

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

RITA FORREST, *Applicant*

vs.

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

**Adjudication Number: ADJ12369987
San Francisco District Office**

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

Defendant seeks reconsideration of the May 28, 2021 Findings of Fact and Award wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to temporary disability at the rate of \$1,010.28 per week for the period of July 1, 2019 through November 7, 2019 and from July 17, 2020 through the present and continuing.

Defendant contends that applicant is not entitled to temporary disability from July 17, 2020 through October 27, 2020 because applicant was not receiving medical treatment during that time and applicant's refusal to submit to medical treatment was unreasonable.

We have reviewed applicant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons stated below, we will grant reconsideration, amend the Findings of Fact and Award to clarify that the issue of temporary disability between November 7, 2019 and July 17, 2020 is deferred and return this matter to the trial level for further proceedings on the issue that was deferred. For the reasons stated by the WCJ in the Report, which we adopt and incorporate, we will affirm the remainder of the WCJ's decision.

FACTS

Applicant filed an application for an injury to her left elbow on June 6, 2019. The claim was initially denied.

The parties selected Bruce E. Ellison as a panel qualified medical evaluator in the field of orthopedic surgery. In a report issued on August 16, 2020 after a July 17, 2020 examination, Dr. Ellison opined that applicant sustained an industrial injury to her left elbow, recommended a course of treatment and stated that applicant could return to work with restrictions. “Initial recommended work restrictions would typically include no lifting greater than 10 pounds, no pushing or pulling greater than 10 pounds, lifting or extreme use of the upper extremity.” (Exh. 5, August 16, 2020, Panel Qualified Medical Evaluation Report, Bruce E. Ellison, M.D., p. 13.) Dr. Ellison indicated that applicant’s symptoms were “increasing over time, and the typical intervention for these symptoms has not been pursued to completion.” (*Ibid.*) Dr. Ellison opined that applicant had not yet reached maximum medical improvement.

At trial, the parties framed the issues as follows:

1. Temporary total disability, with applicant claiming the period of June 30, 2019 to the present and continuing.
2. Attorney’s fees
3. EDD’s lien for the period of July 22, 20, through March 30, 2020. (April 6, 2021 Minutes of Hearing and Summary of Evidence, p. 2.)

On May 28, 2021, the WCJ issued the Findings of Fact and Award that is the subject of defendant’s Petition for Reconsideration. In the Opinion on Decision prepared in conjunction with the Findings of Fact and Award, the WCJ explained that she did not award temporary disability indemnity from November 8, 2019 through July 17, 2020 because “[n]o evidence was offered as to whether or not the applicant was treating on an industrial basis between the September 23, 2019 visit with Dr. Bell and the July 17, 2020 panel QME evaluation, nor was any evidence offered regarding her work status during this period. (May 28, 2021, Opinion on Decision, p. 8.)

ANALYSIS

Labor Code section 5313 requires the WCJ to “make and file findings upon all facts involved in the controversy.” The determination must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d. 627 [35 Cal.Comp.Cases 16].)

In this case, we are granting reconsideration to explicitly defer the issue of applicant's entitlement to temporary disability indemnity where the WCJ did not make a finding of fact regarding whether she was entitled to temporary disability. Although it could be argued that the WCJ impliedly determined that applicant was not entitled to temporary disability during that time period based on the discussion in the Opinion on Decision, the Opinion on Decision cannot substitute for an explicit Finding of Fact.

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 Board* (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 purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

Contemporaneous medical reporting is not required to support a finding of temporary disability. Especially in cases involving a denied claim where an applicant may not have received adequate medical treatment, contemporaneous evidence may not be available. A PQME or treating physician may find a retroactive period of temporary disability, and the WCJ may find that applicant is entitled to temporary disability indemnity if there is substantial medical evidence to support a retroactive award.

If the WCJ determines that there is insufficient evidence to determine whether or not applicant was temporarily disabled during the disputed time period, the WCJ should order that the medical record be further developed. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ["principle of allowing full

development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc.)

Therefore, , we will return this matter to the trial level for the WCJ to address the deferred period of temporary disability.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 28, 2021 Findings of Fact and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 28, 2021 Findings of Fact and Award is **AFFIRMED**, **EXCEPT** Finding of Fact No. 4 is **AMENDED** as follows:

4. All other issues, including whether applicant is entitled to total temporary disability from November 7, 2019 through July 17, 2020, are deferred with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS B.OARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2021

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

**RITA FORREST
DELFINO GREEN & GREEN
LAUGHLIN, FALBO, LEVY & MORESI**

MWH/ara

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