

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

DAVID GOLDSTEIN, *Applicant*

vs.

**SAN JOAQUIN COUNTY, permissibly self-insured, administered by TRISTAR RISK
MANAGEMENT, *Defendants***

**Adjudication Number: ADJ11229378
Stockton District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on May 4, 2021, wherein the WCJ found in part that applicant was not entitled to temporary disability indemnity (TDI) benefits.

Applicant contends that based on the reports of Annu H. Navani, M.D., and the functional capacity evaluation (FCE) by Chris M. Cake, D.C., applicant was temporarily totally disabled for the period from September 3, 2018, through September 3, 2020.

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

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&O, except that we will amend the F&O to find that applicant was temporarily totally disabled for the period from September 4, 2018, through October 23, 2018 (Finding of Fact 3); and based thereon we will include an Award of TDI benefits.

BACKGROUND

Applicant claimed injury to his right shoulder, right wrist, and right hand, on February 28, 2018, while employed by defendant as a correctional officer. Applicant had previously claimed injury to his right knee and left shoulder while employed by defendant on April 5, 2012.

Starting June 11, 2018, Jerome A. Robson, M.D., was applicant's primary treating physician (PTP) for his right shoulder and right hand injury. (Def. Exh. D, Dr. Robson, June 11, 2018, pp. 1 – 4.) In his September 25, 2018 progress report (PR-2), the Impression [diagnosis] portion of the report included right shoulder pain, right wrist pain, and "Right knee internal structural damage, second workers' compensation concern." (Def. Exh. D, September 25, 2018, p. 4 [EAMS p. 10].) In the October 23, 2018 report (PR-4), Dr. Robson stated that based on "the upper extremities including the shoulders" applicant had reached permanent and stationary status and that he had 6% whole person impairment (WPI) caused by the February 28, 2018 injury. (Def. Exh. D, October 23, 2018, p. 5 [EAMS p. 16].) The doctor described applicant's "functional work capacities" and stated:

Based on this information, he could ... easily do his job as a San Joaquin County Sheriff based on his shoulder. As a matter-of-fact, the shoulder is not a major concern, his knee is his major concern and that is [a] different issue. We are not addressing that in this report.
(Def. Exh. D, p. 5 [EAMS p. 16].)

In his November 20, 2018 PR-2, Dr. Robson indicated that applicant's physical examination remained unchanged, that his right shoulder, wrist, and hand remained permanent and stationary and that his work restrictions included no running and no climbing, due to the right knee condition. (Def. Exh. D, November 20, 2018, p. 4 [EAMS p. 24].)

On April 17, 2019, applicant was seen at the Comprehensive Spine & Sports Center by pain management specialist Annu H. Navani, M.D. Applicant was subsequently seen at that facility by Desiree Callum, PA-C. (App. Exh. 2, Dr. Navani, February 19, 2020, deposition transcript, p. 14.) In her April 17, 2019 report Dr. Navani noted that, "The patient maintains a Permanent and Stationary status." (Def Exh. A, Dr. Navani, April 17, 2019, p. 2.) In the November 15, 2019 treatment report, nurse practitioner Callum stated: "The patient maintains a Permanent and Stationary status." (App. Exh. 1, November 15, 2019, p. 2 [EAMS p. 5].)

Dr. Navani's deposition was taken on February 19, 2020. Her testimony included:

Q. So you do agree that Mr. Goldstein has not been able to perform the job of a correctional officer since February 28, 2018, the date the injury?

A. That is, correct.

Q. Okay. What you're saying is he may have been able to do some form of modified work or light duty that did not involve lifting more than five pounds?

A. That is correct.

Q. Okay. Is it fair to say that if the employer could not offer Mr. Goldstein a job taken into consideration those work restrictions, he would be considered totally temporarily disabled; is that fair?

A. That is correct.

(App. Exh. 2, Dr. Navani, February 19, 2020, deposition transcript, p. 13.)

Applicant underwent a Functional Capacity Evaluation on November 7, 2019. (App. Exh. 3, Chris M. Cake, D.C., November 7, 2019.)

On March 18, 2020, orthopedic agreed medical examiner (AME) Stephen P. Abelow, M.D., evaluated applicant in regard to his April 5, 2012, June 6, 2016, February 28, 2018, and September 3, 2018 injury claims. (Def. Exh. B, Dr. Abelow, p. 3.)¹ Dr. Abelow examined applicant, took a history, and reviewed the medical record. The diagnoses included contusion, sprain, and strain of applicant's right shoulder and right hand. (Def. Exh. B, p. 22.) Dr. Abelow stated that, "The right shoulder and right hand condition were permanent and stationary by 10/23/18 at the time of Primary Treating Physician's Report from Jerome Robson, M.D." (Def. Exh. B, p. 23.) He concluded that 100% of applicant's right shoulder, right wrist and hand permanent disability was caused by the February 28, 2018 injury. (Def. Exh. B, p. 26.)

In his August 3, 2020 supplemental report, Dr. Abelow stated:

The right shoulder and right hand condition were reportedly permanent and stationary by 10/23/18 as per the report of Primary Treating Physician's report from Jerome Robson, M.D. The right shoulder and right hand condition were permanent and stationary on 3/18/20 at the time of my evaluation.

(Def. Exh. B, August 3, 2020, p. 2 [EAMS p. 60].)

Based upon the medical records presented to me, Mr. Goldstein could be considered totally temporarily disabled from 4/17/19 to 3/18/20 if light-duty work with no inmate contact could be accommodated by San Joaquin County.

(Def. Exh. B, August 3, 2020, p. 3 [EAMS p. 61].)

After reviewing additional medical records Dr. Abelow submitted a supplemental report wherein he stated:

Based upon Dr. Navani's opinion set forth in her 4/17/19 report that Mr. Goldstein "maintains a permanent and stationary status," I would agree, with reasonable medical probability, that Mr. Goldstein's condition was permanent and stationary as of 4/17/19

(Def. Exh. B, September 14, 2020, p. 2 [EAMS p. 65].)

¹It appears that Dr. Abelow previously examined applicant on December 2, 2016, December 28, 2017, and June 11, 2018, but those reports (and the supplemental reports based thereon) were not offered/admitted into evidence. (Def. Exh. B, Dr. Abelow, March 18, 2020, p. 3.)

On November 12, 2020, Dr. Abelow's deposition was taken. (Def. Exh. C, Dr. Abelow, November 12, 2020, deposition transcript.) The attorney's discourse and the doctor's testimony included the following:

THE WITNESS: Well, she [Dr. Navani] had reported that he [applicant] was permanent and stationary, and had given him restrictions. So at that point if the restrictions couldn't be accommodated, he would be permanent and stationary and permanently disabled. I'm not sure he would be continued temporarily disabled. Once you're permanent and stationary, you're permanent and stationary.

Q Okay. So if Dr. Robson found Mr. Goldstein permanent and stationary as of October 23rd, 2018, then that means he's no longer temporarily total disability; correct?

A Correct.

MR. FOGY: Again, same objection. I know you already answered, but that was not the PTP at the time. Dr. Navani continued to have him TD.

MS. WHITE: Actually, Dr. Robson was the PTP back on October - -

MR. FOGY: Not for this claim. Not for the claim where he was TD. You're confusing the doctor right now. Robson was seeing him for the knee, not for the shoulder. ... ¶ ... We are talking about two separate injuries: one to the knee, one to the shoulder. Robson was the treater for the knee. Dr. Navani was treater for the shoulder. Dr. Navani did not have him TD -- I mean, P&S for the shoulder until late in October -- I apologize, in April of 2019. ...

[THE WITNESS] A. But initial -- I wrote over here, Initial comprehensive primary treating physician evaluation by Jerome Robson, M.D. 6/11/18, for date of injury 2/28/18. Body parts included, quote, right hand and right shoulder. Gave an impression of right wrist pain, no evidence of internal structural damage reported regarding his shoulder. He examined his shoulder. And I see nothing here from that date, of the knee. ¶ Now, lots of time, and lots of injury and lots of everything, but 6/11/18, Dr. Robson said he had a right hand, and right shoulder problem, and then later on in October, he said he was permanent and stationary. ¶ So that's what the record shows to me. And anything else, I'm just sometimes a scientist going on what the record shows, not what people argue about. So that's what it showed. 6/11/18, he did - Robson's initial evaluation was for the right hand and right shoulder.

(Def. Exh. C, pp. 28 - 31 [EAMS pp. 6 - 9])

The parties proceeded to an Expedited Hearing on March 4, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 4, 2021.) The issues submitted for decision included

applicant's entitlement to TDI benefits for the period from September 3, 2018, through September 3, 2020. (MOH/SOE, p. 2.)

DISCUSSION

Temporary disability is defined as incapacity to work that is reasonably expected to be improved with medical treatment. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631] citing *W. M. Lyles Co. v. Workmen's Comp. App. Bd. (Butz)* (1969) 3 Cal.App.3d 132, 136 [34 Cal.Comp.Cases 652].) An injured worker's condition is deemed permanent and stationary (P&S) when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [16 Cal.Comp.Cases 264].)

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292]; *Bolanos v. Workers' Comp. Appeals Bd.* (2014 W/D) 79 Cal.Comp.Cases 1531.)

It appears that applicant's arguments are premised upon the contention that if the employer cannot accommodate work restrictions, then the injured worker is temporarily totally disabled. There are circumstances where applicant's contention is correct. (See e.g. *Huston v. Workers' Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].) However, when an injured worker's condition becomes P&S, i.e. is stable and unlikely to change with or without treatment, the injured worker is no longer temporarily totally disabled. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd., supra.*) The employer's ability to accommodate work restrictions is no longer a factor in the worker's temporary/permanent disability status after the condition caused by the work injury becomes P&S.

Applicant also argues that Dr. Navani's reports are proof that applicant was temporarily totally disabled. This is a misrepresentation of the evidence in that, as noted above, the only reports from Dr. Navani that address applicant's disability status state that, "The patient maintains a Permanent and Stationary status." (See Def. Exh. A and App. Exh. 1.) Applicant's counsel further misrepresents the evidence by arguing that Dr. Robson was not the PTP regarding applicant's right

shoulder, wrist, and hand injury. (See Def. Exh. C, pp. 28 - 31 [EAMS pp. 6 - 9], and Def. Exh. D.)²

As to the argument that the FCE is evidence that applicant was temporarily totally disabled, applicant does not explain how Chris Cake, D.C., could determine applicant's level of disability in the FCE if applicant's condition was not P&S.

Based on our review of the record, we agree with the WCJ that the work restrictions described by the reporting doctors appear to be permanent restrictions and the record contains no evidence that applicant was temporarily totally disabled after October 23, 2018.

Finally, as discussed above, applicant's right shoulder, right wrist/hand condition was P&S as of October 24, 2018. We note that the parties agreed that applicant was performing modified duty from February 28, 2018, through September 3, 2018, when defendant could no longer accommodate his restrictions.³ Since defendant could not accommodate applicant's work restrictions, applicant would be considered temporarily totally disabled until his condition became permanent and stationary. (*General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases375]; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417, 421 - 422 [24 Cal.Comp.Cases 144].) Based thereon, it is appropriate that applicant receive TDI benefits for the period from September 4, 2018, through October 23, 2018.

Accordingly, we grant reconsideration and we affirm the F&O, except that we amend the F&O to find that applicant was temporarily totally disabled for the period from September 4, 2018, through October 23, 2018 (Finding of Fact 3); and based thereon we will include an Award of benefits.

² WCAB Rule 10421(b) states that the violations of section 5813 include: (b)(5) Executing a declaration or verification to any petition, pleading, or other document filed with the [Appeals Board]: (A) that: ... (ii) contains statements of fact that are substantially misleading (iii) contains substantial misrepresentation of fact; ... and/or (vi) conceals or substantially conceals material facts" (Cal. Code Regs., tit. 8 § 10421 (b)(5).) Counsel is reminded that such misleading conduct may constitute bad faith tactics and may warrant the imposition of sanctions pursuant to Labor Code section 5813.

³See Petition p. 2, "Applicant was on modified duty from February 28, 2018 to September 3, 2018 when he went off modified work because the employer could no longer accommodate" and Answer p. 2 "On September 3, 2018, the Employer could no longer accommodate Applicant's modified duty."

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on May 4, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 4, 2021 Findings of Fact and Order, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. Based upon the parties' stipulations and the medical evidence submitted at trial, applicant was temporarily totally disabled for the period from September 4, 2018, through October 23, 2018.

AWARD

AWARD IS MADE in favor of **DAVID GOLDSTEIN** and against **SAN JOAQUIN COUNTY**, permissibly self-insured, administered by **TRISTAR RISK MANAGEMENT**, as follows:

(a) Temporary disability indemnity payments for the period from September 4, 2018, through October 23, 2018; the actual amount of the benefits to be paid is to be determined by the WCJ if the parties are unable to informally resolve the matter.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 22, 2021

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

**DAVID GOLDSTEIN
LAW OFFICE OF GEORGE FOGY
MULLEN & FILIPPI**

TLH/pc

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