

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

Laura Thompson, *Applicant*

vs.

Paradise Valley Hospital, and Safety National Casualty Corporation administered by Corvel Claims Management / American Claims Management, *Defendants*

**Adjudication Number: ADJ10762635
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
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 April 12, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her bilateral wrists, that applicant was temporarily totally disabled during the period from April 16, 2019, through February 9, 2021, and that applicant was entitled to \$100,920.88 in retroactive temporary disability indemnity benefits.¹

Defendant contends that: 1. Temporary disability benefits shall not extend for more than 104 compensable weeks within a period of two years from date of commencement of temporary disability payments; 2. Defendant's payment of temporary disability benefits paid in case number ADJ10773371 was "an internal claim administration matter" because the parties stipulated to pay the benefits in case number ADJ10762635; 3. Commencement of temporary disability benefits as of May 3, 2018, regarding the present matter (ADJ10762635) requires termination of temporary disability benefits in 104 weeks on May 3, 2020; and 4. Temporary disability benefits are not owed

¹ The WCJ also found that the Employment Development Department (EDD) was entitled to reimbursement in the amount of \$43,973.14. Lien Claimant Exh. 4 indicates that the EDD paid applicant benefits for various periods from February 16, 2017, through March 19, 2020, although the "issue dates" appear to be from October 18, 2019, through March 20, 2020. For reasons discussed herein, we are deferring the issue of payment of applicant's temporary disability indemnity benefits, and in turn we will defer all issues regarding reimbursement to the EDD.

when an injured employee abandons or fails to maintain the necessary licensing status or, temporary disability benefits are not owed at the rate paid for a licensed occupational position.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an 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&A except that we will amend the F&A to find that the injury caused temporary disability for the period beginning May 28, 2019, through October 13, 2020 and defer the issue of continuing and/or additional periods of temporary disability (Finding of Fact 7); to defer all issues regarding reimbursement to the EDD as payment for its lien (Finding of Fact 8); and to defer the issue of attorney fees payable to applicant's counsel (Finding of Fact 9). Based thereon we will amend the Award and the Order, and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her bilateral wrists while employed by defendant as a registered nurse during the period from February 9, 2015, through February 9, 2016. Applicant also claimed injury to her back, shoulders, and knees, while employed by defendant on February 16, 2016 (ADJ10773371).

Orthopedic qualified medical examiner (QME) William J. Previte, D.O., evaluated applicant on July 31, 2017. Dr. Previte took a history and examined applicant, but he was not provided medical records to review. In his report, the doctor noted that:

Currently, she is working four hours per day four days per week. This was based upon the recommendation of Dr. Dodge regarding her back injury or aggravation of February 2016.

(App. Exh. 2, Dr. Previte, July 31, 2017, p. 3.)

Dr. Previte explained:

... I can state that based upon the information available, it would appear that repetitive activities of upper extremity intensive nature involving Ms. Thompson's duties as a Registered Nurse have resulted in an overuse syndrome with probable carpal tunnel syndrome as well as possible left elbow ulnar neuritis or neuropathy.

(App. Exh. 2, p. 8.)

Applicant's last day of work for defendant was October 17, 2017. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 4, 2021, p. 3.) On May 14, 2018, applicant underwent a lumbar laminectomy and fusion surgery, performed by Larry Dodge M.D. (App. Exh. 1, Dr. Previte, June 3, 2020 p. 2; App. Exh. 19, David M. Kupfer, M.D, May 28, 2019, p. 2.)

Starting May 28, 2019, David M. Kupfer, M.D., was applicant's primary treating physician (PTP) for her wrist injury. In his initial report, Dr. Kupfer stated:

Status: Ms. Thompson could return to work avoiding typing, data entry, or other highly repetitive clerical or similar repetitive nursing tasks exceeding 30 minutes per hour. ¶ If modified duties cannot be accommodated by this employer, then this patient would be considered temporarily disabled from regular work and a separate off work order is not required. (App. Exh. 19, p. 8; see also App. Exh. 25.)

In a subsequent report Dr. Kupfer reiterated the previously stated work restrictions and noted that applicant would, "...require temporary total disability following surgery scheduled on 10/30/19." (App. Exh. 22, Dr. Kupfer, September 19, 2019.) Applicant underwent right carpal tunnel decompression surgery on October 30, 2019. (App. Exh. 14, Dr. Kupfer, November 7, 2019, p. 4.) She underwent left carpal and cubital tunnel decompression surgery on February 19, 2020. (App. Exh. 11, Dr. Kupfer, February 27, 2020, pp. 3 – 4.) Dr. Kupfer noted that as of March 27, 2020, applicant had not reached maximum medical improvement (MMI) and was temporarily totally disabled as a result of her surgery. (App. Exh. 10, p. 4.)

On June 3, 2020, applicant was re-evaluated by QME Dr. Previte. The doctor re-examined applicant, took an interim history, and noted that the medical record CD he was provided was for a person other than applicant. (App. Exh. 1, p. 2.) In his report, Dr. Previte stated:

I have also learned that she underwent low back surgery in May of 2018 as well as staged carpal tunnel release procedures performed in November 2019 and March 2020. She remains under the care of her spine surgeon, Dr. Dodge. Apparently there is further workup being entertained due to failed benefit of prior low back surgery and ongoing issues of back pain limiting her function. She also remains under the care of Dr. Kupfer and is awaiting physical therapy for the more recently completed left upper extremity surgical procedure. ¶ My examination conducted today reveals residual abnormality in principally the left upper extremity as well as the low back area. I would state that she remains shy of maximum medical improvement particularly considering that her treating physicians are continuing care recommendations for her. ¶ Ms. [sic] Thompson is temporarily partially disabled. She is precluded from forceful use of her bilateral upper extremities estimating force of five pounds in gripping, grasping,

squeezing, twisting, torquing, pushing and pulling. ¶ She is precluded from prolonged sitting, repetitive bending, twisting, and stooping at the waist as well as lifting and carrying of objects weighing greater than 10 pounds. ¶ Based on all information available to me at this time, Ms. [sic] Thompson bilateral upper extremity issues are causally related to cumulative trauma occurring at work through 2/9/16. Her low back condition was industrially aggravated by a specific event occurring at work on 2/16/16. (App. Exh. 1, June 3, 2020 pp. 6 – 7.)

In his June 9, 2020 report, PTP Dr. Kupfer stated that applicant was still temporarily totally disabled as a result of her left wrist surgery. (App. Exh. 7, Dr. Kupfer, June 9, 2020, p. 4.) On July 16, 2020, Dr. Kupfer found that:

Ms. Thompson is currently unable to use the left hand. ¶ If modified duties cannot be accommodated by this employer, then this patient would be considered temporarily disabled from regular work and a separate off work order is not required.
(App. Exh. 6, Dr. Kupfer, July 16, 2020, p. 4.)

Applicant's disability status remained unchanged through October 13, 2020. (App. Exh. 3, Dr. Kupfer, October 13, 2020, p. 4; see also App. Exhs. 4 – 6.)

The parties proceeded to trial on December 23, 2020. The stipulations and issues were identified, exhibits were admitted into the record, and the matter was continued. (MOH/SOE, December 23, 2020.) At the February 4, 2021 trial, the issues previously identified were amended, applicant testified, and the matter was continued. (MOH/SOE, February 4, 2021.) The WCJ's summary of applicant's testimony regarding her ability to work included:

She did have light duty for a year, but she then was told that they are taking her off of work because she had already been on light duty for a year, and that was too long. They had no other positions that they could offer her. She didn't ask any further for work because she was still on the same restrictions. They had already told her they couldn't accommodate her, so she didn't ask again. ¶ In reference to her light-duty work, she was off of light duty due to her back. She had been on light duty for one year relative to her back claim. The light duty she was doing at Paradise Valley was educating new employees and some data entry. ¶ In 2019 she had surgery to her right hand in October of 2019 with Dr. Kupfer. She could not use the right hand until after physical therapy. However, after physical therapy on her right hand, she was scheduled for her left hand surgery for February of 2020. Then after her left hand surgery, her status stated "no use of the left hand." The only work to be done would be without the use of her left hand. There was nothing she could do without the use of her left hand.
(MOH/SOE, February 4, 2021, pp. 8 - 9.)

Applicant testified at the February 17, 2021 trial and the matter was continued. (MOH/SOE, February 17, 2021.) The summary of applicant's testimony included:

She was doing the job of a data entry person when she was on modified duties due to her back at Paradise Valley Hospital. That job did not require an RN degree. She would have continued to do the data entry job if her wrists were not injured. Now, but for her wrists, she could not do the job as data entry due to her wrist injury. She did not do the data entry anymore because they took that job away and then her wrists were injured.
(MOH/SOE, February 17, 2021, p. 7.)

Defense witness Kimberly Wiser testified at the February 22, 2021 trial and the matter was continued. (MOH/SOE, February 22, 2021.) The WCJ's summary of Ms. Wiser's testimony included:

A stipulation was made on May 15, 2018 to pay TTD benefits on the wrist claim. However, rather than paying on the wrist claim, she paid on the back. It was the witness' recollection that she was paying on the back because applicant was post-surgical on the back and still disabled. She is not sure what medical that was based on, but she remembers it was based on medical evidence at the time. ¶ 104 weeks had elapsed on the back claim so benefits were stopped. It was her understanding that applicant's TTD was not picked up on the wrist claim because wrist surgery was pending a date and time.
(MOH/SOE, February 22, 2021, p. 3.)

At the March 1, 2021 trial, defense witness Ana Fox testified and the matter was submitted for decision as of March 16, 2021. (MOH/SOE, March 1, 2021, p. 15.)

DISCUSSION

Pursuant to Labor Code 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.)

Defendant makes various arguments based on its contention that, "Temporary disability benefits shall not extend for more than 104 compensable weeks within a period of two years from date of commencement of temporary disability payments." These arguments are based on the provisions of Labor Code section 4656 subsection (c)(1), which apply to injuries that occurred between 2004 and 2008, and not on subsection (c)(2), which applies to injuries that occurred after

January 1, 2008. The benefits at issue herein are all within five years from the date of injury. Since applicant's injury occurred after 2008, defendant's arguments premised on Labor Code section 4656 subsection (c)(1) do not apply to the facts of this matter and those arguments will not be further addressed.

While stipulations between adversary parties concerning the existence or nonexistence of material facts are permissible in workers' compensation cases, under Labor Code, section 5702, the stipulations are not binding on the Appeals Board or the WCJ and the Appeals Board or the WCJ may reject or amend a stipulation and base the decision on the evidence presented at the hearing. (Lab. Code, § 5702; Cal. Code Regs., tit. 8, § 10517; *Draper v. Workers' Comp. Appeals Bd.* (1983) 147 Cal. App. 3d 502 [48 Cal.Comp.Cases 748]; *Turner Gas Co. v. Workmen's Comp. Appeals Bd.*, (1975) 47 Cal.App.3d 286 [40 Cal.Comp.Cases 253]; *Memorex Corp. v. Workmen's Comp. Appeals Bd. (Kraton)* (1977 W/D) 42 Cal.Comp.Cases 458.) The Appeals Board and the WCJ have the authority to make findings that are inconsistent with the parties' stipulations if the stipulations are inconsistent with the evidence submitted at trial.

Defendant argues that its payment of temporary disability benefits paid in case number ADJ10773371 was "an internal claim administration matter" because at the May 15, 2018 hearing the parties stipulated to pay the benefits in case number ADJ10762635.

The May 15, 2018 Minutes of Hearing (MOH) contain the statement that, "Defendants agree to pick up TD as of 5/3/18 per Dr. Dodge. Issue of retro TD reserved. Penalties reserved." (MOH, May 15, 2018.) At the December 23, 2020 trial the parties stipulated that:

The carrier/employer has paid compensation as follows: Temporary disability at a weekly rate of \$1,060.73 from May 3, 2018 to April 15, 2019.
(MOH/SOE, December 23, 2020, p. 2.)

We first note that, as stated above, Dr. Kupfer was applicant's PTP for her wrist injury, and Dr. Dodge treated applicant for her back injury, including performing the May 14, 2018 lumbar surgery. Also, at the February 22, 2021 trial, defense witness Kimberly Wiser testified that defendant had paid applicant temporary disability indemnity benefits for the period from February 18, 2016, through January 20, 2017, (48 weeks) in regard to the specific back injury claim. (MOH/SOE, February 22, 2021, p. 2.) The WCJ's summary of Ms. Wiser's subsequent testimony includes:

A stipulation was made on May 15, 2018 to pay TTD benefits on the wrist claim. However, rather than paying on the wrist claim, she paid on the back. It was the witness' recollection that she was paying on the back because applicant was post-surgical on the back and still disabled. She is not sure what medical that was based on, but she remembers it was based on medical evidence at the time. 104 weeks had elapsed on the back claim so benefits were stopped. (MOH/SOE, February 22, 2021, p. 3.)²

Review of the trial records indicates that the December 23, 2020 stipulation is inconsistent with the evidence presented at the subsequent trials. The WCJ's decision was based on, and was consistent with, the evidence submitted.

Further, a worker who is only partially disabled may receive temporary total disability payments if his or her partial disability results in a total loss of wages. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) The employer has the burden of proof to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. (*Id.*, at p. 422); *General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375]; *Hardware Mutual Casualty Co. v. Workers' Comp. Appeals Bd.* (1967) 253 Cal.App.2d 62 [32 Cal.Comp. Cases 291].)

In his May 28, 2019 report Dr. Kupfer stated that applicant could return to work avoiding typing, data entry, or other highly repetitive tasks exceeding 30 minutes per hour. (App. Exh. 19, p. 8.) There was no evidence in the record that applicant was working or that defendant offered applicant modified work within applicant's work restrictions as assigned by Dr. Kupfer. Applicant's last day of work was October 17, 2017. (MOH/SOE, February 4, 2021 p. 3.) In his July 10, 2020 report Dr. Kupfer assigned work restrictions and stated that if the restrictions could not be accommodated, applicant "would be considered temporarily disabled." (App. Exh. 6, Dr. Kupfer, July 16, 2020, p. 4.) Applicant's disability status remained unchanged through October 13, 2020. (App. Exh. 3, Dr. Kupfer, October 13, 2020, p. 4.)

As stated by the WCJ:

For clarification, applicant testified that in reference to her light-duty work, she had been on light duty for her back.((Minutes of Hearing (MOH)/SOE,

² The Benefit Printout (Def. Exh. C) indicates defendant actually paid a total of 98 weeks of temporary disability indemnity for applicant's back injury (ADJ10773371).

2/4/21, page 8, lines 22-24) ... ¶ ... Here, there has been no evidence that defendant at any time has made a bona fide offer of modified work to applicant with regards to her wrists claims.
(F&A, p. 7, p. 10, Opinion on Decision.)

We agree with the WCJ that there is no evidence in the trial record indicating defendant offered applicant work that would accommodate the restrictions imposed on applicant as a result of her bilateral wrist injury. Thus, applicant would be entitled to temporary total disability benefits for periods that she was temporarily partially disabled in addition to the periods of temporary total disability.

Defendant's last argument is that it is not required to pay applicant temporary disability benefits because her nursing license has expired. Applicant testified that her Registered Nurse license expired November 30, 2019. (MOH/SOE February 17, 2021, p. 9.)

Applicant testified that she does not consider herself to be retired because, "...she would work as something if her hands were okay." (MOH/SOE February 17, 2021, p. 6.) Applicant also testified that she had recently met with the employer and, "... let them know she does not have a license or CPR basic life training, she told them that she also cannot get it because she cannot do the CPR training." (MOH/SOE, February 17, 2021, pp. 6 – 7.) It appears that applicant is unable to do the CPR training because she is not able to use her left hand. Otherwise stated, her inability to do the CPR basic training is a result of her wrist injury.

Applicant also testified that, if she could afford to pay for her nursing license, "...the turnaround time to be able to work as an RN is approximately one to two weeks if she was physically capable of doing so." (MOH/SOE, February 17, 2021, p. 9.) Although applicant's license expired as of November 30, 2019, if she had been offered modified work as an RN, she could have renewed her license within one to two weeks. Based thereon, it appears that applicant did not "abandon" her RN license, or her employment as a nurse, as defendant argues. Defendant's argument is not supported by the evidence in the trial record, and it is not a basis for denying applicant the temporary disability benefits to which she would be entitled.

Finally, based on the reports of QME Dr. Previte, and PTP Dr. Kupfer, and for the reasons discussed above, applicant was temporarily totally disabled, as a result of her bilateral wrist injury or temporarily partially disabled with no offer of modified work, for the period from May 28, 2019, through October 13, 2020. Based thereon she is entitled to temporary disability indemnity benefits for that period. However, there is no medical evidence in the record that indicates whether

applicant's condition has or has not reached maximum medical improvement/permanent and stationary status. Therefore, we cannot determine that the period of applicant's temporary disability has ended nor can we determine that it is ongoing, subject to the 104 week limitation.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, such as an injured worker's entitlement to indemnity benefits, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *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].) 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, the parties have the discretion to determine how best to develop the record to address the issue of applicant's temporary disability status.

Accordingly, we affirm the F&A except that we amend the F&A to find that the injury caused temporary disability for the period beginning May 28, 2019, through October 13, 2020, and we defer the issue of continuing and/or additional periods of temporary disability all issues regarding reimbursement to the EDD as payment for its lien, and the issue of attorney fees payable to applicant's counsel. Based thereon we amend the Award and the 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, Award, and Order issued by the WCJ on April 12, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 12, 2021 Findings, Award and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

7. The injury caused temporary disability for the period beginning May 28, 2019, through October 13, 2020; the issues of continuing and/or additional periods of temporary disability are deferred.

8. All issues regarding reimbursement to the EDD as payment for its lien are deferred.

9. The issue of attorney fees payable to applicant's counsel is deferred.

AWARD

* * *

a. The award of temporary disability indemnity benefits is deferred.

b. The award of attorney fees is deferred.

ORDER

It is **ORDERED** that reimbursement to the EDD for its lien 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, 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.

**LAURA THOMPSON
HIDEN, ROTT & OERTLE
LAW OFFICE OF DANIEL K. LEE**

TLH/pc

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