

**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
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Order granting Petition for Reconsideration and Decision after Reconsideration (prior Opinion) issued by the Appeals Board on July 22, 2021, wherein we granted reconsideration and affirmed the May 4, 2021 Findings of Fact and Order (F&O), except that we amended the F&O to find that applicant was temporarily totally disabled for the period from September 4, 2018, through October 23, 2018, and we awarded benefits based thereon.

Defendant contends that the trial record contains no evidence that supports the award of temporary disability indemnity benefits for the period from September 4, 2018, through October 23, 2018.

We have considered the allegations in the Petition for Reconsideration (Petition). Based on our review of the record, for the reasons stated in our prior Opinion, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

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, 2012.¹

Starting June 11, 2018, Jerome A. Robson, M.D., was applicant's primary treating physician (PTP) for his right shoulder and right hand injury. In his initial evaluation report Dr. Robson stated:

I have no specific recommendations for the right shoulder and wrist. If it was the just the right shoulder and wrist, the patient will be ready for regular duty. Unfortunately, he also has a right knee complaint that keeps him at a modified-duty situation. I do not recommend any further medicines or referrals for this injury currently.

(Def. Exh. D, Dr. Robson, June 11, 2018, p. 4.)

In his next report the doctor stated:

Mr. Goldstein still has moderate pain in his right wrist and right shoulder. ... I will continue to watch his right wrist and right shoulder once we get the right knee taken care of. (Def. Exh. D, September 25, 2018, p. 2 [EAMS p. 8]) ... Mr. David Goldstein is in stable condition with his right shoulder and right wrist. They seem to be in reasonable state. I am not asking for therapy currently for them. I will keep an eye on him.

(Def. Exh. D, September 25, 2018, p. 4 [EAMS p. 10].)

In the October 23, 2018 Permanent and Stationary Report, Dr. Robson stated:

The patient has already had an MRI that showed tendonitis, but no structural internal damage and therefore since there is no further therapy required for him, he has reached permanent and stationary status.

(Def. Exh. D, October 23, 2018, p. 2 [EAMS p. 13].)

Later in the report Dr. Robson reiterated his opinion that applicant's upper extremities, including his shoulders were permanent and stationary, he then assigned work restrictions and identified the whole person impairment (WPI) caused by the right shoulder, right wrist, and right hand injury. (Def. Exh. D, October 23, 2018, pp. 5 – 6 [EAMS pp. 16 – 17].) In his subsequent reports Dr. Robson noted that the permanent and stationary report had been submitted on October 23, 2018. (See Def. Exh. D, November 20, 2018, p. 4 [EAMS p. 24] and December 18, 2018, p. 4 [EAMS p. 29].)

¹ The history of applicant's injury claim and medical treatment, relevant to the issues raised in applicant's May 28, 2021 Petition for Reconsideration, is summarized in our prior Opinion, pages 2 – 4. Additional facts, relevant to defendant's Petition are included herein.

Orthopedic AME Stephen P. Abelow's deposition was taken November 12, 2020. When asked about applicant's temporary disability/permanent and stationary status, he testified that:

Well, she [Dr. Navani] had reported that he 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 totally disabled [sic]; correct?

A. Correct.

(Def. Exh. C, Dr. Abelow, November 12, 2020, deposition transcript, pp. 28 – 29 [EAMS pp. 6 – 7].)

DISCUSSION

Our review of the record indicates that there is no evidence that applicant was released to regular duty, or that his right shoulder/right wrist condition was permanent and stationary prior to the October 23, 2018 report from Dr. Robson. Also, as noted, Dr. Abelow testified that based on the report from Dr. Robson, applicant was no longer temporarily totally disabled after October 23, 2018. Defendant is correct that applicant's modified duty, which ended September 3, 2018, was due to his prior right knee injury, not his right shoulder/right wrist injury. However, applicant was not working for the period from September 4, 2018, through October 23, 2018, the date that Dr. Robson determined applicant's condition had become permanent and stationary, and the date that Dr. Abelow testified that applicant was no longer temporarily totally disabled.

In our prior Opinion we denied applicant's claim for temporary disability indemnity benefits from September 3, 2018, through September 3, 2020, and instead found that the benefits were owed for the period from September 4, 2018, through October 23, 2018. Having again reviewed the trial record we see no factual or legal basis for changing our prior Opinion.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Order granting Petition for Reconsideration and Decision after Reconsideration issued by the on July 22, 2021, is **DENIED**.

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

October 5, 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. o.o*