

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

NOE ANTONIO MORALES, *Applicant*

vs.

**FARMSHOP, LLC, and EMPLOYERS COMPENSATION INSURANCE COMPANY,
*Defendants***

**Adjudication Number: ADJ10199475
Los Angeles District Office**

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

Applicant seeks reconsideration of the Findings of Fact, Award, and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 15, 2022, wherein the WCJ found in pertinent part that applicant's injury did not cause any periods of temporary total disability, that applicant's condition became permanent and stationary on August 17, 2016, and that the Employment Development Department (EDD) is to be reimbursed at the rate of \$290.00 per week for the period from August 17, 2016, [sic] to December 13, 2016.

Applicant contends that he is "entitled to temporary disability through the date of Dr. Brouman's final report." [December 17, 2018] (Petition, p. 1), and that the EDD should not be reimbursed from the permanent disability award.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be dismissed or denied. We received an Answer from defendant.

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&O except that we will amend the F&O to defer the issue of applicant's entitlement to temporary disability indemnity benefits during the period that he was temporarily partially disabled, (Finding of Fact 3); and to defer the issue of reimbursement to the

EDD for benefits paid to applicant (Finding of Fact 8); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his cervical spine, left shoulder/right shoulder, bilateral wrists, thoracic spine, lumbar spine, and knees; to his psyche, and internal system; and in the form of an orthodontic dental injury while employed by defendant as a baker during the period from June 22, 2014, through November 18, 2015. Applicant's last day of work for defendant was December 14, 2015, and he received Unemployment Compensation Disability Benefits (EDD benefits) from December 22, 2015, through December 13, 2016.

Sylvia Dela Llana, M.D., treated applicant during the period from December 3, 2015, through May 26, 2016, and Hitendra Shah, M.D., treated applicant from June 28, 2016, to September 15, 2016. (See Court Exh. Z, Dr. Brouman, December 17, 2018, pp. 5 – 13, review of medical records.)

On August 17, 2016, orthopedic agreed medical examiner (AME) Phillip J. Kanter, M.D., evaluated applicant. (App. Exh. 2, Phillip J. Kanter, M.D., August 17, 2016.) Dr. Kanter diagnosed applicant as having cervical radiculitis syndrome, right and left shoulder sprains, right wrist/hand sprain/status post-surgery for nonindustrial lacerations, thoracic spine syndrome, and lumbosacral sciatic syndrome, and he concluded that applicant's condition had reached maximum medical improvement (MMI) status as of the date of the evaluation (August 17, 2016). (App. Exh. 2, pp. 22 – 23.) After reviewing additional medical records, Dr. Kanter stated that his previously stated opinions were unchanged. (App. Exh. 1, Phillip J. Kanter, M.D., January 1, 2017.) The doctor subsequently retired and was no longer available.

Orthopedic AME Steven N. Brouman, M.D., evaluated applicant on November 19, 2018. Dr. Brouman examined applicant and took a history. He diagnosed cervical, thoracic, and lumbar spine strain, right shoulder subacromial impingement syndrome, and stated that applicant was status post right wrist tendon repair – non-industrial. (Court Exh. Y, Dr. Brouman, November 19, 2018, p. 20.) Dr. Brouman stated that he needed to have various MRIs and other diagnostics done and that he was not provided medical records to review. (Court Exh. Y, pp. 19 – 20.)

After reviewing the medical record and the diagnostics he requested, Dr. Brouman concluded that applicant's orthopedic injury caused 14% whole person impairment (WPI), that

there were no periods of temporary total disability, and that applicant's condition had reached maximum medical improvement/was permanent and stationary (MMI/P&S). (Court Exh. Z, Dr. Brouman, December 17, 2018, p. 15.) Dr. Brouman's deposition was taken on June 17, 2019, and he made no changes to the opinions previously stated in his reports.

The parties proceeded to trial on January 4, 2021. The issues identified by the parties included parts of body injured, temporary disability with applicant claiming the period of November 18, 2015, through January 17, 2017, permanent and stationary date with applicant claiming January 17, 2017, and defendant claiming December 17, 2018, permanent disability/apportionment, and the EDD lien for benefits paid from December 22, 2015, through December 13, 2016. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 4, 2021, pp. 2 – 3.) The trial was continued and the WCJ's summary of applicant's testimony included:

He is currently working as a driver, but not with Lyft. He did work at Lyft after Farmshop.
(MOH/SOE, March 4, 2021, pp. 2 – 3.)

The matter was submitted for decision and on May 17, 2021 the WCJ issued an Order Vacating Submission to Develop The Record regarding the issue of applicant's earnings. At the November 16, 2021 trial the matter was again submitted for decision.

DISCUSSION

Any person aggrieved by a final order may petition the Appeals Board for reconsideration. (Lab. Code, § 5900(a).) The petition must set forth the grounds on which the final order was unjust or unlawful and must be verified. (Lab. Code, § 5902.)

Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition.
(Cal. Code Regs., tit. 8, § 10945(a).)

We admonish applicant's attorney for filing a cursory, skeletal petition for reconsideration, in violation of Appeals Board Rule 10945. Subdivision (b) of Rule 10945 provides, in relevant part: “[e]ach petition for reconsideration ... *shall support its evidentiary statements by specific references to the record.*” (Cal. Code Regs., tit. 8, § 10945(b) (emphasis added).) The requirements of rule 10945 regarding specific references to the record are consistent with case law

regarding proper citation to the record in appellate proceedings. (See e.g. *Flores v. Cal. Dept. of Corrections and Rehab.* (2014) 224 Cal.App.4th 199, 204 (“an appellant must do more than assert error and leave it to the appellate court to search the record ... to test his claim”); *City of Santa Maria v. Adam* (2012) 211 Cal. App.4th 266, 287 (“[r]ather than scour the record unguided, we may decide that the appellant has waived a point urged on appeal when it is not supported by accurate citations to the record”).) As noted by the WCJ, the Petition fails to state the grounds for which reconsideration is sought, it does not cite specifically to the trial record, nor does it properly cite any legal authority. (See Report, pp. 2 – 3.)

As to the merits of the argument that applicant is entitled to temporary disability indemnity through the date of Dr. Brouman’s December 17, 2018 report, we first note that Dr. Brouman stated:

In order to determine the exact nature and extent of his disability I need to obtain MRI scans of the cervical, thoracic and lumbar spine, bilateral shoulders and right wrist, ultrasound evaluation of the bilateral shoulders and right wrist and electrodiagnostic testing of the bilateral upper and lower extremities.
(Court Exh. Y, p. 20.)

Dr. Brouman’s need for diagnostics to “determine the exact nature and extent” of applicant’s disability does not render applicant temporarily totally disabled pending the diagnostics. We also note that in his subsequent report Dr. Brouman stated that there were no periods of temporary total disability. (Court Exh. Z, Dr. Brouman, December 17, 2018, p. 15.)

However, the Review of Medical Records portion of Dr. Brouman’s report includes references to several treating physician reports that indicate applicant had been released to modified duty. In her December 3, 2015 initial report, Sylvia Dela Llana, M.D., stated that applicant’s work status was, “Modified work duty: No prolonged standing, walking, bending, twisting, and kneeling; maximum lifting, carrying, pushing or pulling not more than 25 pounds.” (Court Exh. Z p. 5, review of medical record.)¹ Also, the reports of Hitendra Shah, M.D., from June 28, 2016, through September 15, 2016, state, “Work Status: Modified work duty.” (Court Exh. Z pp. 11 - 13, review of medical record.)

The California Supreme Court has held:

¹ Each of Dr. Llana’s subsequent reports through May 26, 2016, state that applicant’s work status was “modified duty” but Dr. Brouman noted that the remainder of each report was illegible and the work restrictions are not identified. (Court Exh. Z pp. 6 - 11, review of medical record.)

Under the ‘odd lot’ doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages. ... This doctrine places the burden on the employer 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....

(General Foundry Service v. Workers’ Comp. Appeals Board (Jackson) (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases375], citations omitted.)

At his February 5, 2016 deposition, applicant testified that he had been released to return to work but that he could not lift heavy things, he said the employer “didn’t take me back” and he said he did not want to return to work because “they treated me very bad.” (App. Exh. 2, Dr. Kanter, August 17, 2016, p. 14, review of applicant’s February 5, 2016 deposition.)

There is no evidence in the trial record that applicant was working after December 3, 2015, or that there was a job available within applicant's work restrictions. However, at the trial applicant testified that at that time he was working as a driver but not for Lyft. He then stated that he did work for Lyft after working for defendant. The record is not clear as to the nature and extent of applicant’s work restrictions, whether defendant made work available that would accommodate the work restrictions, or if applicant would have accepted the modified work if it was available. Absent substantial evidence addressing those issues we cannot make a determination as to applicant’s entitlement to temporary disability indemnity benefits during the period that he was temporarily partially disabled.

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; *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].). Under the circumstances of this matter, it is appropriate that the issue of applicant’s entitlement to temporary disability indemnity benefits during the period that he was temporarily partially disabled, be deferred to allow further development of the record. Resolution of this issue will directly impact the reimbursement of benefits paid by the EDD, so it is appropriate to also defer the issues related to the EDD lien.

Accordingly, we grant reconsideration, and affirm the F&O except that we amend the F&O to defer the issue of applicant’s entitlement to temporary disability indemnity benefits during the

period that he was temporarily partially disabled; and to defer the issue of reimbursement to the EDD for benefits paid to applicant (Finding of Fact 8); and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Award, and Orders issued by the WCJ on February 15, 2022, is **GRANTED**.

IT IS FURTHER ORDERED, that the February 15, 2022 Findings of Fact, Award and Orders is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. Applicant's injury did not cause any periods of temporary total disability; the issue of applicant's entitlement to temporary disability indemnity benefits during the period that he was temporarily partially disabled is deferred.

* * *

8. The Employment Development Department (EDD) has paid applicant Unemployment Compensation Disability Benefits during the period from December 22, 2015, through December 13, 2016, at the rate of \$351.00 per week; all issues regarding the EDD's reimbursement for benefits paid to applicant are 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 21, 2022

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

**NOE MORALES
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TLH/pc

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