**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**DANIEL STRAMBI,** ***Applicant***

**vs.**

**CITY OF FOSTER CITY,**
**permissibly self-insured, adjusted by THE CITIES GROUP,**
***Defendants***

**Adjudication Number: ADJ12075922**
**San Francisco District Office**

**OPINION AND ORDER**
**DENYING PETITION FOR**
**RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report which we adopt and incorporate, we will deny reconsideration.

We note that applicant's Answer contained a request for an award of sanctions against defendant. Labor Code section 5813 authorizes sanctions for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a).) Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the WCAB proceedings, or filing a verified document with the WCAB that contains substantially misleading statements of fact for which a reasonable excuse is not offered. (Cal. Code Regs., tit. 8. § 10421(b).) Based on our review of the record, while some of defendant's arguments appear to be meritless, we decline to award sanctions pursuant to section 5813 related to defendant's filing of this Petition. We do not address the issue here of whether defendant's conduct may give raise to an award of penalties pursuant to Labor Code section 5814.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**September 8, 2023**

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

**DANIEL STRAMBI**
**DURARD MCKENNA**
**LITTLER MENDELSON**
**CA ASSOCIATION OF PROFESSIONAL FIREFIGHTERS**

**LN/pm**

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

**REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

Defendant seeks reconsideration of my June 12, 2023, Supplemental Findings of Fact, Orders, and Award (hereinafter "the F&A"), relating to a disputed period of total temporary disability (TTD) indemnity and associated attorney fees and lien claim. Defendant asserts that, (1) in issuing the F&A, I acted without or in excess of the Appeals Board's powers; (2) the evidence does not justify my findings of fact; and (3) those findings do not support the award.

The petition is verified and timely with respect to the F&A (however, as discussed below, its timeliness is questionable as to the second basis for reconsideration mentioned above). Applicant does not appear to have filed an answer to this petition, which is titled "Amended" even though there is no record of an original petition having been previously filed. Of note, however, the EAMS docket does include an answer to reconsideration filed by applicant on June 19, 2023, three weeks <u>before</u> the instant amended petition was signed and submitted. Thus, it is possible that an earlier petition for reconsideration was served on applicant but not filed.

## II
## FACTS

*1. <u>Procedural background</u>.*

Applicant was a firefighter with the defendant city when he injured his lower back, left knee, and left hip during the period ending April 21, 2018. The claim was found compensable in December 2020, following an earlier trial on injury AOE/COE.

More recently, at trial on September 13, 2022, applicant asserted an open-ended period of TTD starting March 11, 2019, with the first year allegedly owed in the form of Labor Code section 4850 [all further statutory references herein are to the Labor Code.] pay (defendant did not dispute his general eligibility for these benefits). Per the parties' stipulations, applicant received disability benefits from lien claimant California Association of Professional Firefighters ("CAPF") during a small portion of the relevant period: March 11 through March 28, 2019. At trial, he agreed that the lien claimant is entitled to a full recovery for these benefits, to be paid from his award, if any. The parties proposed dramatically different figures for applicant's pre-injury earnings: applicant alleged an average weekly wage (AWW) of$3,314.72 while defendant admitted only $2,068.79. Thus, the issues submitted to me for decision were (1) earnings; (2) TTD

indemnity and section 4850 pay for the period starting March 11, 2019; (3) attorney fees; and (4) CAPF's lien claim.

2. *Evidence at trial and 2022 F&O.*

As summarized on pages 2-7 of the December 14, 2022 Opinion on Decision (hereinafter "the 2022 Opinion"), the parties offered 11 exhibits and the testimony of two witnesses. All exhibits were unopposed and admitted (see September 13, 2022, Minutes of Hearing at pp. 4-5). The entirety of the medical evidence is contained in applicant's exhibits 13-18. More specifically, as discussed on pages 2-3 of the 2022 Opinion, there were two Qualified Medical Evaluation (QME) reports from two different chiropractors. Dr. William Fishkin examined applicant and reported on October 30, 2020 (exhibit 13), with a recommendation for left knee surgery and the following comment: "This patient was on TTD from the date of the injury through the date of 10/16/2019 and ongoing through today's date." The QME report in exhibit 14 comes from Dr. Marijan Pevec (having taken judicial notice of the DWC Medical Unit's online database, I have ascertained that Dr. Fishkin is no longer a QME, though there was no evidence offered by the parties regarding his availability or the circumstances of his replacement with respect to this case). Dr. Pevec's report is dated December 10, 2021. Of relevance to the TTD dispute, he wrote, "Based on my understanding of the physical demands of Daniel Strambi's normal job duties as he describes them, it is clear that he cannot and could not perform them sufficiently and safely from at least March 11, 2019 forward and until all medically necessary and reasonable treatments (including surgical intervention) are authorized and provided. [ ] He is off work (TTD) on an occupational injury basis for his physical injuries from at least 03/11/2019 to 12/27/2021."

Applicant's exhibits 15-18, discussed on pages 3-4 of the 2022 Opinion, document his intermittent treatment, primarily with Daniel Solomon, M.D., between March 2019 and January 2022. On March 11, 2019 (exhibit 16), Dr. Solomon recommended left knee surgery (it is unclear whether applicant ever actually underwent the procedure, though exhibit 18 shows that a request for surgery authorization was non-certified by defendant in January 2021). On May 17, 2022 (exhibit 17), Dr. Solomon opined that applicant's condition "would have required time off and/or work restrictions throughout the time period [between March 11, 2019, and January 31, 2022]." Applicant's exhibits 19-21, which are summarized on pages 4-5 of the 2022 Opinion, are relevant to the issue of earnings, which is not germane on reconsideration.

Applicant's trial testimony is summarized on pages 6-7 of the 2022 Opinion. He recalled left knee symptoms going back to April 2018. In September 2018, he took a personal leave for unrelated reasons, intending at the time to return to work as a firefighter. His leave benefits were exhausted in early 2019. Around the same time, he first sought treatment with Dr. Solomon, who told him that he could not perform his customary job duties. In early 2020, he and the employer

communicated about modified duty at the Fire Bureau, but the position was eliminated after the start of the pandemic. He took a disability retirement in December 2020 because the Fire Bureau job was not available. The sole defense witness' offer of proof (see pages 7-8 of the September 13, 2022, Minutes of Hearing and page 7 of the 2022 Opinion) was to the effect that the employer denied benefits for lack of "contemporaneous primary treating physician medical reporting," in that it never received a request for treatment or any treatment reports other than a request for surgery authorization (presumably the one giving rise to the 2021 Utilization Review decision in exhibit 18).

Having considered the evidence, I concluded that applicant met his burden of proof with respect to TTD starting March 11, 2019. As discussed on pages 8-10 of the 2022 Opinion, I found that there is unrebutted and sufficiently probative medical evidence of disability, including both contemporaneous treatment reporting and after-the-fact medical-legal evaluations, which demonstrates that applicant's admitted industrial left knee injury rendered him temporarily disabled as of March 2019. In reaching this conclusion, I specifically considered and rejected defendant's argument, supported mostly by innuendo in lieu of actual evidence, that applicant's temporary disability resulted not from the industrial injury, but from the personal issue that prompted him to take a leave of absence in 2018. On this basis, my F&O included findings that applicant's work injury caused TTD starting March 11, 2019 (Finding of Fact No. 3), for which he is entitled to section 4850 pay and indemnity in accordance with the law (Finding of Fact No. 4).

Unfortunately, after an exhaustive analysis of the evidence regarding earnings (see pages 4-5 and 10-11 of the 2022 Opinion), I was forced to order development of the record regarding issues 1, 3, and 4 (see "Procedural Background," *supra)* because the existing evidence did not allow me to make a finding as to AWW. This prevented me from being able to award indemnity or section 4850 pay, to award any attorney fees, or to consider the lien claimant's potential recovery. Consequently, within the F&O, I vacated submission with respect to those three issues while, at the same time, making Findings of Pact No. 3 and 4 discussed in the foregoing paragraph. None of the parties sought removal or reconsideration following issuance of the F&O.

*3.* <u>*Resubmission and 2023 F&A*</u>.

Perhaps not surprisingly given the state of the record at the initial trial, the parties struggled to come up with probative evidence of applicant's pre-injury earnings. On January 5, 2023, at a conference set pursuant to the F&O, the case was set for further trial proceedings, with the parties instructed to meet and confer regarding potential avenues for agreement regarding earnings, failing which they would produce such evidence as to allow me to make the necessary findings at the next trial setting. Day 2 of trial took place on May 9, 2023. On that day, the parties informed me that, while neither side had any new evidence to present,

they did reach agreement on a number of stipulations meant to, essentially, sidestep the issue holding up the issuance of an award.

Specifically (see May 9, 2023, Minutes of Hearing at page 2; see also signed stipulations at EAMS Document ID No. 76718590), all three parties agreed that, for purposes of TTD indemnity, applicant is entitled to the maximum statutory weekly rate. Applicant stipulated that he was only eligible for TTD benefits through October 31, 2020. He further agreed that lien claimant CAPP may be paid out of his award ofTTD indemnity, as opposed to any section 4850 pay. Applicant's attorney waived any fee on section 4850 benefits. With that, the parties also agreed to informally adjust the exact amount of section 4850 pay owed to applicant. These stipulations were entered into the trial record and the three undecided issues were re-submitted. On June 12, 2023, I issued the F&A giving rise to defendant's petition for reconsideration. Therein, I awarded applicant $54,357.18 in TTD indemnity, applying the agreed-upon maximum benefit rate to the previously found period of disability after carving out the first year for section 4850 pay. From that amount, I awarded the full $4,105.98 to the lien claimant and another $8,153.58 in attorney fees to applicant's counsel. Concurrently, I ordered applicant and defendant to meet and confer in good faith in order to adjust the exact amount owed in section 4850 pay during the period identified in the 2022 F&O. Defendant was also ordered to issue such payment forthwith upon the parties, reaching agreement.

*4. Contentions on reconsideration.*

On reconsideration, defendant contends that there was no substantial medical evidence to support a finding ofTTD because Dr. Pevec did not explain his reasoning and because Dr. Fishkin's findings "should not be admissible." Defendant also argues that I improperly relied on the treatment reports of Dr. Solomon because they were not served on the employer when issued, he was not an authorized primary treating physician (PTP), and he did not comply with reporting requirements.

## III
## DISCUSSION

*1. The petition is untimely as to the finding of TTD.*

As outlined above, even though I was not able to issue an award following the initial trial in 2022, I did affirmatively find that applicant is entitled to TTD indemnity and section 4850 pay for the period starting March 11, 2019, to be paid once the proper benefit rate was established.

Findings of Fact No. 3 and 4 were issued on December 14, 2022, and served on all parties the following day; they are supported by the analysis laid out in the 2022 Opinion and Finding No. 3 is expressly cited in the F&A as the basis for the award. If defendant was aggrieved by my finding of TTD, it should have sought reconsideration following the F&O because the subsequent proceedings giving rise to the 2023 F&A did not touch on the issue of applicant's right to benefits, only the rate.

2. *The finding of TTD* 1-1 *as supported by substantial evidence*.

Contrary to petitioner's contentions, the record contained sufficiently probative sources of information to find that applicant met his burden of proof as to TTD. First, the argument that Dr. Fishkin's QME report in exhibit 13 "should not be admissible" is misplaced because the report was previously offered into evidence and was admitted only after defendant waived objection on the record. A party may not raise evidentiary objections for the first time on reconsideration. See *McFeely v. Industrial Acci. Com.* (1923) 65 Cal. App. 45, 48.

Turning to the actual evidence at hand, I continue to stand by the analysis laid out on pages 8-9 of the 2022 Opinion, where I addressed the manner in which the entire record-QME reports, treatment records, and witness testimony-points to the existence of a period of industrial disability as alleged by applicant in this trial.

Based on my analysis of the entire record, I find that applicant has met his burden of proof with respect to TTD starting March 11, 2019. In its brief, defendant makes much of the fact that applicant went out for unrelated reasons in September 2018 and began seeking treatment for the knee after exhausting his leave. However, this timeline-and the connotation of ulterior motives it carries-does not outweigh the entirety of the medical evidence in the case, according to which applicant became incapable of performing his job in March 2019, specifically as a result of symptoms in the left knee. There is contemporaneous reporting from Dr. Solomon in exhibit 16, as well as reports from both QMEs in exhibits 13 and 14-all three opined that applicant's left knee symptoms were disabling absent surgical intervention.

Defendant's position is also undermined by applicant's credible and unrebutted testimony that, in fact, he developed knee symptoms as far back as April 2018 and not only started seeing a doctor, but used some sick leave as a result as well. Applicant was also credible when he testified that he intended to resume firefighting duties when he stopped working in September 2018. The fact that he was unable to obtain treatment on an industrial basis early on did deprive defendant of the opportunity to consider accommodating any temporary partial disability that may have existed after March 2019. However, the evidence actually shows that both QMEs specifically found applicant totally disabled, while the treating physician opined in early 2022 that he was "unable to sit and

concentrate effectively" (see exhibit 17). The February 2020 certification form from Dr. Solomon in exhibit 16 contains the earliest indication of actual work restnct10ns. It comports with applicant's credible testimony that defendant's efforts to accommodate him were thwarted by COVID. This does not relieve the employer of the obligation to pay TTD indemnity (see, e.g., *Escobar v. Wood Ranch BBQ & Grill, Inc.* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 218).

The fact is, applicant was told by Dr. Solomon that he could not do his job because of his left knee condition, the parties have stipulated that the left knee was injured at work, and defendant has not demonstrated that a suitable position was ever offered and available to him. This is a sufficient showing to entitle applicant to TTD indemnity, under the "odd lot" doctrine ...

(internal quotation from *Meyers v. Industrial Acci. Com.* (1940) 39 Cal. App. 2d 665 omitted).

Thus, the evidence shows that applicant began experiencing symptoms related to his left knee before going off work for reasons other than his injury. Once he commenced regular treatment for the knee, his non-industrial treating physician recommended surgery and told him to refrain from working as a firefighter. At the same time, defendant denied liability for his claim until injury AOE/COE was found at trial in 2020. Petitioner makes a specious argument when it questions the validity of Dr. Solomon's findings on the basis that he was not designated as applicant's PTP and did not comply with industrial reporting requirements. The reality is that applicant could not have designated anyone at the time of this treatment in 2019 (and the alleged treatment with Dr. Schubiner in 2018). Petitioner's assertions regarding the nature and weight of Dr. Solomon's findings (see page 7 of the petition for reconsideration) are without legal basis and are unsupported by any authority within the petition.

## RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on July 10, 2023, be denied.

DATED: July 25, 2023

**Eugene Gogerman**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE