

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

AUGUSTO GARCIA, *Applicant*

vs.

**SIERRA TRAFFIC SERVICE;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9693769
Oxnard District Office**

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.¹ This is our decision after reconsideration.

Defendant State Compensation Insurance Fund and lien claimant Spine and Ortho Center seek reconsideration of the March 3, 2020 Findings, Award and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on September 17, 2014 sustained an injury arising out of and occurring in the course of employment in the form of heat stroke, dehydration, exhaustion, and a sleep disorder and did not sustain injury to his head, back, left knee, left ankle, and neck. The WCJ also found applicant sustained temporary disability from March 15, 2015, through and including March 17, 2016. The WCJ also ordered defendant to reimburse the Employment Development Department (EDD) and ordered that the lien of Spine and Ortho Center be disallowed.

Defendant contends that the WCJ erred in finding that applicant was entitled to temporary disability benefits, arguing that there is no substantial medical evidence to support the finding. Defendant requested leave to file a supplemental petition after reviewing the WCJ's Report. We accept the supplemental petition and we have considered it in reaching our decision.

Lien claimant contends that the WCJ erred in finding that applicant did not sustain an orthopedic injury, arguing that the issue was not raised at trial and that the WCJ should not have

¹ Commissioner Lowe has retired and is no longer available as a panelist. Another panelist has been assigned in her place.

relied on a report by a specialist in internal medicine to find that applicant did not sustain an orthopedic injury.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration in response to each petition. For the reasons stated in the Report prepared on March 24, 2020, in response to lien claimant's petition, which we adopt and incorporate by reference, we will affirm the WCJ's finding that applicant did not sustain an orthopedic industrial injury and his order that the lien of Spine and Ortho Center be disallowed. For the reasons discussed below, we will amend the WCJ's findings to find that applicant is not entitled to temporary disability and rescind the award of temporary disability indemnity.

As an initial matter, the petition for reconsideration is timely. To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).) Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify, or set aside the findings, order, decision, or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020, in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020, stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.³ Therefore, the petition for reconsideration is deemed filed on April 13, 2020, and the opinion granting the petition for reconsideration issued within the 60-day period.

As mentioned above, applicant did not sustain an orthopedic injury but did sustain an injury in the form of heat stroke, dehydration, and exhaustion. The WCJ's award of temporary disability was based on the medical reporting of secondary treating physician Dr. Lipper. The WCJ interpreted Dr. Lipper's reporting as finding the applicant temporarily disabled based on an aggravation of an industrial injury. (Report, p. 3; Exhibit 4, October 13, 2015, Arthur Lipper, M.D., Medical Report, p. 2.) However, Dr. Lipper reported that applicant was placed on temporary disability by his primary treating physician Dr. Moelleken. (Exh. 4 at 3.) Dr. Moelleken treated applicant for orthopedic injuries that the WCJ found to be non-industrial. Furthermore, Dr. Lipper did not address the issue of temporary disability in any detail. As a secondary treating physician, he was not required to do so.

It is well established that all decisions of 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].) For the WCJ to award EDD reimbursement for a period of temporary disability, there must be substantial medical evidence that applicant was temporarily disabled as a result of an industrial injury. In this case, the reporting of Dr. Lipper is not sufficient to establish that applicant was temporarily disabled as a result of the industrial injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 3, 2020, Findings and Award and Order is **AFFIRMED, EXCEPT** Findings of Fact 3 and 4 and the Award and Order are **RESCINDED**, and the following is **SUBSTITUTED** in their place:

FINDINGS OF FACT

3. Applicant was not temporarily disabled as the result of an industrial injury from March 15, 2015, through and including March 17, 2016.

4. The Employment Development Department is not entitled to reimbursement.

ORDER

IT IS HEREBY ORDERED THAT the liens of Dr. Haronian, California Interpreters, Spine and Ortho Center, and the Employment Development Department are disallowed.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 26, 2022

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

**AUGUSTO GARCIA
MANUEL MARTINEZ
STATE COMPENSATION INSURANCE FUND
EDWIN HARONIAN, M.D.
CA INTERPRETERS
SPINE AND ORTHO CENTER
BILLING DYNAMICS
EMPLOYMENT DEVELOPMENT DEPARTMENT**

MWH/mc

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