**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**MEREDITH MILLS YOUNGQUIST, *Applicant***

**vs.**

**FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ4006497 (LAO 0876608), ADJ406911 (LAO 0888739)**
**Van Nuys District Office**

## OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 18, 2020, wherein the WCJ found in pertinent part that applicant was entitled to retroactive temporary partial disability indemnity for the period from August 25, 2006, through November 12, 2008, in the total amount of $93,048.47, and that more than $40,000.00 in benefits were unreasonably delayed so applicant is entitled to an increase of $10,000.00 pursuant to Labor Code section 5814(a).

Defendant contends that the medical evidence does not support a finding that applicant was temporarily partially disabled for the period August 25, 2006, to November 12, 2008; and that it promptly investigated its potential liability for temporary partial disability benefits so there was no unreasonable delay of benefits and there is no evidence in the record that warrants the $10,000.00 Labor Code section 5814(a) benefit increase.

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 applicant.

We have considered the allegations in the Petition for Reconsideration (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.

## BACKGROUND

Applicant claimed injury to her cervical, thoracic, and lumbar spine, to her shoulders, and psyche, and in the form of shiftwork sleep disorder and dental injury while employed by defendant as a nurse on November 25, 2005. Her last day of employment with defendant was August 24, 2006.

On March 5, 2007, applicant was evaluated by orthopedic qualified medical examiner (QME) B. Ted Field, M.D. (Joint Exh. 1, Dr. Field, March 5, 2007.) After examining applicant, taking a history, and reviewing the medical record, Dr. Field noted:

> She last worked at the hospital in July of 2006. At that time she was taken off work due to a combination of her orthopedic condition and frequent skin infections. … The patient states she did inquire as to the availability of modified work duties but she was never contacted to return.
> (Joint Exh. 1, p. 2.)

He later stated:

> Despite the duration of her symptoms I do not feel her condition has reached a permanent and stationary status. ¶ In my opinion she would be available for modified work duties with restrictions of no lifting, pulling or pushing greater than 10 pounds, no overhead work and no repetitive bending or stooping.
> (Joint Exh. 1, p. 10.)

On December 2, 2008, applicant was evaluated by orthopedic agreed medical examiner (AME) Andrew L. Sew Hoy, M.D. (Court Exh. Y, Dr. Hoy, January 7, 2009.) Dr. Hoy examined applicant, reviewed the medical record, and took a history. Regarding applicant's employment, he noted:

> Ms. Mills -Youngquist first stopped working for the Fountain Valley Regional Hospital on November 26, 2005 because of her injury. She was off work for one day. She then returned to work and continued working until mid 2006, at which time she again stopped working. . She has remained off work from the Fountain Valley Regional Hospital from mid 2006 to the present time. ¶ Ms. Mills-Youngquist was also noted to be concurrently employed by Rehab West from 2005 until 2006, and also from Network HCO from 2006 to the present time. She notes that following her November 25, 2005 injury, she continued performing her usual job with these other employers.
> (Court Exh. Y, Dr. Hoy, January 7, 2009, p. 2.)

Dr. Hoy concluded that:

> Ms. Mills-Youngquist is at a point of maximum medical improvement. She may be considered to have reached a point of maximum medical improvement at the time of her agreed medical evaluation, that is, on 12/2/08. ¶… As indicated above, Ms. Mills-Youngquist reasonably reached a point of maximum medical improvement on 12/2/08. …
> (Court Exh. Y, p. 23.)

Applicant was evaluated by orthopedic AME Alexander Angerman, M.D., on January 6, 2016. (Court Exh. Z1, Dr. Angerman, April 7, 2016, p. 3.) In his April 7, 2016 supplemental report Dr. Angerman stated that he had not received applicant's deposition transcript, which he had previously requested, so he would "defer further comment in this case" until he received the transcript. (Court Exh. Z1, p. 3.) On June 22, 2016, the doctor submitted a report wherein he stated:

> At the time the patient was initially examined in this office, I was provided with Dr. Sew Hoy's report dated December 8, 2008 in which he opined that she was considered to be permanent and stationary for rating purposes.[1] ¶ … From an orthopaedic standpoint, it is felt the patient's condition has remained permanent and stationary for rating purposes since she was seen by the prior Agreed Medical Examiner, Dr. Sew Hoy, on December 8, 2008. That AME appointment took place more than two years subsequent to the date the patient last worked at Fountain Valley Regional Hospital and Medical Center.
> (Court Exh. Z2, Dr. Angerman, June 22, 2016, pp. 7 and 10.)

In his September 8, 2017 supplemental report, Dr. Angerman stated:

> I have now been provided with the neurological QME report from Dr. Richman which is summarized above. Following my review of that report which I have now received, I see no reason to alter or change my previously expressed orthopaedic opinions in this case.
> (Court Exh. Z3, Dr. Angerman, September 8, 2017, p. 2.)

Defendant and applicant, appearing in pro per, proceeded to trial on January 28, 2020. The parties stipulated that applicant's last date of employment with defendant was August 24, 2006. They also stipulated to applicant's periods of concurrent employment with TRISTAR Managed Care, to her subsequent employment with Rehab West, and Network HCO, and to applicant's earnings from those employers. The issues submitted for decision were temporary partial disability for the period from August 25, 2006, to the present and continuing, and the Labor Code section

[1] This appears to be a clerical error, in that Dr. Hoy found applicant's condition to be permanent and stationary as of the date of the examination, December 2, 2008. (Court Exh. Y, p. 23.)

5814 increase in benefits. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 28, 2020, pp. 2 - 3.)

**DISCUSSION**

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020, and the Petition is deemed filed on April 13, 2020.

"A temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment." (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].) "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." (*Ibid,* at 801 (quoting from *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc).) A determination regarding whether an applicant is permanent and stationary or temporarily disabled typically requires medical evidence. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 867 [44 Cal.Comp.Cases 798]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) An employer's obligation to pay temporary disability indemnity to an injured worker ceases when (1) the employee returns to work, (2) the

employee is deemed medically able to return to work, or (3) the employee's medical condition becomes permanent and stationary. (*Huston v. Workers' Comp. Appeals Bd., supra,* at 868.) If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. (Lab. Code, § 4657.) "An employee is considered temporarily partially disabled if he [or she] is able to earn some income during his [or her] healing period but not his [or her] full wages. The disability payment in such event is [two-thirds] of the employee's weekly wage loss." (*Herrera v. Workmen's Comp. Appeals Bd*. (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].)

Here, QME Dr. Field stated that as of his March 5, 2007 examination of applicant, she had not reached permanent and stationary/maximum medical improvement (P&S/MMI) status. (Joint Exh. 1, p. 10.) AME Dr. Hoy subsequently determined that applicant "was at a point of" being P&S/MMI as of December 2, 2008. (Court Exh. Y, p. 23.) AME Dr. Angerman, stated that he believed applicant's condition had remained P&S/MMI "for rating purposes since she was seen by the prior Agreed Medical Examiner, Dr. Sew Hoy." (Court Exh. Z2, p. 10.)

Based on the case law noted above, if applicant had wage loss during the period prior to her condition reaching P&S/MMI status, she would be either temporarily totally disabled or temporarily partially disabled. The parties stipulated that applicant's last day of employment with defendant was August 24, 2006. Dr. Field noted that applicant was taken off work due to a combination of her orthopedic condition and frequent skin infections. (Joint Exh. 1, p. 2.) The parties also stipulated to applicant's employment and earnings regarding her "concurrent employers" including her employment after her last day with defendant. (MOH/SOE, p. 2.) Based thereon, we agree with the WCJ that the trial record contains substantial evidence that applicant was temporarily partially disabled during the period commencing August 25, 2006, and in turn that she was entitled to temporary partial disability indemnity.

Pursuant to Labor Code section 4656 (c) (1):

> Aggregate disability payments for a single injury occurring on or after April 19, 2004, [and prior to January1, 2008] causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.
> (Lab. Code, § 4656.)

Although applicant's condition did not reach P&S/MMI status until December 8, 2008, the award of benefits through November 12, 2008, is consistent with the 104 week limitation in Labor

Code section 4656 (c) (1). It appears that the WCJ calculated applicant's earnings and wage loss during the period from August 25, 2006, through November 12, 2008, based on the parties' stipulations. In the Petition defendant did not object to the earnings/wage loss calculations. Thus we will not disturb the Award.

Finally, we note that statements made in trial briefs are not evidence admitted into the trial record and cannot be considered as a basis for making a decision. Also, defendant makes various arguments as to its attempted investigation regarding applicant's entitlement to temporary disability benefits (e.g. Petition, p. 2, lines 21 – 28) but there is no evidence in the record that supports those arguments. A party's arguments are not, in and of themselves, evidence. Based thereon, we see no evidence in the trial record that is inconsistent with the WCJ's conclusion that applicant is entitled to the $10,000.00 Labor Code section 5814 increase in benefits.

Accordingly, we affirm the F&A.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on March 18, 2020, is **AFFIRMED.**

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

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

**April 16, 2021**

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

**LAW OFFICES OF CARL A. FELDMAN**
**LAW OFFICES OF DENNIS J. HERSHEWE**
**LAW OFFICES OF GEORGE A. ALMODOVAR**
**MEREDITH MILLS YOUNGQUIST**
**ROSENZWEIG SCOTT, M.D.**
**STANDER, REUBENS, THOMAS, KINSEY**

**TLH/*pc***

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