

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

CHARLES SHAFER, *Applicant*

vs.

**MARIN RESOURCE RECOVERY CENTER
and
ALASKA NATIONAL INSURANCE COMPANY, *Defendants***

Adjudication Numbers: ADJ13053362 ADJ13074726 ADJ13073507 ADJ13074711

Oakland District Office

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

Defendant seeks removal, or in the alternative, reconsideration of the Joint Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 2, 2023, wherein the WCJ found in pertinent part that in addition to temporary disability indemnity payments previously received, applicant is entitled to receive temporary disability indemnity benefits for the period starting February 21, 2022, and continuing, subject to 104 week limitation; and that applicant is not barred from receiving temporary disability indemnity benefits as a result of his failure to attend a Functional Capacity Evaluation scheduled by defendant.

Defendant makes various arguments that appear to be intended to support its contentions that the reports from neurology qualified medical examiner (QME) Jonathan S. Rutchik, M.D., are not substantial evidence on the issue of temporary disability, and that the medical record should be further developed.

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

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, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to his neck, shoulders, back, and knee while employed by defendant as a superintendent/supervisor on March 19, 2018 (ADJ13073507). Applicant also claimed injury to his neck on March 19, 2019 (ADJ13053362); to his right arm/elbow on April 15, 2019 (ADJ13074711); and to his lower extremity/knee-patella on May 2, 2019 (ADJ13074726).

QME Dr. Rutchik evaluated applicant on July 16, 2020. The doctor examined applicant and took a history “via face time,” (Joint Exh. 101, Jonathan S. Rutchik, M.D., July 16, 2020, p. 13) and he reviewed the medical record. The diagnoses included neck, middle, and low back pain; left shoulder and left wrist pain; right elbow pain; and bi-lateral knee pain. (Joint Exh. 101, p. 12.) As to applicant’s disability status, Dr. Rutchik stated, “I have examined the above referenced claimant and have determined that this patient is not yet permanent and stationary.” (Joint Exh. 101, p. 2.) He later stated that applicant was, “Likely MMI [maximum medical improvement] but further medical records from the original right elbow injury are important.” (Joint Exh. 101, p. 15.)

Having received correspondence from applicant’s counsel requesting that he address issues regarding whether applicant was temporarily totally disabled for periods before and/or after February of 2022, Dr. Rutchik issued a supplemental report dated November 7, 2022. In that report he noted, “I last saw this patient on January 27, 2022. A Supplemental Report was issued with a date of July 15, 2022.” (Joint Exh. 102, Jonathan S. Rutchik, M.D., November 7, 2022, p. 1.)¹ Dr. Rutchik’s response to the questions about applicant’s temporary disability status included:

As stated in my 7/15/2022, Supplemental Report, I stated the following:
I did opine in my 1/27/2022, report that Mr. Shafer was at MMI status with 100% of his impairment attributed to the industrial activities; however, given his continued pain and difficulties, I would concur that Mr. Shafer is TTD at this time. ¶ Additionally, as stated in my 1/27/2022 report, on the discussion of work restrictions, I stated the following: Appears to have limitations with repetitive

¹ Those reports are not in evidence, but Dr. Rutchik summarized them in his November 7, 2022 QME supplemental report. (See Joint Exh. 102, pp. 2 – 10.)

flexion and extension of the right elbow, gripping of the left hand, pushing pulling and carrying of normal and 25 pounds, and 110 more than occasional bending and stooping the bilateral knees. ¶ I continue to be of the opinion that Mr. Shafer is/was TTD and would concur with the opinion of his new treating physician, that Mr. Shafer was TTD from February 2022. ¶ Therefore, I would opine that Mr. Shafer was TTD since at least February of 2022. ¶ I do also continue to recommend that Mr. Schaefer undergo an FCE [functional capacity evaluation] to better assess/evaluate his level of physical capability. ¶ Once completed, a re-examination may be warranted for a full and accurate rating. Once so approved, my staff will assist with scheduling.
(Joint Exh. 102, p. 11.)

The parties proceeded to trial on March 6, 2023. They stipulated that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his left knee in each of the four injury claims. The issues submitted for decision included applicant's claim for temporary disability benefits beginning in February of 2022 through the present date and continuing; whether the reports from QME Dr. Rutchik are substantial evidence on the issue of temporary disability; whether the record needs to be further developed; and whether proceeding without further development of the record is a violation of defendant's due process rights. (Minutes of Hearing and Summary of Evidence (MOH/SOE) March 6, 2023, pp. 2 – 3.)

DISCUSSION

As a preliminary matter, defendant's Petition is timely. Defendant filed the Petition on June 15, 2023. However, the Petition did not come to the attention of the Appeals Board until November 3, 2023. Defendant's Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Here, through no fault of defendant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the Petition, which occurred on November 3, 2023. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felis)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

A petition for reconsideration may only be taken from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) As noted above, the F&A includes a Finding that applicant is entitled to receive temporary disability indemnity benefits starting February 21, 2022, and continuing; and benefits were awarded based thereon. Thus, the F&A is a final order and is subject to reconsideration rather than removal.

We first note that the Petition has approximately 25 pages of exhibits attached which is in violation of Appeals Board Rule 10945(c). (Cal. Code Regs., tit. 8, § 10945.) The exhibits will not be considered, and counsel is reminded that failure to comply with the Appeals Board Rules may be deemed sanctionable conduct. Further, a party must support its arguments or contentions by making specific reference to the evidence in the trial record. (Cal. Code Regs., tit. 8, § 10945(b).) Arguments not based on, or consistent with, the trial record are irrelevant.² Also, a trial brief and/or exhibits attached to a trial brief, but not offered or admitted into evidence, are not evidence upon which an argument and/or a decision may be based and will not be considered. Based on our review of the Petition in the context of the evidence in the trial record, it appears that the only issue to be addressed herein is whether the reports from Dr. Rutchik constitute substantial medical evidence.

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) To be substantial evidence a medical opinion must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

² See for example defendant’s argument that applicant is not entitled to temporary disability indemnity benefits because he failed to attend a Functional Capacity Evaluation. (Petition pp. 2 and 4.)

“A temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044]; *Chavira v. Workers’ Comp. Appeals Bd. (Johns-Manville Sales Corp.)* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Temporary disability ends when an applicant’s medical condition becomes permanent and stationary (or MMI). (*Huston v. Workers’ Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].)

Here, as quoted above, in his November 7, 2022 report, (referring to his July 15, 2022 report), Dr. Rutchik stated that in his January 27, 2022 report he had concluded that applicant’s condition had reached MMI status “with 100% of his impairment attributed to the industrial activities; however, given his continued pain and difficulties, I would concur that Mr. Shafer is TTD at this time. ... Therefore, I would opine that Mr. Shafer was TTD since at least February of 2022.” (Joint Exh. 102, p. 11.) Clearly, Dr. Rutchik stated his conclusion but did not set forth the reasoning or the basis for his opinion. It appears that his only explanation for changing his previously stated opinion that applicant had reached MMI status was applicant’s “continued pain and difficulties.” However, “[a] temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd.*; *Chavira v. Workers’ Comp. Appeals Bd. (Johns-Manville Sales Corp.)* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Temporary disability ends when the injured worker’s medical condition becomes permanent and stationary. (*Huston v. Workers’ Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].) The doctor’s statement that applicant had “continued pain and difficulties” implies that his condition had not changed since the January 27, 2022 evaluation. It’s also important to note the fact that an injured worker is receiving medical treatment is not in and of itself substantial evidence that the he or she is temporarily totally disabled. It is quite common for an injured worker to be awarded lifetime medical treatment after the injury condition became permanent and stationary. (See e.g. DWC-WCAB form 10214(a) - Stipulations with Request for Award.)

Absent an explanation of his analysis and reasoning as to his change in opinion regarding applicant’s MMI/P&S status, Dr. Rutchik’s report does not constitute substantial evidence. (*Escobedo v. Marshalls, supra.*) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted

for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) In this matter, the trial record does not contain substantial evidence as to the issue of applicant's disability status. Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Under the circumstances of this matter, it is appropriate for the parties to request a supplemental report from Dr. Rutchik addressing the issue of applicant's temporary disability status as discussed herein. It is important that the doctor be provided the most current medical record available, and it should be left to him to decide whether or not he needs to re-examine applicant.

Accordingly, we grant reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings, Award and Order issued by the WCJ on June 2, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 2, 2023 Joint Findings, Award and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

ANNE SCHMITZ, DEPUTY COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2023

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

**CHARLES SHAFER
LAW OFFICE OF CHRISTINA LOPEZ
MANNING/KASS (FORMER COUNSEL FOR DEFENDANT)
LAUGHLIN, FALBO, LEVY & MORESI (CURRENT COUNSEL FOR DEFENDANT)**

TLH/mc

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