, 2020.

Defendant contends that the award for temporary disability is not supported by the reporting from the qualified medical evaluator (QME).

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, amend Finding of Fact No. 6 to find that there is insufficient evidence to address the issue of temporary disability, remove part E of the Award and order further development of the record. We will also amend Finding of Fact No. 1 and part A of the Award to include all of the body parts injured per the parties' stipulations and as supported by the record.

## FACTUAL BACKGROUND

Applicant claims injury to her head, right arm, left thigh, right thigh, cervical spine, thoracic spine, lumbar spine and psyche on March 26, 2019 while employed as a farm laborer by Lion Farms. Defendant has accepted the head, right arm, left thigh and right thigh as compensable, but disputes compensability for the other parts pled. (Amended Minutes of Hearing and Summary of Evidence, April 25, 2022, p. 2.)

Scott Graham, M.D. evaluated applicant as the orthopedic QME. In his May 12, 2020 report, Dr. Graham noted that applicant was currently working for defendant and was “off work from 03/30/19 to 04/04/19 when she returned to work.” (Exhibit A, QME report, Scott Graham, M.D., May 12, 2020, p. 4.) He also noted that she was “a supervisor working with self-accommodation.” (*Id.* at p. 12.) Dr. Graham found injury to several body parts caused by the specific industrial injury including cervicalgia, thoracalgia and lumbago. (*Id.* at p. 11.) Her condition was not considered to have reached maximum medical improvement yet. (*Id.*) Dr. Graham’s report states: “Periods of TPD/TTD, I am unable to opine without a complete set of records.” (*Id.* at p. 12.) He did not provide her with work restrictions beyond her continuing to self-accommodate. (*Id.*)

A claim for disability insurance benefits was filed with the Employment Development Department (EDD) dated September 4, 2020. (EDD’s Exhibit CC, Claim for Disability Insurance Benefits – Physician/Practitioner’s Certificate, Dennis Butchart, M.D., September 4, 2020.) The claim was checked “YES” under the question regarding whether applicant had been incapable of performing her regular and customary work. (*Id.* at p. 1.) The date the disability began was stated as August 18, 2020. (*Id.*) The claim was checked “NO” in response to whether the disability was caused by an accident or trauma. (*Id.*) The diagnosis states “low back pain.” (*Id.* at p. 2.) The form was checked “NO” regarding whether the disabling condition was “caused and/or aggravated by the patient’s regular or customary work.” (*Id.* at p. 3.)

Applicant continued to receive treatment for her injury subsequent to Dr. Graham’s evaluation. Dr. Gary Hatcher issued a report dated August 19, 2020 wherein it was noted that applicant is able to perform usual work. (Defendant’s Exhibit F, Doctor’s First Report of Occupational Injury or Illness, August 19, 2020, p. 3.) The assessment in the narrative report states in pertinent part: “Pt is being released from care with no objective findings of impairment or need for future medical/ pt is able to continue full duty work.” (*Id.* at p. 7.)

The orthopedic QME Dr. Graham re-evaluated applicant on November 17, 2020. In his report, Dr. Graham noted that applicant was laid off from her job with defendant on August 19, 2020. (Defendant’s Exhibit B, QME reevaluation report, Scott Graham, M.D., December 14, 2020, p. 6.) Her condition was considered permanent and stationary as of the date of Dr. Graham’s examination. (*Id.* at p. 13.) Dr. Graham opined in relevant part: “Periods of TTD/TPD: The medical records do not indicate any periods of TTD/TPD.” (*Id.*) He noted “None” under the section for work restrictions. (*Id.* at p. 14.)

The matter proceeded to trial for two days on April 25, 2022 and May 26, 2022. The issues at trial included applicant’s claim for temporary disability from August 23, 2020 to July 5, 2021. (Amended Minutes of Hearing and Summary of Evidence, April 25, 2022, p. 2.) Applicant testified at trial as follows in relevant part:

After she left Lion Farms, she found work with a labor contractor, and she oversees crews of people. She has obtained a license to oversee people. She started with the labor contractor in July 2021 and is still working there. The name of the labor contractor is Jorge Leon.

...

She indicated that she has had to look for a chiropractor in San Jose.

Applicant was referred to Exhibit 14, which was an invoice from Butchart Health. Applicant did recall treating there, and she paid for this treatment herself.

(*Id.* at pp. 5-7.)

Applicant purportedly began working for the other employer on July 6, 2021. (Applicant’s Post-Trial Brief, June 15, 2022, p. 9.)

The WCJ issued the resulting F&A wherein he made multiple findings of fact including that applicant was entitled to temporary total disability from August 23, 2020 to November 17, 2020. Defendant solely disputes the WCJ’s finding and award regarding temporary disability.

## DISCUSSION

### I.

Temporary disability indemnity is a workers’ compensation benefit which is paid during the time an injured employee is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers’ Comp. Appeals Board* (1998) 68

Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657;<sup>1</sup> *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].) A disability is permanent and stationary when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, §§ 9785(a)(8), 10152; *Austin, supra*, 16 Cal.App.4th at p. 235.)

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis and citations omitted.)

There is conflicting evidence regarding whether applicant was temporarily disabled during the period found by the WCJ. The WCJ in his Report explained that he based the finding of temporary disability on the September 4, 2020 disability claim signed by Dr. Butchart that applicant was incapable of performing her regular or customary work coupled with applicant's testimony that she did not work after her termination and the QME Dr. Graham's finding that her condition was permanent and stationary as of November 17, 2020. (Report, September 9, 2022, pp. 8-9.)<sup>2</sup> Applicant had been released to full duty as of August 19, 2020 by another doctor, but

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

<sup>2</sup> The WCJ's Report confusingly contains a recommendation to deny the Petition and an electronic signature on page 6, but the analysis of defendant's Petition is on the subsequent pages.

then she began treating with Dr. Butchart on her own per her trial testimony. As noted by the WCJ, there is sparse contemporaneous medical evidence during this period due to lack of medical treatment since defendant apparently would not authorize it. Under the circumstances here, the record must be developed in order to determine whether applicant is entitled to temporary disability during the period claimed.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) The record may thus be developed with the existing physicians in this matter per *McDuffie*.

Therefore, we will amend Finding of Fact No. 6 to find that there is insufficient evidence to address the issue of temporary disability during the period in dispute, remove part E of the Award and order further development of the record.

## II.

The parties stipulated at trial to injury arising out of and in the course of employment (AOE/COE) to the head, right arm, left thigh and right thigh. (Amended Minutes of Hearing and Summary of Evidence, April 25, 2022, p. 2.) Although the WCJ noted this in the F&A under the “Stipulated Facts” section, Finding of Fact No. 1 and part A of the Award only notes injury AOE/COE to the cervical spine, lumbar spine, thoracic spine and headaches. Injury AOE/COE to

the cervical spine, lumbar spine, thoracic spine and head is supported by the reporting of the orthopedic QME Dr. Graham and the neurological QME Dr. Robert Shorr. (Defendant’s Exhibit A, QME report, Scott Graham, M.D., May 12, 2020; Defendant’s Exhibit D, QME report, Robert Shorr, M.D., June 29, 2021.) Defendant also does not dispute in its Petition the WCJ’s finding of injury AOE/COE to these parts. It is presumed that the lack of finding of injury AOE/COE to the right arm, left thigh and right thigh in the F&A in accordance with the parties’ stipulation was an inadvertent omission and will be remedied in the amended decision. (See e.g., *Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also Lab. Code, § 5702; *County of Sacramento v. Workers’ Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].)<sup>3</sup>

In conclusion, we will amend the F&A as outlined herein. The matter is returned to the trial level for further proceedings consistent with this opinion.

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<sup>3</sup> A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. I.A.C. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. I.A.C. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact, Award and Opinion on Decision issued by the WCJ on August 12, 2022 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award and Opinion on Decision issued by the WCJ on August 12, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

1. Maria Ruiz, while employed on March 26, 2019 as a farm laborer, occupational group code 491, at Selma, California by Lion Farms, LLC, sustained injury arising out of and in the course of employment to her head, right arm, left thigh, right thigh, cervical spine, lumbar spine and thoracic spine. Applicant did not sustain an injury arising out of and in the course of employment to her psyche.

\* \* \*

6. The current record is insufficient to address the issue of temporary disability from the period August 23, 2020 to July 5, 2021.

\* \* \*

**AWARD**

- A) Applicant sustained injury AOE/COE to her head, right arm, left thigh, right thigh, cervical spine, lumbar spine and thoracic spine per Finding of Fact No. 1;
- B) Applicant is in need of future medical care for her injuries as per Finding of Fact No. 2;
- C) Applicant was found to have become MMI/permanent and stationary as of 11/07/2020 as per Finding of Fact No. 3;
- D) Applicant sustained PD of 5% as per Finding of Fact No. 4;
- E) Applicant is entitled to be reimbursed for both self-procured medical treatment and mileage expense as per Findings of Fact Nos. 7 and 8;
- F) Applicant's attorney is entitled to an attorney fee as per Finding of Fact No. 10.

**ORDER**

**IT IS ORDERED** that further development of the record is necessary to address temporary disability during the period in dispute.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 24, 2022**

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

**DANIEL DAWSON  
EMPLOYMENT DEVELOPMENT DEPARTMENT  
MARIA RUIZ  
PEREZ WILLIAMS**

***AI/pc***

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