

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

MYRAN TORAIN, *Applicant*

vs.

COUNTY OF SANTA CLARA/DEPARTMENT OF CORRECTION, permissibly self-insured, self-administered, *Defendants*

**Adjudication Numbers: ADJ11292969, ADJ12026971
Stockton District Office**

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

Defendant seeks reconsideration of the Amended Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on April 21, 2021, wherein the WCJ found in pertinent part that defendant paid applicant Labor Code section 4650 benefits from January 31, 2019, through January 26, 2020, and temporary disability indemnity benefits from January 27, 2020, through January 10, 2021, and that:

There is a short period of concurrent temporary disability from the date of the amendment of the cumulative trauma injury (ADJ11292969), 4 June 2020 through the date that the 104 weeks of accumulated Labor Code Section 4850 and temporary disability is reached; thereafter the applicant would be entitled to temporary disability if there is medical support for the same.
(F&O, p. 2.)

Defendant contends that when two separate injuries result in concurrent periods of temporary disability, the 104 week limitation runs concurrently and the periods that the benefits are owed run concurrently, not consecutively.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received Answer from applicant.

We have considered the allegations in the Petition for Reconsideration (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 we will affirm the F&O except that we will

amend the F&O to defer the issues of whether applicant's injuries caused concurrent and/or separate periods of temporary disability (Joint Finding of Fact 2), and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his low back while employed by defendant as a correctional deputy during the period from February 1, 2011, through February 1, 2018 (ADJ11292969). The injury claim was amended to include the right hip. Applicant also claimed injury to his right hip while employed by defendant as a correctional deputy on November 11, 2018 (ADJ12026971). The injury claim was amended to include the low back.

Applicant had been evaluated by orthopedic agreed medical examiner (AME) Donald Pang, M.D., regarding various injury claims, and he was re-evaluated by Dr. Pang on April 17, 2019. (Joint Exh. 1, Dr. Pang, April 17, 2019.) Dr. Pang's re-examination of applicant included his right hip and lumbar spine. After taking an interim history and reviewing the medical record Dr. Pang stated:

Referable to this patient's lumbar spine, ... I do not feel he has reached maximal medical improvement. ¶ Referable to this patient's right hip, ... I do not feel he has reached maximal medical improvement. ¶ ... I believe that from a causation standpoint: that it is medically probable from an orthopedic standpoint that the patient has sustained a cumulative trauma through his lumbar spine as well as to his right groin region arising out of his industrial activities and then a superimposed specific injury that occurred on 11/11/18.
(Joint Exh. 1, Dr. Pang, April 17, 2019, pp. 11 - 12.)

On February 26, 2020, Dr. Pang again evaluated applicant in regard to his right hip and lumbar spine injuries. Dr. Pang diagnosed right hip osteoarthritis and multilevel lumbar spine disc protrusions, and stated:

I feel it is premature to consider this patient maximally medically improved. ¶ Referable to the patient's lumbar spine and right hip, the patient sustained specific trauma in November of 2018 to the lumbar spine and right hip. In addition, I feel the patient has in all likelihood within reasonable medical probability from an orthopedic standpoint sustained industrial related cumulative trauma to the lumbar spine as well as to right hip.
(Joint Exh. 1, Dr. Pang, February 26, 2020, p. 11 [EAMS p. 26].)

The parties proceeded to trial on January 11, 2021. The issues submitted for decision included defendant's assertion that the temporary disability indemnity benefits it was paying in the specific injury claim, case number ADJ12026971, "...are running concurrently with benefits being sought by the applicant in ADJ11292969, the cumulative trauma." (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 11, 2021, p. 3.) The WCJ issued a Findings and Order on March 24, 2021 and issued the amended F&O on April 21, 2021.

DISCUSSION

It is settled that Labor Code section 4850 benefits are "aggregate disability payments," subject to the 104-week limitation contained in Labor Code section 4656, subdivision (c)(2). (*County of Alameda v. Workers' Comp. Appeals Bd.* (2013) 213 Cal.App.4th 278, 286 [78 Cal.Comp.Cases 81; Lab. Code, §§ 4656(c)(2) and 4850].)¹

Pursuant to section 4656(c)(2):

Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.
(Lab. Code, § 4656.)

There is no language in the statute suggesting that the limitations periods will not run concurrently where multiple injuries cause an overlap, either partial or complete, during periods of temporary disability. Section 4656(c)(2) does not toll the period during which a worker is entitled to temporary disability benefits based on another injury. Where separate injuries result in concurrent periods of temporary disability, the 104 week limitation periods run concurrently. (*Foster v. Workers' Comp. Appeals Bd.*, (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466].)

There is no statutory or case law that mandates the payment of temporary disability benefits for an injury if the period of temporary total disability for that injury runs concurrently with the period of temporary total disability for a separate injury, for which benefits are being paid. If the periods of temporary total disability for the two injuries are concurrent, then the aggregate benefits are subject to the section 4656(c)(2) 104 week limitation.

As stated by the WCJ, the trial record does not contain sufficient evidence to determine the periods of applicant's temporary total disability caused by his injuries. In turn, there is no means

¹ All further statutory references are to the Labor Code unless otherwise noted.

for determining concurrent and/or separate periods of the disability. Thus, we agree with the WCJ that the record should be further developed.

Also, we note that amending an injury claim does not constitute a basis for making a medical determination as to applicant's disability status. In his April 17, 2019 report Dr. Pang stated that applicant had sustained injury to his right hip and low back and that neither condition had reached maximum medical improvement. (Joint Exh. 1, pp. 11 - 12.) Again, temporary disability status is a medical determination and is not based on a party amending the pleadings.

Accordingly, we affirm the F&O except that we amend the F&O to defer the issues of whether applicant's injuries caused concurrent and/or separate periods of temporary disability (Joint Finding of Fact 2), and we will 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 Amended Findings of Fact and Order issued by the WCJ on April 21, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 21, 2021 Amended Findings of Fact and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The issues of whether applicant's injuries caused concurrent and/or separate periods of temporary disability, are deferred.

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/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 2, 2021

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

**MYRAN TORAIN
MASTAGNI & HOLSTEDT
COUNTY OF SANTA CLARA**

TLH/pc

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