WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JALAN DAVIE, *Applicant*

vs.

GREATER BAY PROTECTION SERVICES; ACCREDITED SURETY AND CASUALTY COMPANY, INC., administered by BRENTWOOD SERVICES ADMINISTRATORS, INC., for U.S. ADMINISTRATORS CLAIMS, *Defendants*

Adjudication Number: ADJ16838747
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Opinion on Decision and Report and Recommendation, both of which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 12, 2023

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

JALAN DAVIE
BOXER & GERSON
COOPER BROWN, APC

JMR/*pc*

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

Jalan Davie
v.
Greater Bay Protection Services; Accredited Surety and Casualty Company, Inc., administered by Brentwood Services Admin., Inc., for US Admin. Claims

WCAB No. ADJ16838747

DATE OF INJURY: August 11, 2022

REPORT AND RECOMMENDATION ON PETITION FOR [RECONSIDERATION]

INTRODUCTION

1.	Applicant's Occupation:	Security Guard
	Age:	42
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition is timely
	Verified:	The Petition is verified.
3.	Date of Order Appealed:	February 15, 2023
4.	The Petitioner contends:	

A. That this WCJ erred in their Findings and Order and that the applicant has been aggrieved by such Order, on the grounds that:

a. The WCJ acted in excess of her powers;
b. The evidence does not justify the findings of fact the award is based upon; and
c. The findings of fact do not support the order, decision, or award.

II. SUMMARY OF FACTS

Applicant Jalan Davie, born [ ], while employed on August 11, 2022, in Richmond, California, as a security guard by Greater Bay Protection Services, Inc., insured for workers' compensation by Accredited Surety and Casualty Company, inc., sustained injury to his right shoulder. His primary treating physician, Dr. George Rakkar, issued a December 12, 2022, report which forms the basis for the claim of temporary disability. The matter came to Expedited Hearing on January 25, 2023, on the issues of temporary disability based on the reporting of Dr. Rakkar. Brought up for the first time at Trial was issue that the Board does not have jurisdiction over this claim, as it falls under the LHWCA (Longshore and Harbor Workers' Compensation Act). Defendants assert that the board does not have jurisdiction and that this issue is a threshold issue.

In the Opinion on Decision issued in this matter, the undersigned found that the board has either concurrent or total jurisdiction, but did not reach a final determination on which, as either would confer jurisdiction to the board. I also found that temporary disability was due based on the reporting of Dr. Rakkar. Defendants have filed this Petition for Reconsideration contesting the findings of jurisdiction and the award of Temporary Disability.

DISCUSSION

1. Does the WCAB Have Jurisdiction to hear this dispute?

Defendants contend that the WCAB does not have jurisdiction to hearing this dispute about temporary disability as the assertion is that the Longshore and Harbor Workers' Compensation Act ("LHWCA") applies to the applicant, taking jurisdiction out of the hands of the WCAB. In my Opinion on Decision, I analyze the subject of jurisdiction and find that, at a minimum, there is concurrent jurisdiction between the WCAB and LHWCA. This gives the WCAB jurisdiction over disputes such as temporary disability. I note:

"[S]ection 905(a) of the LHWCA seems to indicate that the LHWCA is an exclusive remedy against an employer who is responsible for them. *Lenane v. Continental Maritime of San Diego* (1998) 63 CCC 152, 159.

However, despite its language, the courts have been clear that the LHWCA does not bar all state remedies against the employer. Like the LHWCA, the California workers' compensation laws can be available to longshore workers for land-based injuries. *Sea-Land Service, Inc. v. WCAB (Lopez*) (1996) 61 CCC 1360, 1365. In this way, it is possible for the LHWCA and state compensation laws to have concurrent jurisdiction over a claim. This is as a result of extensive case law in the area.

In 1942, the U.S. Supreme Court's decision of *Davis v. Department of Labor and Industries of the State of Washington* (1942)(8 CCC 25, 28.)declared that there was no line between cases falling within federal or state jurisdiction, but "a twilight zone in which the employees must have their rights determined case by case." Within this "twilight zone," the court found concurrent jurisdiction between the LHWCA and state workers' compensation laws.

In *Sun Ship, Inc. v. Pennsylvania*, ((1980) 447 U.S. 715). the U.S. Supreme Court addressed the effects of amendments of 1972, and they found that they did not pre-empt state workers' compensation remedies, but instead supplemented state workers' compensation laws and provided concurrent jurisdiction over land-based injuries. As land-based injuries generally are covered by state workers' compensation laws, the 1972 amendments to the LHWCA expanded the concurrent jurisdiction between the LHWCA and state compensation laws.

The appeals board also has issued several decisions clarifying its jurisdiction over land-based maritime workers. The appeals board held that it had concurrent jurisdiction over a marine electrician who worked in navigable waters and on the docks because a substantial part of his work was land-based. The appeals board held that it had concurrent jurisdiction over injuries to a waysman-sandblaster whose employment activities were land-based and local in character although maritime in nature. Moreover, the appeals board even held that it has concurrent jurisdiction over an employee's claim when a minimum of 5 percent to 10 percent of the employee's job activities were land-based. *Continental Maritime of San Diego v. WCAB (Holloway)* (1995) 60 CCC 491 (writ denied). Case law that followed tended to lean towards allowing concurrent jurisdiction when any work is done on land, by someone who's job is otherwise inherently maritime based." (Opinion on Decision pages 2-3)

Defendants do not offer any cases or arguments that rebut or even address the possibility of concurrent jurisdiction. The argument that the WCAB lacks jurisdiction is conclusory and does not hold up against the litany of cases that have given us guidance on how to proceed in fact patterns just as the current one. The undersigned remains of the mind that the WCAB has either exclusive or concurrent jurisdiction, and either is sufficient.

2. Is Temporary Disability owing?

Defendants next appeal the determination that temporary disability is owed based on the reporting of Dr. Rakkar. Defendants note that under the 14th Amendment of the U.S. Constitution, they are entitled to due process, and seem to imply that their right to due process was violated in this matter. We do not see how that is true. Defendants have not been stopped from pursuing their remedies under the Labor Code to take their disagreement about the finding of temporary disability to a Panel QME. Labor Code Section 4062.5 (a) does allow a party to obtain a panel QME where a medical evaluation is requires to resolve any dispute. Defendants have pursued that remedy, as at the time of Trial, a Panel QME evaluation had been set. Further, Defendant was not deprived of their right to contest the findings of the PTP. They timely objected to the reporting of Dr. Rakkar and proceeded to the panel process. They also sought a supplemental report from Dr. Rakkar to address concerns that they had.

Defendants argue that Dr. Rakkar did not consider a finding of temporary partial disability, but do not cite any case law, labor code sections, or regulations that *require* a primary treating doctor to consider a finding of temporary vs total temporary disability. There is no authority in their Petition for Reconsideration that supports their assertion that Dr. Rakkar, a physician who is treating the applicant, and has evaluated the applicant, should have or must have considered such an outcome in lieu of a finding of total temporary disability. They point out that the applicant was not undergoing any significant treatment and for that reason he could have been returned to some type of modified duty. They

indicate that there is an "elephant in the room", which in reality is their own belief that the worker's compensation system is intended to get workers back to work as soon as possible, so that they may be productive members of the community.

Again, the undersigned does not know upon which authority defendants rest their argument, as it is well understood that the workers' compensation system is a benefits delivery system. The applicant has suffered an admitted injury to his shoulder. (MOH and SOE page 2 lines 7-12). Dr. Rakkar, in his report dated December 12, 2022, noted that the applicant has had "minimal treatment" and has not had any imaging, surgical referral, or physical therapy. (Applicant's Exhibit 1). He requests an MRI, notes that the applicant may need an injection, notes a possible orthopedic referral, and indicates that PT will be held pending imaging studies. It appears that, in this respect, defendants have not been diligent in their provision of benefits, in the form of treatment, to the applicant, and yet they wish for him to return to work with restrictions that they believe are reasonable.

Defendants argue that the reporting of Dr. Rakkar is not substantial medical evidence, which I have addressed in my opinion on decision. Defendants have not offered any evidence, whatsoever, indicating that the applicant is capable of returning to work. They have not provided rebuttal reports to those of Dr. Rakkar. They point out that the applicant had a prior injury, shortly before his industrial injury, to the same body part. (Petition for Reconsideration page 3, lines 1-7). The implication seems to be that perhaps the need for treatment and/or temporary disability is due to this pre-existing injury. However, this claim is accepted, and neither medical treatment nor temporary disability are apportionable. If the uncontroverted medical evidence establishes that an employee is still temporarily disabled, the appeals board does not have substantial evidence to hold that the employee is not entitled to temporary disability. *LeVesque v. WCAB* (1970) 35 CCC 16.

Further, defendant's argument that I should make a finding that would "reasonably require doctors to consider and opine about work restrictions, however limiting or permissible so long as reasonable, would allow the employers the opportunity to evaluate the return to work question? (sic)" is misplaced and has no basis in existing law of which the undersigned is aware. As a matter of fact, should I have made such a finding it would have been made without a basis in law.

Defendants seem to misunderstand the burden presented and the interplay of the right to object to a finding of temporary disability made by a doctor, and the obligation of an employer to furnish benefits, even in the face of an objection. Labor Code 4062 requires an employer object to a medical determination by a treating physician concerning any medical issue within 20 days of a report, and they may begin the medical legal process to address the issue. This labor code

section indicates that a medical evaluation to determine the disputed medical issue shall be obtained as provided in section 4062.2…Labor Code section 4062.2 deals with the procedural process by which the parties may obtain a panel and issue strikes. No where in Labor Code section 4062 does it state that the employer is under no obligation to furnish benefits until such time as the evaluation is had. This could result in a very onerous burden for the employees who may be expected to live without indemnity benefits during such time as the dispute over their work status is ongoing.

An employer does not have the right to delay the provision of benefits until a formal hearing. *Kerley v. WCAB* (1971) 36 CCC 152. This is discussed under the topic of Labor Code 5814 penalties for delay of benefits. An employer is required to and must expeditiously take the initiative to provide benefits. This concept is discussed in *Dorman v. WCAB* (1978) 43 CCC 302, where the Board held that the burden is on the employer or his carrier to present substantial evidence on which a finding of genuine doubt as to liability for payments is made. Upon notice or knowledge of a claimed injury, the employer has both the burden and the right to investigate the facts in order to determine his liability, but he must act expeditiously in order to comply with the statutory provisions for payment of compensation which require that he take the initiative in providing benefits. (*Dorman, Supra*, quoting *Ramirez v. Workmen's Comp. App. Bd*. (1970) 10 Cal.App.3d 227, 234 [88 Cal.Rptr. 865].)

We note that these last two cases deal with penalties for unreasonable delay of payment of benefits, but we find them instructive on the employers obligation to provide benefits while also pursuing their rights under Labor Code 4062 to object to the findings of the medical reporting and to seek out the opinion of the Panel QME. Nothing in the Petition for Reconsideration has convinced the undersigned that there is any authority for withholding temporary disability benefits when the evidence is uncontroverted that the applicant is entitled to such benefits, notwithstanding the provisions of Labor Code 4062.

RECOMMENDATION

For the foregoing reasons, we recommend that the Petition for Reconsideration be denied in its entirety.

Dated: 27 March 2023

Respectfully submitted,
Joanna Stevenson
Workers' Compensation Judge

OPINION ON DECISION

BACKGROUND INFORMATION

Applicant Jalan Davie, born [ ], while employed on August 11, 2022, in Richmond, California, as a security guard by Greater Bay Protection Services, Inc., insured for workers' compensation by Accredited Surety and Casualty Company, inc., sustained injury to his right shoulder. His primary treating physician, Dr. George Rakkar, issued a December 12, 2022, report which forms the basis for the claim of temporary disability. No temporary disability has been paid. There is a Panel QME, and the appointment with that doctor is set for March 22, 2023.

The matter came to Expedited Hearing on January 25, 2023, on the issues of temporary disability based on the reporting of Dr. Rakkar. Defendants timely objected to the report of Dr. Rakkar, dated December 12, 2022, and began the Labor Cde 4062 process of obtaining a panel. It is their position that since they disagree with the finding of temporary disposition issued by Dr. Rakkar, that they are under no obligation to begin indemnity benefits until the applicant has been evaluated by the Panel QME.

Brought up for the first time at Trial was issue that the Board does not have jurisdiction over this claim, as it falls under the LHWCA (Longshore and Harbor Workers' Compensation Act). Defendants assert that the board does not have jurisdiction and that this issue is a threshold issue. WE address this issue first.

DOES THE LHWCA APPLY TO THE FACTS IN THIS CASE, AND DOES THE BOARD HAVE JURISDICTION TO HEAR THE CASE

The issue of whether an employee is subject to the LHWCA (Longshore and Harbor Workers' Compensation Act) or a seaman covered by the Jones Act is a fact-specific inquiry. *Southwest Marine, Inc. v. Gizoni* (1991) 502 U.S. 81, 88-89

The LHWCA now "provides compensation for the death or disability of any person engaged in 'maritime employment,' Section 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, Section 903(a). *Herb's Welding, Inc. v. Gray* (1985) 470 U.S. 414, 415 In light of these changes, the courts have clarified that an employee making a claim under the LHWCA must satisfy both a "status" and a "situs" test. (*Herbs Welding*, supra)

For the Status portion of the test, the workers must meet the definition of employee as it is set forth under Section 902(3) of the LHWCA. Section 902(3) states in relevant part:

[A]n employee "means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." The term "maritime employment" refers to the nature of a worker's activities." *P. C. Pfeiffer Co., Inc. v. Ford* (1979) 444 U.S. 69.

"Maritime employment" is not defined by the LHWCA, but the U.S. Supreme Court has stated that it is an occupational test that focuses on loading and unloading. *Herb's Welding, Inc. v. Gray* (1985) 470 U.S. 414, 424. In the instant case the applicant was a welder, and it was determined that he could not bring a claim under the LHWCA because his work had nothing to do with the loading and unloading process, and there was nothing inherently maritime about his work.

The second part of the test, the situs test, requires the injury to occur on the navigable waters of the United States or any area used by an employer in loading, unloading, repairing or building a vessel such as a pier, wharf, dry dock, terminal building way or marine way. 33 U.S.C. 903(a).

Section 905(a) of the LHWCA seems to indicate that the LHWCA is an exclusive remedy against an employer who is responsible for them. *Lenane v. Continental Maritime of San Diego* (1998) 63 CCC 152, 159.

However, despite its language, the courts have been clear that the LHWCA does not bar all state remedies against the employer. Like the LHWCA, the California workers' compensation laws can be available to longshore workers for land-based injuries. *Sea-Land Service, Inc. v. WCAB (Lopez*) (1996) 61 CCC 1360, 1365. In this way, it is possible for the LHWCA and state compensation laws to have concurrent jurisdiction over a claim. This is as a result of extensive case law in the area. XXX

In 1942, the U.S. Supreme Court's decision of *Davis v. Department of Labor and Industries of the State of Washington* (1942)(8 CCC 25, 28.)declared that there was no line between cases falling within federal or state jurisdiction, but "a twilight zone in which the employees must have their rights determined case by case." Within this "twilight zone," the court found concurrent jurisdiction between the LHWCA and state workers' compensation laws.

In *Sun Ship, Inc. v. Pennsylvania*,((1980) 447 U.S. 715). the U.S. Supreme Court addressed the effects of amendments of 1972, and they found that they did not pre-empt state workers' compensation remedies, but instead supplemented state workers' compensation laws and provided concurrent jurisdiction over

land-based injuries. As land-based injuries generally are covered by state workers' compensation laws, the 1972 amendments to the LHWCA expanded the concurrent jurisdiction between the LHWCA and state compensation laws.

The appeals board also has issued several decisions clarifying its jurisdiction over land-based maritime workers. The appeals board held that it had concurrent jurisdiction over a marine electrician who worked in navigable waters and on the docks because a substantial part of his work was land-based. The appeals board held that it had concurrent jurisdiction over injuries to a waysman-sandblaster whose employment activities were land-based and local in character although maritime in nature. Moreover, the appeals board even held that it has concurrent jurisdiction over an employee's claim when a minimum of 5 percent to 10 percent of the employee's job activities were land-based. *Continental Maritime of San Diego v. WCAB (Holloway*) (1995) 60 CCC 491 (writ denied). Case law that followed tended to lean towards allowing concurrent jurisdiction when any work is done on land, by someone who's job is otherwise inherently maritime based.

In *House v. Moore Dry Dock Co*., 2013 Cal. Wrk. Comp. P.D. LEXIS 556, no concurrent jurisdiction was found for an injured worker whose attorney, at trial, stipulated to the fact that he performed 100% of his work on board ships in navigable water of the United States, even though his job was in repair and reconstruction of ships that were tied to piers.

Furthermore, Labor Code Section 128 also allows for the WCAB to hear LHWCA claims. It notes that the appeals boar is not required to so but may accept appointment as a deputy commissioner to enforce the LHWCA.

In the instant matter, the applicant was hired by a security company, Greater Bay Protection, as a service guard. His job is entirely land based. He does not have any longshoremen benefits, nor any credentials at all, and his job does not require him to have longshoreman credentials. (SOE and MOH pages 4-5, lines 46-47 and 1-4). The applicant further notes that he does not have any experience as a longshoreman, nor how to become one, and in fact does not know anything about longshoremen, except the word. (SOE and MOH page 5 lines1-17).

The applicant notes that he was in the terminal when he was injured. It's a through way from the terminal to the parking lot. He was injured inside the terminal, but the entrance and exit doors. (SOE and MOH page 5, lines 19-21).

The applicant's job in security was a purely land based job. He worked in the terminal at the docks, but could not go down to the boat (SOE and MOH page 5, line 3). He was not employed by the government, but a security firm and his only jurisdiction is on the land. He does not take process in the loading or unloading of the ships. The undersigned finds that the applicant was not a

longshoreman as defined above for purposes of workers' compensation benefits, and if there were disagreement on this aspect, then it would be easy to find, at a minimum, concurrent jurisdiction. As such, the Board retains jurisdiction to hear this matter.

DOES ALLOWING DUE PROCESS FOR DEFENDANTS INCLUDE WAITING TO ISSUE OPINION ON TEMPORARY DISABILITY WHEN THE DEFENDANTS OBJECTED TO THE FINDING OF TEMPORARY DISABILITY, AND HAVE BEGUN THE PANEL PROCESS UNDER LC 4062

Defendants next allege that it is a violation of their due process rights to move forward with an expedited hearing on the issue of temporary disability (TD) when they aver that they have correctly objected to the findings of the PTP and have begun the panel QME process, which they believe is the correct method for when there is a disagreement over temporary disability.

Temporary disability determinations must be based on substantial medical evidence. The employee bears the burden of proving his or her entitlement to these benefits. Whether an employee is temporarily disabled is a question of fact, which needs to be proved by a preponderance of evidence. LC 3202.5; *Western Growers Insurance Co. v. WCAB (Austin*) (1993) 58 CCC 323, 327.

Labor Code section 4062 deals with obtaining a panel QME when there are medical determinations at issue. It states:

> (a) "If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of the receipt of the report if the employee is represented by an attorney….If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained."

Labor Code 4062.2 deals with the online panel process and the timeline for when the panel may be selected.

Temporary disability is awarded upon 5 separate qualifying criteria:

1. The employee must have a medical disability that precludes them from working; and
2. The disability must be temporary, rather than permanent; and
3. The disability must be a result of a compensable industrial injury; and

4. The wage loss must result from the work-related disability.

Whether an employee is temporarily disabled is a question of fact for the appeals board to determine and should be based on substantial medical evidence. *Huston v. WCAB* (1979) 44 CCC 798. A finding of temporary disability may even issue with no physician has explicitly opined that the employee was temporarily disabled, the Board is entitled to draw reasonable inferences from the evidence. *Boatman v. City of Los Angeles*, 2011 Cal. Wrk. Comp. P.D. LEXIS 6 (applicant found to be TD without explicit opinion from physician when he underwent surgery to correct significant tear of meniscus, which required his wife to help him to get out of bed and that required two weeks' convalescence before he was recommended to undergo physical therapy); *Howe v. Longs Drugs*, 2011 Cal. Wrk. Comp. P.D. LEXIS 166 (appeals board rejected WCJ's decision that did not accept current evidence to establish applicant's TD status retroactively and when there were contemporaneous medical reports from applicant's treating physician indicating ongoing medical treatment and decline in applicant's condition); *Ralphs Grocery Co. v. WCAB (Boyd*) (2011) 76 CCC 1096 (writ denied) (WCJ found that applicant's testimony alone, without medical corroboration, could be sufficient to support finding of TD).

The timing of payments is established in Labor Code Section 4650, and it provides that the first payment of temporary disability payments must be made no later than 14 days after knowledge of the injury and disability. The treating physician is the appropriate source of an opinion on the anticipated duration of disability, and the employer can verify when the employee may return to work. Payment is required by the 14th day of lost time and written medical opinions are not a prerequisite to payment. The employer may, if they are unable to make a determination within the 14 days if temporary disability is owed, may issue a "delay letter" explaining why payments cannot be made within the 14-day period, what other information is required, and when the employer expects to have the requisite information. Labor Code 4650(d) and 8 C.C.R. 9812(a)(2). If the employer cannot decide by this original date, the employer must issue another delay issue no later than the date of the original determination.

In this case we have a delay notice dated November 16, 2022, delaying Temporary Disability payments for the period of August 11, 2022 through present because they were " in need of medical reports from BARRT medical Services and any other medical evidence. I expect to advise you of the status of these benefits by 12/26/22." (See Defendant's Exhibit C).

Applicant's exhibit 1 is the report of Dr. Rakkar dated December 12, 2022. Applicant testified that this was the first date that he saw Dr. Rakkar, and had been treating with his personal doctors, through BARRT Programs, in Richmond, CA, prior to this time, and his personal doctor, Dr. Kyle Moore, had been taking him off work prior to his time with Dr. Rakkar. In Exhibit 1, page

4, Dr. Rakkar notes that the applicant rates his pain a 10 at baseline, 9 our of 10 at its worst, and 3 out of 10 at its least.

Labor Code 5952(d) requires an award of the appeals board to be "supported by substantial evidence." It is well established that any decision of the WCJ or WCAB must be supported by substantial evidence considering the entire record. (*Escobedo v. Marshalls* (2005) 70Cal.Comp.Cases 604, 620 (Appeals Board en banc); *Lamb v. Workmen's Comp. Appeals Bd.* (1974)11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16, 22].)

To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and examination, and must set forth the reasoning used to support the expert conclusions reached. (*Yeager Construction v. Workers' Comp.Appeals Bd.(Gatten*) (2006) 145 Cal.App4th 922, 928 [71 Cal.Comp.Cases 1687, 1691]; *Escobedo v.Marshalls* (supra)). "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture or guess."(Gatten, Supra).

In this case, Dr. Rakkar takes a history of the injury, including a past relevant injury, reviews the very scarce reports sent to him, does a physical examination, requests diagnostics for more accurate diagnoses, and notes that the applicant has not had any real treatment to date, but can't really use his right upper extremity. He bases his conclusions, including that the applicant is totally temporarily disabled until February 28, 2023. We find this report to be substantial medical evidence, and that the applicant has met his burden proving that he is entitled to temporary total disability. In the follow up visit on January 16, 2023, Dr. Rakkar again reports that the applicant is totally temporarily disabled until February 28, 2023.

We note several things. The first is that the applicant saw Dr. Rakkar and had an off work note given to him well before the deadline on his delay letter (December 26, 2022). At that time, the carrier had the medical evidence they needed to find benefits in the applicant's favor. This is an accepted claim for the right shoulder. Furthermore, in their delay letter the defendants clearly are aware of where the applicant had been receiving treatment and presumably any off work notes, as well. They reference in the letter that they need the medical records from BARRT Medical Services. The undersigned takes judicial notice of the fact that an Application for Adjudication was filed in EAMS on October 19, 2023. Once an ADJ number existed, the defendants could and should have issued subpoena to the BARRT Programs, as it is their duty to investigate claims in a timely manner.

We do not see that a second delay letter issued to the applicant, or a denial of temporary benefits notice, or was not entered into evidence, if it does exist. Upon receipt of the medical reporting from Dr. Rakkar, the employer's reason for not paying temporary disability payments no longer exists – they had the medical evidence they requested, and they did not send out a second denial or delay notification, with the proper information as noted in 8 C.C.R. 138.4. The objection letter sent by Defendant's counsel, dated December 27, 2022, does not conform with the notice requirements in Reg. 138.4, and does not specifically enumerate that temporary disability is an issue.

We find that the reports of Dr. Rakkar are substantial medical evidence, and support a finding of total temporary disability from December 12, 2022 and continuing. Any retroactive periods prior to December 12, 2022, are deferred. The Panel QME may, of course, also offer an opinion on periods of temporary disability and/or work restrictions, but there has been no proffered evidence of anything contradicting the finding that the applicant is totally temporarily disabled from an industrial standpoint.

DATE: 15 February 2023

Joanna Stevenson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE