

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

MACLOVIO QUINTERO GALLEGOS, *Applicant*

vs.

**DECISION HR HOLDINGS LCF NIBBELINK MASONRY CONSTRUCTION; UNITED
WISCONSIN INSURANCE COMPANY, Administered By NEXT LEVEL
ADMINISTRATORS, *Defendants***

**Adjudication Numbers: ADJ13891706, ADJ13891678
Van Nuys District Office**

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

Applicant and defendant have filed separate Petitions for Reconsideration of a workers' compensation administrative law judge's (WCJ) Joint Findings and Award and Order of December 1, 2022. In the decision, it was found that while employed on June 24, 2020 as a construction worker in case ADJ13891706, applicant sustained admitted industrial injury to his left shoulder causing temporary disability from August 24, 2020 to August 9, 2021, permanent disability of 14% after apportionment, and the need for further medical treatment. In finding permanent disability of 14%, the WCJ apportioned 10% of applicant's permanent disability to nonindustrial factors pursuant to the opinion of qualified medical evaluator orthopedist Reza Omid, M.D. The WCJ found that applicant's average weekly wage was \$1,546.58 per week, warranting a temporary disability indemnity rate of \$1,030.95 per week. The WCJ found that applicant did not sustain a cumulative injury to the hands, lumbar spine, knees, feet, cervical spine or upper extremities during a period ending November 19, 2020 in case ADJ1389678.

Defendant contends that the WCJ erred in finding temporary disability through August 9, 2021, arguing that temporary disability liability should have ceased as of June 26, 2021, when Dr. Omid stated that applicant's shoulder condition was permanent and stationary. Defendant also contends that the WCJ erred in determining applicant's average weekly wage, arguing that post-injury earnings should not have been taken into account, and arguing that the WCJ made errors

computing applicant's earnings and the number of weeks for which evidence of earnings was submitted.

Applicant contends in its Petition that the WCJ erred in (1) not finding cumulative injury in case ADJ13891678 and in (2) apportioning permanent disability in case ADJ13891706.

We have not received an Answer and the WCJ has filed to separate Reports and Recommendations on Petition for Reconsideration addressing each Petition.

As explained below, we will grant both Petitions. With regard to applicant's Petition, we will find that the temporary disability period ceased on June 26, 2021. We also find that applicant's average weekly wage was \$1,484.19, yielding a temporary disability indemnity rate of \$989.46 per week. With regard to defendant's Petition, we will grant reconsideration, and defer the issue of whether applicant sustained cumulative injury in case ADJ13891678 and the issue of apportionment in case ADJ13891706.

With regard to defendant's Petition, Dr. Omid found applicant permanent and stationary in his June 26, 2021 report. (June 26, 2021 report at p. 13.). Temporary disability ceases when either the injured worker returns to work or when his condition becomes permanent and stationary. (*Bethlehem Steel Co. v. Industrial Acc. Com. (Lemons)* (1942) 54 Cal.App.2d 585 [76 Cal.Comp.Cases 250].) We therefore amend the temporary disability period to end on June 26, 2021. We affirm the use of post-injury earnings to calculate the applicant's average weekly wage as this best represents the applicant's earning capacity. (Lab. Code, § 4445, subd. (c)(4).) However, the WCJ miscalculated both applicant's wages and the number of weeks of wages in evidence. The wage records in evidence span a 32-week period from January 6, 2020 to August 16, 2020. Applicant earned \$47,944.08 during this period. This sum divided by 32-weeks means that applicant's average weekly wage was \$1,484.19, and thus the proper temporary disability indemnity rate should be \$989.46 (Lab. Code, § 4653). We note that although the parties stipulated that defendant paid temporary disability indemnity corresponding to the period August 24, 2020 to August 9, 2021, the benefit printout in the evidentiary records shows that no temporary disability indemnity was paid corresponding to the period October 28, 2020 to January 18, 2021.

Turning to applicant's Petition, with regard to the issue of apportionment of permanent disability in the specific injury case, the WCJ relied on Dr. Omid who wrote in his June 26, 2021 report with regard to apportionment, "I apportioned 90% of the condition to industrial reasons and

10% to normal degenerative process as well as the fact that he has diabetes which is known to cause tendinopathies and rotator cuff tearing.” (June 26, 2021 report at p. 13.)

As we explained in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]):

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

For example, if a physician opines that approximately 50% of an employee’s back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee’s back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Here, Dr. Omid’s apportionment determination does not in detail the “how and why” non-industrial factors are contributing to applicant’s level of permanent impairment.

With regard to the cumulative injury, while the applicant gave inconsistent histories to the medical evaluators, at his deposition and at trial, the WCJ does not clearly explain in the Report the basis behind his finding that applicant did not sustain cumulative injury. The Report appears to be a reproduction of the Summary of Evidence and Opinion on Decision. It may be helpful for the WCJ to obtain new reporting from the reporting doctors in which the body parts claimed by the applicant in the cumulative injury can be evaluated and the applicant can give the reporting physicians an updated history. We express no opinion regarding the applicant’s credibility or the ultimate determination of these issues. However, the WCJ must succinctly explain the basis behind his ultimate decision (Lab. Code, § 5313).

The WCJ and the Appeals Board have a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Since, in accordance with that mandate, "it is well established that the WCJ or the Board may not leave undeveloped matters" within its acquired specialized knowledge (*Id.* at p. 404), pursuant to Labor Code section 5906, we will defer the issues of permanent disability and apportionment in case ADJ13891706 and defer the issue of industrial cumulative injury in case ADJ13891678. As explained above, we amend the WCJ's decision to find temporary disability in case ADJ13891706 from August 24, 2020 to June 26, 2021, payable at the rate of \$989.46 per week.

For the foregoing reasons,

IT IS ORDERED that that Applicant's and Defendant's respective Petitions for Reconsideration of the Joint Findings and Award and Order of December 1, 2022 are **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award and Order of December 1, 2022 is **AMENDED** as follows:

FINDINGS OF FACT

1. Maclovio Quintero Gallegos, age 61 on the date of injury, while employed on 6/24/2020 in case ADJ13891706, as a construction worker, Occupational Group No. 480, at Lancaster, California, by Decision HR Holdings Leasing Company for Nibbelink Masonry Construction, sustained injury arising out of and in the course of employment to the left shoulder. Applicant did not sustain injury arising out of and in the course of employment to the left hand and left elbow.

2. Applicant's earnings at the time of injury in case ADJ13891706 were \$1,484.19 per week, for purposes of both temporary and permanent disability indemnity/sufficient to establish a temporary disability rate of \$989.46 per week and a permanent partial disability rate of \$290.00 per week.

3. The injury in case ADJ13891706 resulted in temporary disability for the period of 8/24/2020 through 6/26/2021 payable at the rate of \$989.46 per week, less any sums paid on account thereof.

4. The issues of permanent disability and apportionment in case in case ADJ13891706 are deferred, with jurisdiction reserved.

5. Applicant will require further medical treatment to cure or relieve from the effects of the injury in case ADJ13891706.

6. The issues of medical-legal/or self-procured treatment liens in case ADJ13891706 are deferred, with jurisdiction reserved.

7. The reasonable value of the services and disbursements of applicant's attorney in case ADJ13891706 is 15% of any unpaid temporary disability awarded herein, in an amount to be adjusted by the parties with jurisdiction reserved in the event of a dispute. The issue of attorney's fees based on any permanent disability recovery is deferred, with jurisdiction reserved.

8. The issue of whether the applicant sustained compensable cumulative injury to any body part in case ADJ13891678 is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of MACLOVIO QUINTERO GALLEGOS against UNITED WISCONSIN INSURANCE COMPANY of:

- a. Temporary disability, in accordance with Findings of Fact No. 3, as above;
- b. Further medical treatment, in accordance with Findings of Fact No. 5, as above.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 17, 2023

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

**MACLOVIO QUINTERO GALLEGOS
EQUITABLE LAW FIRM
MacDONALD, EBBING & LLOYD**

DW/oo

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