WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIELLE MANNING, *Applicant*

vs.

CONIFER HEALTH SOLUTIONS, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ9607300
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order 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 and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 11, 2020. By the F&A, the WCJ found that applicant is entitled to temporary total disability from April 1, 2014 to April 1, 2015, and from September 1, 2015 to August 31, 2016.

Defendant contends that the trial court erred in relying on the medical reporting of Jeffrey Bone, Psy.D. in finding that applicant was temporarily totally disabled. Defendant also contends that without Dr. Bone's reporting as part of the record, there is no medical evidence in support of the award for temporary disability. Lastly, defendant contends that the WCJ denied its right to due process by ordering the parties to return to Dr. Bone for further evaluation.

We received an answer from applicant. The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to her psyche through April 1, 2014 while employed as an accounts receivable collector by Conifer Health Solutions.[1]

Dr. Bone evaluated applicant on October 10, 2013 "pursuant to [Sedgwick's] request." (Applicant's Exhibit No. 2, Psychological Evaluation Report from Dr. Jeffrey Bone, October 10, 2013, p. 1.) He diagnosed applicant with an adjustment disorder with mixed anxiety and depression. (*Id.* at p. 10.) Causation was addressed as follows:

> Based on reasonable psychological probability, the examinee's psychological history and presentation clearly indicate the examinee's emotional and psychological symptomatology are attributable greater than 51%, to the work injury on August 5, 201 [*sic*] while working for Conifer Health Solutions.
>
> (*Id.* at p. 12.)

Dr. Bone considered applicant temporarily partially disabled on a psychological basis, but noted that when she "returns from her present medical leave, she can resume her usual and customary duties with no modifications or limitations on a psychological basis." (*Id.*) Her condition was not considered permanent and stationary yet. (*Id.*) Dr. Bone requested "authorization for eight individual psychotherapy sessions. These individual sessions, which will be provided by myself, Dr. Jeffrey Bone will consist of cognitive behavioral therapy and stress management for the examinee's symptoms of anxiety and dysphoria associated with her industrial work stress." (*Id.* at pp. 12-13.)

Dr. Bone issued a "Progress Note" dated October 21, 2013 with the "Patient" identified as applicant and stating "Activity: 1 hr individual" at the top. (Applicant's Exhibit No. 1, Progress Note from Dr. Jeffrey Bone, October 21, 2013.) The Note concluded with the following: "On a psychological basis, the examinee can return to her usual and customer duties for her employer when her nonindustrial medical leave ends with no limitations or modifications to her work duties." (*Id.*)

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[1] Applicant also had a separate claim for injury to the same body parts through February 21, 2014 while employed in the same position (ADJ9352570), which was consolidated with ADJ9607300. (Minutes of Hearing, Order of Consolidation and Summary of Evidence, August 15, 2019, p. 2.) In the December 2, 2019 Findings and Order, the WCJ concluded that there was no separate industrial injury in ADJ9352570. (Findings and Order, December 2, 2019, p. 21.)

Sara Watkin, M.D. evaluated applicant as the psychiatric panel qualified medical evaluator (QME) and issued several reports. Dr. Watkin diagnosed applicant with a major depressive disorder and anxiety disorder. (Joint Exhibit T, Panel QME Report of Dr. Sara E. Watkin, June 11, 2018, p. 14.) Dr. Watkin concluded that "[w]hile the previous episode of Major Depression was considered to be related to the events that transpired while Ms. Manning was working at Conifter/Tenet, the current episode is not considered industrially related." (*Id.* at p. 18.) Dr. Watkin did not find "any interval periods of Temporary Psychiatric Disability." (*Id.* at p. 19.)

Julie Goalwin, Ph.D. issued two reports regarding applicant's psychiatric condition in 2015 and a final report in 2018. Dr. Goalwin also diagnosed applicant with a major depressive disorder and anxiety disorder, as well as a pain disorder. (Applicant's Exhibit No. 5, MMI Psych Final Report by Julie Goalwin, September 22, 2015, p. 13.) Her psychiatric condition was considered predominantly caused by actual events of employment by Dr. Goalwin. (*Id.* at p. 16.)

The matter proceeded to trial on August 15, 2019. The issues in dispute included injury arising out of and in the course of employment (AOE/COE), as well as temporary disability. (Minutes of Hearing, Order of Consolidation and Summary of Evidence, August 15, 2019, p. 3.) Applicant testified at trial as follows in relevant part:

> Applicant states that she never received the initial report from Dr. Watkin. Dr. Watkin's office said she served it on Sedgwick, but Sedgwick said that they did not receive it. Applicant was told by Sedgwick to file a complaint for the untimely report. Applicant did file the complaint for the untimely report with the State at the address given to her by Sedgwick.
>
> Applicant saw Dr. Watkin on January 19, 2015. This evaluation did include face-to-face time. During that evaluation Dr. Watkin asked Applicant if she knew why she was there. Dr. Watkin told her that it was because her attorney did not provide the medical records. Applicant was not represented at the time that she was initially evaluated by Dr. Watkin and tried to tell her this. Applicant felt that Dr. Watkin was annoyed with her and that she would not listen to her when she tried to explain that she was not represented at the time.
>
> Dr. Watkin asked Applicant why she had filed a complaint. Applicant advised her that it was for the untimely report. Dr. Watkin said that it was not her fault. Applicant felt that she was justified in filing the complaint as the report was a few months late.
>
> The last time that Applicant saw Dr. Watkin was June 11, 2018. Applicant states the meeting was uncomfortable because Dr. Watkin continued to comment on Applicant filing reports and complaints due to her late reporting. Applicant

> stated she had no response to Dr. Watkin's comment at the end of her last evaluation that maybe the doctor would get her report out on time this time.
>
> Applicant does not know if Dr. Watkin was fair to her in the reports as she has not read them. Applicant does not feel that Dr. Watkin can be fair to her because of Applicant filing two complaints for late reports and the doctor's continued comments about it during each evaluation.
>
> Applicant filed a second complaint because the second report was untimely as well.
>
> (*Id.* at pp. 10-11.)

Applicant's trial exhibits included an email by applicant with her complaint to the Medical Unit against Dr. Watkin and selected Kaiser records. (Applicant's Exhibit No. 9, QME Complaint Email by applicant, various dates; Applicant's Exhibit No. 10, Kaiser Permanente Records.)

The WCJ made multiple findings of fact in the resulting Findings and Order issued on December 2, 2019. This included a finding of injury AOE/COE to the psyche, headaches and right index finger with a date of injury of October 10, 2013 per Labor Code[2] section 5412. (Findings and Order, December 2, 2019, p. 1.) The WCJ also found that the reporting of Dr. Watkin is "unsubstantial evidence" and the record needs to be developed on whether applicant is entitled to temporary total disability. (*Id.* at p. 2.) The parties were ordered to appear before the WCJ on January 6, 2020 "to discuss and develop a discovery plan" and included the following orders in relevant part:

> a. Prior to the hearing, the parties are to determine if Dr. Bone is available to re-evaluate the applicant and provide a supplemental report addressing all remaining issues, except causation, including but not limited to total temporary disability, permanent disability and apportionment of applicant's psychological injuries.
>
> b. If Dr. Bone is unavailable the parties are encouraged to select an Agreed Medical Examiner.
>
> c. If the parties are unable to select an Agreed Medical Examiner the court will consider appointing a regular physician pursuant to California Labor Code Section 5701.
>
> (*Id.*)

[2] All further statutory references are to the Labor Code unless otherwise stated.

In the Opinion on Decision, the WCJ explained the rationale for the findings regarding Dr. Watkin and temporary disability as follows:

> The Court finds Dr. Watkin's opinion on applicant's disability to be inconsistent and that it may be influenced, if not consciously then subconsciously, by a bias resulting from the multiple complaints filed against Dr. Watkin by the applicant; Complaints that Dr. Watkin appears to have felt were unjustified.
>
> Wherefore, the court finds the medical reporting of Dr. Watkin unsubstantial evidence and will not rely upon it in making its findings.
> …
> Applicant was last evaluated by Dr. Jeffrey Bone in October of 2013. Subsequently, applicant returned to work and continued to work for Conifer Health Solutions until April of 2014.
>
> After April 2014, applicant had various periods of employment, as well as suffering from multiple episodes of depression.
>
> There are no medical records that discuss the episodes of depression and their effect on applicant's ability to work. In addition, the records from Kaiser identify treatment that applicant received for her right index finger, but does not adequately address its effect on applicant's ability to work.
>
> The Court finds the record incomplete with regard to the periods of disability that applicant may or may not have sustained as a result of her psychological and orthopedic injuries.
>
> The issue of applicant's entitlement to temporary disability is deferred until the record is developed further on the issue.
>
> (*Id.* at pp. 7 and 17-18.)

Defendant sought reconsideration of the December 2, 2019 Findings and Order. In its Petition, defendant contended that Dr. Watkin's opinions are substantial evidence and there is no evidence of bias by Dr. Watkin. (Defendant's Petition for Reconsideration, December 17, 2019, pp. 7-13.) Defendant further argued that the record does not support the finding of injury AOE/COE to the finger or headaches. (*Id.* at pp. 13-16.) Defendant also contended that the WCJ erred in finding the record needs to be developed regarding temporary disability benefits and other disputed issues. (*Id.* at p. 16.)

The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration dated January 10, 2020 (2020 Report) in response to defendant's

December 17, 2019 Petition. The WCJ recommended that the Petition be granted solely with respect to causation for applicant's right index finger injury and headaches. (2020 Report, January 10, 2020, pp. 8-10.) The WCJ explained the order for development of the record as follows in pertinent part:

> The Undersigned Judge found the final opinions of Dr. Watkin contradictory, in that if applicant is likely to have recurrent episodes of depression (90% more likely) and is currently suffering from an episode of depression, how is applicant's current episodes of depression 100% related to an arbitration that occurred approximately 2 years prior? An analysis was not provided by Dr. Watkin to the undersigned Judge's satisfaction.
>
> As such, the Undersigned Judge did not error in finding the final opinion of Dr. Watkin was inconsistent.
>
> **Development of the Record**
>
> Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. However, before directing augmentation of the medical record, the WCJ must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.[3]
>
> Based on the contradictory opinions contained in Dr. Watkins final report on the issues of permanent disability and the lack of opinion on apportionment,[4] the Undersigned Judge ordered that the record be developed.
>
> Where the WCJ determines after trial or submission of a case for decision that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case.
>
> Only if the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, should other physicians be considered.[5]
>
> …
>
> Applicant's testimony was un-contradicted and unimpeached. Wherefore, the Undersigned Judge accepted as true that Dr. Watkin made the comments concerning the complaints filed by the applicant. Comments that imply that Dr. Watkin felt the applicant's complaints were unjustified.

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[3] "Tyler v. Workers' Comp. Appeals Bd., 56 Cal. App. 4th 389"

[4] "Dr. Watking [*sic*] declined to discuss apportionment given her opinion that applicant had no industrial permanent disability."

[5] "McDuffie v. Los Angeles County Metro Transit Auth., 67 Cal. Comp. Cases 138, 2002 Cal. Wrk. Comp. LEXIS 1218 (Cal. App. February 25, 2002)"

> The Undersigned Judge found that Dr. Watkin's addressing of the complaints with the applicant at each subsequent examination was evidence of an inability of Dr. Watkin to move beyond the complaints filed by the applicant and, if not conscious then subconscious, bias. Bias that contributed to the contradictory opinions contained in Dr. Watkins final report of June 11, 2018.
>
> Having found bias, the Undersigned Judge determined that a supplemental report from Dr. Watkin could not cure the need for development of the medical record.
>
> Therefore, the Undersigned Judge ordered the parties to determine if Dr. Bone, applicant's initial MPN primary treating physician, was available to re-evaluate the applicant and provide a supplemental report addressing all remaining issues, except causation, including but not limited to total temporary disability, permanent disability and apportionment of applicant's psychological injuries. If Dr. Bone was unavailable the Undersigned Judge encouraged the parties to select an Agreed Medical Examiner.
>
> Based on the above the Undersigned Judge was not in error in finding Dr. Watkin's opinions were influenced by bias and, therefore, a supplemental report from Dr. Watkin would not cure the need for development of the medical record.
>
> Furthermore, the undersigned Judge's order to develop the record is consistent with the holding in *McDuffie v. Los Angeles County Metro. Transit Auth., 67 Cal. Comp. Cases 138*.
>
> (*Id.* at pp. 4-5, 7-8.)

On February 24, 2020, the Appeals Board granted defendant's Petition, adopted and incorporated the WCJ's 2020 Report and amended the December 2, 2019 Findings and Order as recommended by the WCJ. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, February 24, 2020.) Finding of Fact No. 1 was amended to defer the issue of causation for the right index finger and headaches. The WCJ's decision was otherwise affirmed.

Defendant filed a Petition for Reconsideration/Removal of the Appeals Board's February 24, 2020 decision. Defendant contended that it was error for the Appeals Board to permit development of the record regarding causation for the right index finger and headaches when discovery had previously closed as of May 2, 2019. (Defendant's Petition for Reconsideration/Removal, March 20, 2020.)

On May 11, 2020, the Appeals Board issued an Opinion and Order Denying Petition for Reconsideration in response to defendant's Petition for Reconsideration/Removal. The decision stated that the order challenged by defendant regarding development of the record was an interlocutory finding/order and applied the removal standard. The Appeals Board determined that defendant had not shown significant prejudice or irreparable harm, or that reconsideration would not be an adequate remedy if a final decision adverse to defendant ultimately issued.

Two additional reports were issued by Dr. Bone in 2020. In his January 3, 2020 report, Dr. Bone noted that applicant was receiving individual psychotherapy and psychiatric treatment through Kaiser. (Joint Exhibit TT, Report of Dr. Jeffrey Bone, January 3, 2020, p. 11.) He opined that applicant was temporarily totally disabled on a psychological basis. (*Id.* at p. 12.) Dr. Bone recommended 24 sessions of individual psychotherapy on a weekly basis to "be provided by" Dr. Bone. (*Id.*) In his subsequent June 3, 2020 report, Dr. Bone reported under "Interim History" that applicant "has been treating with her present psychiatrist, Dr. Joy Iskarous, every 2 to 3 months. The examinee is also utilizing psychological services through Kaiser, but is being treated every 2 to 3 months." (Joint Exhibit SS, Report of Dr. Jeffrey Bone, June 3, 2020, p. 5.) The report does not indicate that Dr. Bone has provided treatment to applicant and states that she "has only obtained individual psychotherapy and psychiatric services through Kaiser after her industrial injury." (*Id.* at p. 11. He reviewed applicant's Kaiser records as part of his evaluation. (*Id.* at p. 16.) Dr. Bone opined in relevant part that applicant "has been temporarily totally disabled on a psychological basis from April 1, 2014 to the present. She remains totally temporarily disabled until August 1, 2020." (*Id.* at p. 17.)

The matter proceeded to an expedited hearing on August 3, 2020. The disputed issues included earnings and temporary disability with applicant claiming the period of April 1, 2014 through the present. (Expedited Hearing, August 3, 2020, p. 2.) Additional exhibits included subpoenaed records from Kaiser offered by applicant and the two 2020 reports by Dr. Bone identified as "Joint" exhibits SS and TT. (*Id.*) The Minutes state in relevant part:

> **LET THE MINUTES REFLECT** that defense counsel objected to Joint Exhibits SS and TT based on violation of Labor Code Section 4605. The Court notes defense counsel's objection and will address these exhibits in his Opinion on Decision with regard to the admissibility. Therefore, Joint Exhibits SS and TT are marked for identification purposes only.

(*Id.* at p. 3.)

The trial was continued to another date to permit testimony from applicant. (*Id.* at p. 1.)

On the second day of trial, the parties stipulated that applicant's hourly wage is $24.9661. (Minutes of Hearing (Further) and Summary of Evidence, September 28, 2020, p. 2.) Applicant testified at trial as follows in relevant part:

> Ms. Manning recalls seeing Dr. Bone originally in October of 2013. At that time, she understood that Dr. Bone was her treating physician. She did see Dr. Bone again after the initial evaluation but was later told that she could not see him because they had denied her case.
>
> Applicant started seeing Dr. Bone again in 2020. Applicant understands that Dr. Bone is her treating physician. Applicant currently has a re-evaluation with Dr. Bone on this upcoming Wednesday, September 30, 2020.
> …
> After March and/or April of 2014 Applicant had no further employment.
> …
> Applicant has recently elected Dr. Bone as her primary treating physician; however, in 2013, she did not elect Dr. Bone but was sent to Dr. Bone by the employer. Applicant is currently seeing Dr. Bone every few weeks; however, she does not recall when she started seeing Dr. Bone again.
> …
> Applicant did work after she left Conifer. She worked for a company called Jacobus between May and August in 2015.
>
> (*Id.* at pp. 3-4.)

The WCJ issued the F&A as outlined above. The periods awarded were based on Dr. Bone's reporting, the Kaiser records and applicant's testimony. The WCJ excluded the period when applicant returned to work for another employer in 2015 and ended disability pursuant to the 104-week limitation applicable to applicant's injury per section 4656. (Lab. Code, § 4656.)

DISCUSSION

I.

Applicant contends in her answer that defendant may not now challenge the WCJ's December 2, 2019 order returning the parties to Dr. Bone. The 2019 Findings and Order was amended by the Appeals Board in our February 24, 2020 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration. The resulting decision was a hybrid of both threshold and interlocutory issues. If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the

right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.)

Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues. Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues. The right to later challenge an interlocutory order is evident in the required showing by a party seeking removal: that "reconsideration will not be an adequate remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, § 10955(a).) This language reveals that an interlocutory order may later be challenged *after* the issuance of a final order, decision or award, but the moving party must show this is not an adequate remedy in order for the Appeals Board to grant *removal*.

The WCJ's 2019 order to develop the record with Dr. Bone was an interlocutory decision regarding discovery. (See e.g., *Reichelt v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 820 (writ dism.) [the Court of Appeal dismissed applicant's petition for writ of review because it was not taken from a final order or decision when the WCAB ordered further development of the medical record by appointment of a medical examiner under section 5701].) Therefore, defendant remained entitled to challenge this order when a final decision issued regarding applicant's entitlement to temporary disability.

II.

An award by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, we must determine whether there is substantial evidence in the

record to support the WCJ's award of temporary total disability.[6]

The record reflects that Dr. Bone initially evaluated applicant in 2013 at defendant's request. The employer has the right to have an employee submit to an examination by a practicing physician per section 4050. (Lab. Code, § 4050.)

Subsequent to that initial evaluation, Dr. Bone's October 21, 2013 progress note suggests that he provided treatment to applicant at least once. (Applicant's Exhibit No. 1, Progress Note from Dr. Jeffrey Bone, October 21, 2013.) However, his reporting in 2020 was apparently prepared pursuant to the WCJ's December 2, 2019 Findings and Order. The WCJ had found that the reporting of the psychiatric QME Dr. Watkin was not substantial evidence and that the record needed to be developed on whether applicant was entitled to temporary total disability. The parties were ordered "to determine if Dr. Bone is available to reevaluate the applicant and provide a supplemental report addressing all remaining issues, except causation, including but not limited to total temporary disability…" (Findings and Order, December 2, 2019, p. 2.) If Dr. Bone was unavailable, then the parties were "encouraged to select" an AME. (*Id.*) If an AME could not be agreed upon, then the WCJ "will consider appointing a regular physician" pursuant to section 5701. (*Id.*)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Thereafter, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an AME should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

In this matter, the WCJ presumably chose not to return applicant to Dr. Watkin to develop

[6] Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].)

the record regarding temporary disability due to concerns that Dr. Watkin was biased against her. (Opinion on Decision, December 2, 2019, pp. 6-7.) In order to return applicant to another physician who had already reported on the case in accordance with the preferred procedure per *McDuffie*, the WCJ instead chose to return her to Dr. Bone who had previously evaluated her at defendant's request per section 4050.

While the WCJ has the authority to appoint a regular physician to examine applicant per section 5701, the December 2, 2019 Findings and Order do not indicate that Dr. Bone was appointed per this section since there was also a contingency order for the WCJ to appoint a physician per section 5701 if Dr. Bone was unavailable and the parties could not agree to an AME. The issue with returning applicant to Dr. Bone is that there is insufficient evidence showing that applicant had previously designated Dr. Bone as a treating physician[7] and therefore, his sole role in the matter was as an examining physician per section 4050. It has previously been found that reports obtained per section 4050 may not circumvent the required medical-legal evaluation process outlined in section 4062.2. (Lab. Code, § 4062.2; see *Catlin v. J.C. Penney, Inc.* (March 16, 2017, ADJ7264010, ADJ7498085) [2017 Cal. Wrk. Comp. P.D. LEXIS 106] [holding that a medical examination under section 4050 cannot circumvent the medical evaluation and reporting procedures in sections 4060, 4061, 4062 or 4610].)[8] Furthermore, reports obtained under section 4050 generally may not be provided to medical-legal evaluators and are considered of limited usefulness. (Cal. Code Regs., tit. 8, § 35(e); see *Marciano v. Ameriflight, Inc.* (August 15, 2013, ADJ3940576) [2013 Cal. Wrk. Comp. P.D. LEXIS 384] [the Appeals Board affirmed a WCJ's finding that a report obtained under section 4050 could not be forwarded to any medical-legal evaluators and is of limited usefulness].)

Applicant asserts that Dr. Bone's reports were <u>not</u> obtained by her per section 4605.

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[7] In the December 11, 2020 Opinion on Decision, the WCJ concluded that applicant's offered exhibit number 13, an August 27, 2020 letter from defendant authorizing Dr. Bone as the PTP, was not admissible. (Opinion on Decision, December 11, 2020, pp. 4-5.) The WCJ further noted that "[n]o offer of proof was made that Dr. Bone's designation as the applicant's primary treating physician occurred before August 27, 2020." (*Id.* at p. 4.) In general, the reports of a treating physician are admissible and may support an award of temporary disability indemnity. (See Lab. Code, §§ 4060(b), 4061(i), 5703; see also *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

[8] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

(Applicant's Answer, January 9, 2021, p. 2; Lab. Code, § 4605.) Assuming arguendo that Dr. Bone's reporting could be considered from a "consulting" or "attending" physician per section 4605, the statute prohibits the use of such reports as "the sole basis of an award of compensation." In other words, Dr. Bone's reporting cannot be the sole basis of the award of temporary total disability if they were considered obtained per section 4605.

We agree with defendant's contention that it is unclear what role Dr. Bone was playing in this matter when he prepared his 2020 reports at a time when was no longer evaluating applicant at defendant's request per section 4050 and before applicant purportedly designated him as her primary treating physician on August 3, 2020. (Defendant's Petition for Reconsideration, December 31, 2020, p. 6.) Under these circumstances, we conclude that Dr. Bone's 2020 reporting may not be the sole evidentiary basis to support the award of temporary disability since he was not evaluating applicant as a treating physician, as a medical-legal evaluator or as a regular physician per section 5701. In the absence of Dr. Bone's 2020 reporting, there is insufficient medical evidence in the current record to determine if applicant is entitled to temporary disability during the period in dispute.

Due to the irregularity of the proceedings and discovery on this matter, we will rescind the December 11, 2020 F&A and return this matter to the trial level for further discovery regarding applicant's entitlement to temporary disability. As discussed above, the Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

Upon return to the trial level, we recommend the WCJ conduct further proceedings including if necessary, proceedings to determine if a replacement psychiatric QME panel is warranted per AD Rule 31.5 in order to obtain a medical-legal evaluation in accordance with section 4062.2, or, alternatively, if the parties will agree to an AME in psychology or psychiatry

in order to adjudicate whether applicant was temporarily totally disabled from her psychiatric injury. (See Cal. Code Regs., tit. 8, §§ 31.5(a), 41(c)(3) and 41.5(d)(4).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on December 11, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 23, 2021

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

DANIELLE MANNING
SILBERMAN & LAM
STANDER REUBENS

AI/*pc*

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