

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

**CHRIS GASPAR, *Applicant***

**vs.**

**SAN MATEO COUNTY TRANSIT DISTRICT dba SAMTRANS, permissibly self-insured, administered by THE CITIES GROUP, *Defendants***

**Adjudication Number: ADJ11489504**

**Oakland District Office**

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 18, 2023, wherein the WCJ found in pertinent part that applicant sustained a cumulative injury to his neck, low back, and left shoulder, arising out of and occurring in the course of employment (AOE/COE); that the injury caused 22% permanent disability; that, "Due to the effects of the industrial injury, applicant was compelled to retire from his position with the employer. The retirement was unplanned as applicant intended to return to work upon recovery from the accepted industrial injury;" and that, "The employer is entitled to a credit for temporary disability overpayment for the period of November 27, 2019, through December 14, 2019, at \$865.88 per week." (F&A, p. 2.)

Defendant contends that of the temporary disability indemnity paid to applicant during the period from June 29, 2019, to December 14, 2019, in the amount of \$29,122.57 was an overpayment and that it is entitled to credit for the full amount, against the permanent disability indemnity awarded to applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. 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 we will affirm the F&A except that we will amend the F&A to defer the issues of the permanent and stationary date, and whether applicant has been adequately compensated for the temporary disability caused by his injury (Finding of Fact #3); to find that applicant's orthopedic injury caused permanent disability of 22%, for a total sum of \$24,795.00 payable at \$290.00 per week (Finding of Fact #4); and to defer the issue of whether defendant is entitled to a credit for the claimed temporary disability indemnity overpayment, against the award of permanent disability indemnity (Finding of Fact #6); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

### **BACKGROUND**

Applicant claimed injury to his neck, low back, left shoulder, and psyche, while employed by defendant as a bus operator during a period of approximately 25 years, ending on April 4, 2018.

Pain medicine qualified medical examiner (QME) Ilya Sabsovich, M.D., conducted an orthopedic evaluation of applicant on August 28, 2018. Dr. Sabsovich examined applicant, took a history, and reviewed the two treatment notes he was provided. He determined that applicant's condition was not permanent and stationary at the time of the evaluation. (App. Exh. 5, Ilya Sabsovich, M.D., August 28, 2018, p. 11.) On March 19, 2019, applicant underwent a left shoulder surgery and the post-surgery diagnoses were: " 1) Left shoulder biceps [sic] tenosynovitis. 2) Left shoulder anterior, posterior and superior SLAP tear. 3) Left shoulder partial rotator cuff tear. 4) Left shoulder bursitis. 5) Left shoulder subacromial bursitis." (App. Exh. 5, p. 28, review of Paul Hughes, M.D. operative report.)

Applicant retired on June 28, 2019. (Def, Exh. D, Resignation of Employment, June 27, 2019.)

On July 23, 2020, Dr. Sabsovich re-evaluated applicant. (App. Exh. 4, Ilya Sabsovich, M.D., July 23, 2020.) After re-examining applicant, taking an interim history, and reviewing a large number of medical records (see App. Exh. 4, pp. 10 – 40), Dr. Sabsovich found that applicant had reached maximum medical improvement/permanent and stationary status. (App. Exh. 4, p. 43.) In his October 31, 2020 supplemental report Dr. Sabsovich stated, "Referrable to the date of P&S, I believe Mr. Gaspar has achieved MMI and P&S status on 7/23/20, as the date of QME re-evaluation [sic]." (App. Exh. 3, Ilya Sabsovich, M.D., October 31, 2020, p. 3.)

On June 14, 2022, psychiatric QME Andrea R. Bates, M.D., evaluated applicant. (App. Exh. 2, Andrea R. Bates, M.D., July 14, 2022.) Having conducted her mental status examination, Dr. Bates diagnosed applicant as having an adjustment disorder resulting in a Global Assessment of Function (GAF) score of 70 and she stated: “Mr. Gaspar had reached MMI at the time of my assessment. I do not think that time would substantially change the presentation.” ... “On a mental health basis, Mr. Gaspar did not have a period of total temporary or partial temporary disability that prohibited working.” (App. Exh. 2, p. 20.)<sup>1</sup>

The parties proceeded to trial on May 2, 2023. They stipulated that defendant paid applicant temporary disability indemnity for the periods from April 14, 2018, to April 20, 2018, and from September 19, 2018, to December 14, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 2, 2023, p. 2.) Applicant testified at the trial and the WCJ’s summary of applicant’s testimony includes the following:

He recognized Exhibit D and submitted this resignation of employment document to resign immediately. This is because the manager of the employer's North Base Operations sent a letter to applicant saying he would be terminated after two weeks if he does not show up for work. At the time of the letter, he had been off work for about two years for his injury. He probably received the letter saying he would be terminated in June of 2019. The North Base Operations manager is Ana, and she sent the letter. He does not recall the date of the letter, but it was around June of 2019. He understood the letter to say he would be terminated in June of 2019. He was unable to return to work at this time because he had shoulder surgery and was in pain and trying to recuperate. The letter caused him to resign. He did not want to get terminated. If he got better for another job, termination would be bad for his record.  
(MOH/SOE, p. 7.)

He does not recall if anyone told him he could not get temporary disability and CalPERS at the same time. He had to go to CalPERS after he terminated employment and bring a termination paper to CalPERS. ¶ In May of 2019, applicant had no plan for retirement. He wanted to go back to work when he got better, and he still wants to go back to work. Since June of 2019, he cannot even steer the bus wheel and can only sit on chair for 30 minutes and then he had to stand up. At that time, he could not bend over to tie his shoes, and he bought slip on shoes at this time.  
(MOH/SOE, p. 9.)

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<sup>1</sup> At the May 2, 2023 trial, the parties agreed to defer the issue of applicant’s psychiatric injury claim. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 2, 2023, p. 2.) Since Dr. Bates stated that applicant had no temporary disability as a result of his psychiatric condition her reports are not evidence pertaining to any other issues addressed herein and will not be further considered.

The issues submitted for decision included defendant's claim that it was entitled to have a temporary disability indemnity overpayment in the amount of \$29,122.57 credited against the award of permanent disability indemnity; issues regarding applicant's psychiatric injury claim were deferred. (MOH/SOE, p. 3.)

## DISCUSSION

The Second District Court of Appeals has explained that:

... [T]emporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. (Citation.) In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained. (Citation.) Permanent disability serves to assist the injured worker in his adjustment in returning to the labor market. (Citation.) Thus, in many instances the allowance of credit for a temporary disability overpayment against permanent disability indemnity can be disruptive and, in some instances totally destructive of the purpose of permanent disability indemnity. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App. 3d 827, 836-837 [45 Cal.Comp.Cases 1106] (citations omitted).)

Also, the payment of retirement benefits does not in and of itself, satisfy an employers' obligation to provide workers' compensation benefits. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 775 [1973 Cal.App. LEXIS 120].) For example, as in this matter, if the injured worker plans to continue working but retires due to the industrial injury, then the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish that he or she intended to continue working but instead had to retire because of the job-related injury. Under those circumstances the worker would be entitled to temporary disability benefits. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *Pham v. Workers' Comp. Appeals Bd.*, (2000) 78 Cal.App.4th 626 [65 Cal.Comp.Cases 139].) We agree with the WCJ's Finding that: "Due to the effects of the industrial injury, applicant was compelled to retire from his position with the employer. The retirement was unplanned as applicant intended to return to work upon recovery from the accepted industrial injury." (F&A, p. 2, Finding #5.)

Workmen's compensation and retirement programs are based upon entirely different considerations. (Citation) The former is compulsory under state law and may not be subsidized by any contributions or exactions from employees while the latter is voluntary and subject to employee-employer contractual arrangements. (Citation.) Where a retirement system grants a definite allowance, unless provision is expressly made for a *pro tanto* deduction for workmen's compensation benefits, such reduction cannot be made. (*City of Costa Mesa v. McKenzie* (1973) 30 Cal.App.3d 763, 775 [1973 Cal.App. LEXIS 120] (citations omitted).)

The trial record contains no evidence that applicant's CalPERS retirement includes language warranting a reduction of the applicable workers' compensation benefits.

In this matter, defendant also argues that:

In disallowing the majority of the claimed temporary disability overpayment against permanent disability, the WCJ observed such would "negate" permanent disability. However, such is not the legal standard. The suggestion appears to be that in allowing the temporary disability credit, Applicant would not receive permanent disability. That is not true. Rather, the permanent disability was paid in the form of temporary disability; it just needs to be credited as such. ¶ Here, it is clear that Applicant in receiving the overpayment is neither disruptive nor destructive of the Applicant's permanent disability. In fact, the payment acted as permanent disability advances to the Applicant as required under the Labor Code. (Petition, pp. 4 – 5.)

It is not clear what defendant is arguing by asserting that "the permanent disability was paid in the form of temporary disability" and that the temporary disability payments "acted as permanent disability advances." It has long been the law that temporary disability ends 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. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806]; *Bethlehem Steel Company v. Industrial Accident Commission and Harvey Lemons* (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250, 252]; *Industrial Indemnity Exchange v. Industrial Accident Commission and Riccardi* (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25, 26-27].)

Here, there is no dispute that applicant has not returned to work. According to Dr. Sabsovich, applicant “achieved MMI and P&S status” on July 23, 2020 (App. Exh. 3, p. 3), well after the June 29, 2019, to December 14, 2019, period at issue herein. However, we note that there is no Finding addressing the permanent and stationary date. Further, it appears that applicant received psychiatric treatment, paid for by defendant, during the period from April 3, 2019, through August 12, 2022. (See Def. Exh. B, Benefit Printout, p. 3 [EAMS p. 4].) The fact that an injured worker is receiving medical treatment is not, in and of itself, substantial evidence that the injured worker is temporarily totally disabled. But since the issues pertaining to the psychiatric injury claim were deferred there is no evidence and in turn no Finding, as to whether applicant sustained a psychiatric injury AOE/COE and/or whether applicant had any periods of temporary disability as a result of the claimed psychiatric injury.

Absent a Finding regarding applicant’s permanent and stationary date and the information pertaining to the psychiatric injury claim discussed herein, we are unable to fully address the issue of defendant’s entitlement to credit for the alleged temporary disability indemnity overpayment.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Kuykendall v. Workers' Comp. Appeals Bd.*, (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264] *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Accordingly, we affirm the F&A except that we amend the F&A to defer the issues of the permanent and stationary date, and whether applicant has been adequately compensated for the temporary disability caused by his injury; to find that applicant’s orthopedic injury caused permanent disability of 22%, for a total sum of \$24,795.00 payable at \$290.00 per week; and to defer the issue of whether defendant is entitled to a credit for the claimed temporary disability indemnity overpayment, against the award of permanent disability indemnity; 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 May 8, 2023, is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 8, 2023 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

3. Applicant's injury caused temporary disability; the issues of the permanent and stationary date, and whether applicant has been adequately compensated for the temporary disability caused by his injury are deferred.

4. Based on QME reporting by Dr. Ilya Sabsovich, applicant's orthopedic injury caused permanent disability of 22%, for a total sum of \$24,795.00 payable at \$290.00 per week.

\* \* \*

6. The issue of whether defendant is entitled to a credit for the claimed temporary disability indemnity overpayment, against the award of permanent disability indemnity, is 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/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSONER**

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



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

**August 4, 2023**

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

**CHRIS GASPAR  
GEORGE P. SURMAITIS, ESQ.  
LAUGHLIN, FALBO, LEVY & MORESI**

**TLH/mc**

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