

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

**DAVID STEINHAEUER, *Applicant***

**vs.**

**CITY OF SIMI VALLEY permissibly self-insured/self-administered, *Defendant***

**Adjudication Number: ADJ10802406**

**Van Nuys District Office**

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

Defendant seeks reconsideration of, and removal regarding, the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on July 8, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his bilateral wrists, bilateral hands, back, left knee, right hip, right ankle, and bilateral feet, that the injury caused 41% permanent disability, and that the period of applicant's temporary disability was deferred.

Defendant contends that based on the reports from orthopedic qualified medical examiner (QME) H. Leon Brooks, M.D., applicant did not sustain injury to his right hip; that applicant's condition reached permanent and stationary status on July 29, 2019; that applicant had returned to modified work, his employment with defendant was terminated for good cause and he was on paid administrative leave until he voluntarily retired on May 5, 2018, so applicant is not entitled to further temporary disability benefits and the issue of temporary disability should not have been deferred; and that applicant's lumbar spine disability was caused by an injury and lumbar fusion surgery that occurred prior to his employment with defendant.

We received a Report and Recommendation on Petition for Removal and Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be granted and that the matter be returned the WCJ "to clarify the record" regarding the right hip injury claim. We received an Answer from applicant.

We have considered the allegations in the 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 F&A to defer the issue of injury to applicant's right hip (Finding of Fact 1); to find that applicant is not entitled to receive additional temporary disability indemnity benefits (Finding of Fact 3); to defer the issue of permanent partial disability caused by applicant's injury (Finding of Fact 5); and to defer the issue of the reasonable value of the services and disbursements of applicant's attorney (Finding of Fact 7). Based thereon, we will amend the Award and Order and we will return the matter to the WCJ for further proceedings consistent with this opinion.

### **BACKGROUND**

Applicant claimed injury to his wrists, hands, lumbar spine, knees, feet, right hip, right ankle, and in the form of arthritis while employed by defendant as a wastewater plant operator during the period from April 30, 2009, through March 22, 2017.

On August 22, 2017, applicant underwent a left knee arthroplasty (replacement surgery). (App. Exh. 13, Gregory H. Tchejeyan, M.D., August 23, 2017.) Applicant was temporarily totally disabled, and he returned to modified work on March 8, 2018. He continued working until March 15, 2018, when his employment was terminated due to a positive drug test (marijuana metabolites) in violation of defendant's company policy. (Def, Exh. G; City of Simi Valley Memorandum, March 15, 2018; Def. Exh. GG, Gloria Dunnder-Leacock, M.D./D.R.S. Medical Review Services, March 15, 2018; see MOH/SOE, May 26, 2021, pp. 11 - 13.)

Applicant was evaluated by QME Dr. Brooks on November 29, 2018. Dr. Brooks examined applicant and took a history. In the Discussion section of his report, Dr. Brooks stated:

[A]t this time [applicant] has filed a claim for cumulative trauma from the period of April 30, 2009 through March 22, 2017 affecting his left foot, right ankle, right foot, lumbar spine, both wrists, and his right hip. ¶ At this time, it would appear based upon his physical activities at work that he does have evidence of cumulative trauma affecting his lumbar spine, both wrists, both knees, and both ankles.

(Def. Exh. FF, Dr. Brooks, November 29, 2018, p.7.)

Dr. Brooks re-evaluated applicant on January 30, 2020. After re-examining applicant, taking an interim history, and reviewing medical records, the diagnoses were left total knee replacement, right knee arthropathy, lumbar spondylosis, and bilateral carpal tunnel syndrome. (Def. Exh AA, Dr. Brooks, January 30, 2020, pp. 3 – 4.)

The parties proceeded to trial on May 26, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 26, 2021.) They stipulated that defendant paid temporary disability indemnity benefits during the period from March 22, 2017, through March 11, 2018. (MOH/SOE, May 26, 2021, p. 2.) The WCJ's summary of applicant's testimony (relevant to the issues herein) included the following:

After the doctor's visit, he went to work to turn in his work restrictions, and he was told to return to modified duty the next day. This was sometime in March of 2018. A week after he had returned to work on modified duty, he received a letter regarding returning to work.

(MOH/SOE p. 11.)

He did take a drug test before he returned to work. Later, he learned he failed the drug test. He did not smoke marijuana on the job. He was using marijuana to wean himself off of the prescription pain medication.

(MOH/SOE p. 12.)

After the drug test, he was terminated. He filed an appeal with the Union. There was a negotiated Last Chance Work Agreement, but he believes that the agreement violated his civil liberties without recourse. This took place within the month of March in 2018. During this time, he was on administrative leave with pay. He was eventually terminated in May of 2018, and the appeal process of his termination ran through the end of 2018. He never returned to work after being notified of the failed drug test.

(MOH/SOE p. 12.)

The applicant confirmed that his last day of work was approximately March 22, 2017. He left due to left knee pain. He acknowledges receiving EDD at that time. In July of 2017, the City of Simi Valley benefits started.

(MOH/SOE p. 12.)

The applicant was asked if he worked during the time, between the drug test and the notice of positive result, and the applicant confirmed he did work during that time frame. He was asked if he was notified on March 15, 2018 of the positive drug test and intent to terminate, which he recalled.

(MOH/SOE p. 13.)

He was asked if he understands that, after 90 days off work, a worker must take a drug test. This was the city's policy in 2018. The applicant understood. ¶ The Court confirmed that the applicant's administrative leave ended on May 5, 2018 with his retirement.

(MOH/SOE p. 14.)

The matter was submitted for decision and on August 9, 2021, the WCJ ordered that submission was vacated for further development of the record. At the June 20, 2022 hearing additional exhibits were accepted into evidence and the matter was again submitted for decision. (MOH/SOE, June 20, 2022, pp. 1 - 2.) The issues submitted for decision included parts of body injured, temporary disability, and permanent disability/apportionment. (MOH/SOE, May 26, 2021, p. 2.)

## DISCUSSION

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, defendant disputes threshold and interlocutory issues and the Petition will be treated as a petition for reconsideration.

Regarding the issue of temporary disability, we note that, "The essential purpose of temporary disability indemnity is to help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability." (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4<sup>th</sup> 790, 801 [71 Cal.Comp.Cases 1044] (quoting from *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc).) An employer's obligation to pay temporary disability indemnity to an injured worker ceases when the replacement income is no longer needed because the applicant has returned to work. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) Here, it appears there is no dispute that applicant returned to work on March 8, 2018. There is also no dispute that his employment was terminated due to a positive drug test, which was in violation of defendant's policies. (Def. Exh. G, pp. 30 – 33.) An injured employee, whose employment was terminated for good cause is not entitled to temporary disability benefits subsequent to the termination. (*Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal.Wrk.Comp. P.D. LEXIS 100 (Appeals Board panel decision).) Thus, there is no legal support

for applicant's argument that he is entitled to temporary disability indemnity benefits after the date that his employment with defendant was terminated for good cause.

As to the issue of applicant's right hip injury claim, although Dr. Brooks stated that applicant claimed injury to his right hip (Def. Exh. FF, p.7), he did not address the issue of whether applicant injured his right hip, as claimed. Having reviewed each of Dr. Brooks' reports, it is clear that he did not address the issue of injury AOE/COE regarding applicant's right hip. Also, the fact that Michael S. Bahk, M.D., said applicant stated that he, "... sustained an injury in his right hip due to over compensating" (Def. Exh. H, Dr. Bahk, February 26, 2018, p. 2) does not constitute substantial evidence regarding the issue of injury AOE/COE. Having reviewed the entire record we see no medical evidence that constitutes substantial evidence regarding the issue of whether applicant sustained an injury AOE/COE to his right hip.

Clearly, injury AOE/COE as to a claimed body part, is a threshold issue. The Appeals Board has the discretionary authority to further develop the record when it does not contain substantial evidence pertaining to a threshold issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) However, under the circumstances of this matter it may be in the parties' interest to have applicant evaluated by an agreed medical examiner (AME) or in the alternative to request that the WCJ appoint a regular physician (Lab. Code, § 5701); and to request that the physician submit a report addressing the issue of whether applicant sustained an injury AOE/COE to his right hip.

Finally, defendant argues that applicant's lumbar spine disability was caused by an injury and lumbar fusion surgery that occurred prior to his employment with defendant. However, although applicant did have a lumbar spine injury prior to being employed by defendant, we agree with the WCJ that:

Petitioner misleads when he attempts to assign post 2005 PDRS to disability found due to a 2002 injury. When Dr. Tabibian questioned the applicant, the history provided was of a surgery to the back in 1997. PQME Dr. Brooks provides different dates of 2004 or 2005, without benefit of any records. There is no evidence provided by defendant of the prior surgery or actual disability award provided for the pre 2005 event to the applicant's lumbar spine. The earliest medical record provided by the defendant were Kaiser records from

2009. ¶ I do not believe I erred in relying on the deposition testimony provided by QME Dr. Brooks regarding the applicant's preinjury level of disability or his subsequent assessment of apportionment.  
(Report, p. 7.)

Accordingly, we grant reconsideration and affirm the F&A except that we amend the F&A to defer the issue of injury to applicant's right hip; to find that applicant is not entitled to receive additional temporary disability indemnity benefits; to defer the issue of permanent partial disability caused by applicant's injury; and to defer the issue of the reasonable value of the services and disbursements of applicant's attorney. Based thereon, we amend the Award and Order and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 8, 2022, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 8, 2022 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

1. DAVID STEINHAUER while employed during the period from April 30, 2009, through March 22, 2017, as a wastewater operator/plant operator group #341 at Simi Valley, California, by the CITY OF SIMI VALLEY, permissibly self-insured, sustained injury arising out of and occurring in the course of employment to his back, including back muscles, spine, and spinal cord, to his left knee, bilateral hands, bilateral wrists, right ankle, and bilateral feet; the issue of injury to applicant's right hip is deferred.

\* \* \*

3. Applicant received temporary disability indemnity benefits for the period from March 22, 2017, through March 9, 2018, at the rate of \$1,172.57 per week. Applicant returned to modified work on March 8, 2018, and is not entitled to additional temporary disability indemnity benefits.

4. The issue of permanent disability caused by applicant's injury is deferred.

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

6. The issue of the reasonable value of the services and disbursements of applicant's attorney is deferred.

**AWARD**

\* \* \*

a. The award of permanent disability indemnity and attorney fees is deferred pending development of the record.

\* \* \*

**ORDER OF COMMUTATION**

The Order regarding commutation of attorney fees 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/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**



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

**September 23, 2022**

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

**DAVID STEINHAUER  
KJT LAW GROUP, LLP  
KEGEL TOBIN & TRUCE**

**TLH/mc**

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