

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

JIM CAMDEN, *Applicant*

vs.

DON'S AUTO BODY; STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ2298079 (STK 0187438)
Stockton District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact, Orders and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 1, 2020. By the F&O, the WCJ found that applicant is temporarily disabled from October 13, 2017 to the present and continuing. Temporary disability was awarded pursuant to that finding with an order for credit for temporary disability overpayment for February 3, 2011 to March 1, 2011, April 15, 2017 to June 23, 2017, and July 8, 2017 to July 21, 2017.

Defendant contends that the period of temporary disability awarded is not supported by the medical evidence since the agreed medical evaluator (AME) had declared applicant's condition to be permanent and stationary. Defendant also contends that it is entitled to credit for temporary disability overpayment for additional periods.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Reconsideration (Report) recommending that reconsideration be granted to amend the periods of credit for temporary disability overpayment, but otherwise recommended defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&O and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Applicant claims injury to the low back, dental, sexual dysfunction, bladder dysfunction, acid reflux and urological dysfunction on October 15, 2002 while employed as an auto body technician by Don's Auto Body.

The parties agreed to use Dr. Gilbert Lang as the orthopedic AME. Dr. Lang evaluated applicant on September 13, 2017. (Joint Exhibit No. 100, Medical report of AME Dr. Lang, October 3, 2017, p. 1.) In his October 3, 2017 report, Dr. Lang stated in relevant part:

TEMPORARY DISABILITY WITH REASONABLE MEDICAL PROBABILITY:

Mr. Camden has had a significant period of time since the left sacroiliac joint fusion surgery. Unless the CT scan shows nonunion or some basis for surgical intervention, and also depending on the lumbar MRI, I feel that realistically he could be found permanent and stationary at this time.

PERMANENT DISABILITY STATUS WITH REASONABLE MEDICAL PROBABILITY:

Mr. Camden is permanent and stationary at this time pending studies.

...

Unless there is some obvious need for surgical intervention on the MRI and CT scan that I ordered, I would consider Mr. Camden to be permanent and stationary. He does require multiple medications. He does need to continue to be followed by Dr. Fine. He should also have the opportunity to see Dr. Light after these new studies are obtained.

(*Id.* at pp. 26-27 and 29.)

On February 5, 2018, defendant sent to applicant a Notice Regarding Temporary Disability Benefits Payment Ending. (Joint Exhibit No. 109, Temporary Disability Benefits Payment Ending Notice, February 5, 2018.) The Notice stated in relevant part:

Your final payment of temporary disability was sent on November 10, 2017. Payments are ending because the Qualified Medical Evaluator, Dr. Lang, declared your medical condition permanent and stationary as of September 13, 2017.

Temporary disability benefits paid to you total \$214,591.43. This amount covers the following period(s) at the following rate(s) per week: 10/21/2002 - 11/11/2002 at a rate of \$480.00
02/11/2004-02/02/2011 at a rate of \$480 .00

06/13/2016-11/10/2017 at a rate of \$480.00

There has been an overpayment totaling \$6232.85 for the period(s): 2/3/11-3/1/11 at a rate of \$310.00

4/15/17-6/23/17 at a rate of \$10.00 ·

7/8/17-7/21/17 at a rate of \$480.00 duplicate period

9/14/17-11/10/17 at a rate of \$480 .00

We will assert credit for the overpayment against Permanent Disability.

(*Id.* at p. 1.)

In a supplemental report dated October 31, 2018, Dr. Lang stated:

I do not see that nerve conduction studies were obtained. There was a 5.4 cm mass associated with the left S1 exiting nerve root. They had recommended a surgical consultation which certainly would have been appropriate.

Before I would order any studies, I would want to know whether a neurosurgical consultation has been obtained regarding the S1 nerve root mass. This mass certainly may play a factor in regard to the sensory loss in the left lowest extremity. These findings were reported to Frank Fine, M.D., in Modesto. It may be helpful to receive follow-up notes from all individuals who were involved in Mr. Camden's case.

It appears that there is probably non-union of the sacroiliac joint attempted fusion. Certainly, the surgeon in this regard, Kenneth Light, M.D., should be made aware of that fact.

(Joint Exhibit No. 100, Medical report of AME Dr. Lang, October 31, 2018, p. 3.)

According to the parties, Dr. Lang passed away in 2019. (Defendant's Petition for Reconsideration, December 17, 2020, p. 7.)

Dr. Fredric Newton conducted a neurological evaluation of applicant.¹ In his December 19, 2019 report, Dr. Newton concluded:

The conditions arising out of the injury are permanent and stationary. I note the opinion of Dr. Lang that this plateau was reached as of October 2017. Based on

¹ Dr. Newton refers to himself as an AME in his reports, but defendant has objected to his reporting because he was purportedly not a qualified medical evaluator (QME) at the time of his evaluations. (Defendant's Petition for Reconsideration, December 17, 2020, p. 3.) Dr. Newton was initially engaged by defendant for the purpose of acting as a defense QME. (Defendant's Post-Trial Brief, October 2, 2020, pp. 2-3.)

all that transpired before and after that determination, it seems to be a reasonable one, and I agree that the patient reached maximal medical improvement.

(Applicant's Exhibit No. 1, Medical report of Dr. Fredric Newton, December 19, 2019, p. 101.)

The matter proceeded to trial on September 1, 2020. The issues at trial included in pertinent part: temporary disability with applicant claiming the period from October 13, 2017 to the present and continuing; and temporary disability overpayment for several periods including from "7/8/17 to 7/21/17" for duplicate payment and "9/14/17 to 11/10/17" for the "difference between the T.D. and P.D. rate." (Minutes of Hearing, September 1, 2020, p. 2.) Exhibits at trial included several PR-2 reports from applicant's primary treating physician (PTP) Dr. Fine, as well as other medical treatment records. (*Id.* at pp. 3-4.)

The WCJ issued the resulting F&O as outlined above.

DISCUSSION

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured employee 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].) 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;² *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. Industrial Acci. Com. (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].) A disability is permanent and stationary when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, §§ 9785(a)(8), 10152; *Austin, supra*, 16 Cal.App.4th at p. 235.)

Defendant contends that the AME Dr. Lang found applicant's condition to be permanent

² All further statutory references are to the Labor Code unless otherwise stated.

and stationary as of his September 13, 2017 evaluation. In his October 3, 2017, the AME Dr. Lang opined that applicant “is permanent and stationary at this time pending studies.” Further studies were conducted and provided to Dr. Lang, but in his supplemental report he inquired about whether a neurosurgical consultation before recommending additional studies.

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]; *Le Vesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) “The term ‘substantial evidence’ means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value.” (*Braewood Convalescent Hosp. v. Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis and citations omitted.)

To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board’s findings if it is based on surmise, speculation, conjecture or guess.” (*Hegglin v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Dr. Lang’s reporting was equivocal as to whether applicant’s condition was permanent and stationary at the time of his evaluation. The other medical reporting in evidence does not address whether applicant was considered temporarily disabled or permanent and stationary subsequent to Dr. Lang’s 2017 evaluation. Although Dr. Newton appeared to agree with Dr. Lang’s opinion regarding whether applicant’s condition was permanent and stationary, his reporting in evidence is unspecific as to when this status was reached.

The current record is consequently insufficient to determine whether applicant was temporarily disabled for the period in dispute, from October 13, 2017 to the present and continuing. The Appeals Board has the discretionary authority to develop the record when the medical record

is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; Lab. Code, §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The “Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee.” (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Unfortunately, the orthopedic AME Dr. Lang has since passed away and the record cannot be developed with him. The record may be developed with the other existing physicians in this matter. Alternatively, per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of a new AME should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

Therefore, we will rescind the F&O and return this matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Orders and Opinion on Decision issued by the WCJ on December 1, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (see separate dissenting opinion),

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2022

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

**JIM CAMDEN
KELLY DUARTE URSTOEGER & RUBLE
STATE COMPENSATION INSURANCE FUND**

AI/pc

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

DISSENTING OPINION OF COMMISSIONER SWEENEY

I respectfully dissent. I would affirm the WCJ's finding that applicant is entitled to temporary disability from October 13, 2017 to the present and continuing, and solely amend the F&O as recommended by the WCJ in his Report to reflect the correct credit for the temporary disability overpayment.

The AME Dr. Lang's October 3, 2017 report includes in its summary of records a June 13, 2016 operative report by Dr. Kenneth Light in which it was noted that applicant has "a pseudoarthrosis at L5-S1." (Joint Exhibit No. 100, Medical report of AME Dr. Lang, October 3, 2017, p. 12.) It was further noted by Dr. Lang that "Dr. Light felt it was possible that the sacroiliac joint did not fuse." (*Id.* at p. 14.) Dr. Lang ordered a CT scan of the left sacroiliac joint region and an MRI of the lumbar spine with and without contrast. (*Id.* at p. 25.) He opined in this report that: "Unless the CT scan shows nonunion or some basis for surgical intervention, and also depending on the lumbar MRI, I feel that realistically he could be found permanent and stationary at this time." (*Id.* at p. 26.)

In Dr. Lang's supplemental report, he summarized the findings from the CT scan and MRI studies of the lumbar spine. (Joint Exhibit No. 100, Medical report of AME Dr. Lang, October 31, 2018, p. 2.) The MRI of the lumbar spine with contrast showed a "5.4 cm mass with the left S1 existing nerve root" with notation that a "[s]urgical consultation is recommended." (*Id.*) Dr. Lang concluded that it "appears that there is probably non-union of the sacroiliac joint attempted fusion." (*Id.* at p. 3.) Dr. Lang wanted to know if a surgical consultation had been conducted before he would order any studies. (*Id.*)

The subsequent records from applicant's primary treating physician Dr. Fine show that applicant spent months attempting to obtain another surgical consultation with Dr. Light, but there was a delay due in part to Dr. Light not having the recent studies and then no longer responding. (Joint Exhibit No. 101. PR-2 Reports of Dr. Fine, multiple dates.) Applicant eventually saw Dr. Greg Helbig for a neurosurgery consult, but Dr. Helbig wanted applicant to obtain a second opinion. (*Id.*) There were then additional delays with obtaining a second opinion. (*Id.*)

"An employer is under a statutorily imposed duty to pay temporary disability compensation for the period during which an injured employee, while unable to work, *is undergoing medical diagnostic procedure and treatment for an industrial injury.*" (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 168 [48 Cal.Comp.Cases 566], citing

Lab. Code, § 4600 and *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 403 [33 Cal.Comp.Cases 647], emphasis added.) Based on Dr. Lang's reporting, applicant's condition was not permanent and stationary in 2017 since he was still pending diagnostic work-up to determine whether further surgery was necessary. There is substantial evidence in the current record to show that the second fusion failed and the further complication of the mass reflected in the 2018 lumbar spine MRI, which may necessitate additional surgery. Pursuant to *Bolton*, the employer remains liable for temporary disability to applicant during this period until his condition is considered to have truly reached maximum medical improvement.

Therefore, I dissent. I would amend the F&O to correct the periods of temporary disability overpayment as recommended by the WCJ, but otherwise affirm the WCJ's finding that applicant is entitled to temporary disability from October 13, 2017 to the present and continuing.



WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2022

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

**JIM CAMDEN
KELLY DUARTE URSTOEGER & RUBLE
STATE COMPENSATION INSURANCE FUND**

AI/pc

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