

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

MIGUEL AHUMADA, *Applicant*

vs.

**CSW CONTRACTORS and ZURICH NORTH AMERICA administered by CREATIVE
RISK SOLUTIONS, *Defendants***

**Adjudication Number: ADJ10210301
Bakersfield District Office**

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

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 6, 2021, wherein the WCJ found in pertinent part that applicant was temporarily totally disabled for the period from October 23, 2015, through November 17, 2016.

Defendant contends that the temporary disability indemnity award overlaps with the period that applicant received state unemployment benefits, and that the trial record does not contain substantial evidence that applicant was temporarily totally disabled for the period from October 22, 2015, through March 18, 2016.

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

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Defendant submitted a request, pursuant to Appeals Board Rule 10964 (Cal. Code of Regs, tit. 8, § 10964), to submit a supplemental pleading in response to the WCJ's Report. The request is granted and the supplemental pleading has been accepted and considered. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and affirm the F&A, except that we will amend the F&A to find that the EDD is entitled to reimbursement for the amount of Unemployment Insurance benefits it paid to applicant from November 7, 2015, through February 6, 2016, and that the award of temporary disability

indemnity will be reduced by the amount of those benefits (Finding of Fact 4); and we will amend the F&A to defer the issues of the actual amount of the Unemployment Insurance benefits for which the EDD will be reimbursed (Finding of Fact 5); and the amount of attorney fees to be awarded (Finding of Fact 9). Based thereon, we will amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to his low back and both legs while employed by defendant as a laborer on September 10, 2015. His last day of work for defendant was October 22, 2015. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 29, 2018, p. 5; Def. Exh. 5.) The Employment Development Department (EDD) paid applicant Unemployment Insurance (UI) benefits for the period from November 7, 2015, through February 6, 2016, and it paid State Disability Insurance (SDI) benefits from March 7, 2016, through October 3, 2016. (Def. Exh. 15; Lien Cl. EDD Exh. 2.)

On March 18, 2016, applicant was evaluated by orthopedic qualified medical examiner (QME) Brian D. Solberg, M.D¹. Dr. Solberg examined applicant, took a history, and reviewed the medical record. As to applicant's disability status, he stated:

By any measure, the applicant has not reached maximum medical improvement, and cannot be considered permanent and stationary at this point in time. Although significant time has elapsed since his injury, he would have been eligible for significant more treatment than he has received
(Joint Exh. 5, Dr. Solberg, March 18, 2016, p. 17.)

After reviewing applicant's May 6, 2016 lumbar spine MRI, Dr. Solberg stated that, "... the applicant has not reached maximum medical improvement, and therefore rating at this point in time would be premature." (Joint Exh. 4, Dr. Solberg, May 10, 2016, p. 2.) In his March 13, 2017 supplemental report, Dr. Solberg stated:

It is unclear whether the applicant has reached Maximum Medical Improvement and I will need to reevaluate and make that determination. At the time that I have evaluated him in March of 2016, he had not reached Maximum Medical Improvement.

¹It is important to note that Dr. Solberg did not examine applicant in the capacity of an agreed medical examiner (AME). The parties went through the QME panel process and Dr. Solberg examined applicant as a QME.

(Joint Exh. 3, Dr. Solberg, March 13, 2017, p. 2.)

On July 21, 2017, Dr. Solberg re-evaluated applicant. He re-examined applicant, took an interim history, and reviewed two sub-rosa surveillance videos. Dr. Solberg concluded:

At this point in time, the applicant has reached Maximum Medical Improvement and he can be considered Permanent and Stationary for the purposes of rating his impairment.

(Joint Exh. 2, Dr. Solberg, August 4, 2017, p. 11.)

The parties proceeded to trial on August 29, 2018. (MOH/SOE, August 29, 2018.) The WCJ's summary of applicant's testimony includes:

He believes his last day at work was 10/22/15. He has not worked since. He feels he is not able to work since. After 10/22/15, CSW did not offer him work. They did not offer him lighter duty work. (MOH/SOE, p. 5.) He was asked how long prior to CSW he had been a union member. He replied barely a year. He was asked if he had other jobs through the union and was then laid off from those jobs. He replied yes. He was asked if the layoff at CSW occurred in October 2015. He replied yes. Since the layoff, he has not looked for work. He was asked why not. He replied because of the pain in his legs and back. He was asked if he had gotten any work since for money. He replied no. (MOH/SOE, p. 6.) He was then asked if he was a landlord. He replied yes. He was asked if this was true for the last five years. He replied yes. He was asked if he did maintenance on the rentals. He replied that he does light things. (MOH/SOE, p. 6.) He was asked if after his layoff he had applied for unemployment. He replied yes. He was asked if he got benefits. He replied yes. He was asked for how long he got benefits, and he didn't know. He was asked if it was for at least six months and he thought it was less. (MOH/SOE, p. 6.)

The February 20, 2019 Findings, Orders, and Award was rescinded for further development of the record regarding applicant's disability status.

Dr. Solberg's deposition was taken on June 7, 2019. (Joint Exh. 6, Dr. Solberg, June 7, 2019, deposition transcript.) His testimony included the following:

A. ... Maximum medical improvement is the time when the applicant has improved as much as they're going to and no change is expected in their condition within the next six to 12 months, so for the foreseeable future.

Q. All right. Thank you. So with that definition in mind, Doctor, and again, what you said already with regard to the, the occupational or the industrial clinic visits, would it be, would it be reasonable to assume that he was MMI at the time you first saw him in March 2015?

A. Yes.

Q. Okay. And you feel you could state that with reasonable medical probability?

A. Yes.
(Joint Exh. 6, pp. 13 – 14.)

Q. All right. So with all those factors in mind, including the sub-rosa, the fact that he did -- was showing slight improvement, would that not indicate that the MMI date was later than the date you just gave?

A. Oh, I see where you're going with this. So, yes, it would indicate that it was after March 18, 2016, but most likely before August 4th, 2017.
(Joint Exh. 6, pp. 16 – 17.)

A. ... I will amend my opinion to say that I'd split the difference between the initial date and the re-eval. So if his initial date was March 2016 and his re-eval was August 2017, that's a 16—month difference. ¶ ... I can't tell with certainty which end it was, so I'll split the difference and say eight months after his initial eval he would have been MMI within reasonable medical probability.
(Joint Exh. 6, pp. 17 - 18.)

Q. Doctor, so given what you just stated, that puts us at about November 2016; is that correct, for his MMI date?

A. That sounds about right, yes.

Q. Okay. And that's, I think, about a year and two months post injury?

A. Yes.
(Joint Exh. 6, p. 18.)

On January 14, 2020, the parties again proceeded to trial. The March 4, 2020 Findings and Award was rescinded and the parties returned to trial on May 5, 2021. The issues submitted for decision included temporary disability, the permanent and stationary date, and the EDD lien. (MOH/SOE, May 5, 2021, p. 2.)

DISCUSSION

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].) It is well settled that the relevant and considered opinions of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and that the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen's Comp. Appeals. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525, 529].) When a physician's report is well-reasoned, is based on an adequate history and examination and sets forth the reasoning behind the

physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, QME Dr. Solberg examined applicant twice, took a history and an interim history, reviewed the medical records including various diagnostics, and reviewed sub-rosa videos. (See Joint Exhs. 1 – 5.) After the initial evaluation Dr. Solberg stated that, “By any measure, the applicant has not reached maximum medical improvement...” (Joint Exh. 5, p. 17) and after reviewing the May 6, 2016 lumbar spine MRI, Dr. Solberg stated that, “... the applicant has not reached maximum medical improvement.” (Joint Exh. 4, p. 2.) Dr. Solberg re-examined applicant and in his August 4, 2017 supplemental report, he determined that, “... the applicant has reached Maximum Medical Improvement and he can be considered Permanent and Stationary....” (Joint Exh. 2, p. 11.) During his deposition Dr. Solberg responded to a course of questions from both attorneys regarding applicant’s actual permanent and stationary date. (Joint Exh. 6, pp. 11 – 18.) He explained that applicant had reached maximum medical improvement/permanent and stationary status in November of 2016, which was approximately one year and two months after his date of injury, i.e. eight months after the March 18, 2016 evaluation. (Joint Exh. 6, p. 18.) Based on our review of the trial record, we agree with the WCJ that Dr. Solberg’s reports and deposition testimony constitute substantial evidence and the period of applicant’s temporary disability was from October 23, 2015, through November 17, 2016.

It has long been the law that if an injured worker receives UI benefits during a period of temporary total disability, the award of temporary disability indemnity will be reduced by the amount of UI benefits, and that the EDD will be reimbursed for those benefits. (*Calif. Comp. Ins. Co. v. Ind. Acc. Comm. (Moore)*, (1954) 128 Cal.App.2d 797 [19 Cal.Comp.Cases 249]; see *Anderson v. Cal. Motor Express* (1967) 32 Cal.Comp.Cases 199, 200, 1967 Cal.Wrk.Comp. LEXIS 261; see also Lab. Code, § 4654.) There appears to be no dispute that prior to receiving the SDI benefits, applicant was paid UI benefits for the period from November 7, 2015, through February 6, 2016. (Def. Exh. 15.) The WCJ found that applicant was temporarily totally disabled for the period from October 23, 2015, through November 17, 2016. Thus, the overlap of benefits was from November 7, 2015, through February 6, 2016. Upon return of this matter it is appropriate that the parties determine the amount of UI benefits applicant received and based thereon,

defendant will need to reimburse the EDD for the UI benefits paid. The temporary disability indemnity defendant owes applicant will be reduced by that amount; and the attorney fee can be calculated based on the amount of remaining temporary disability indemnity owed to applicant. If the parties are able to agree on these issue a Stipulation by applicant, defendant, and the EDD, submitted to the WCJ for approval would be an appropriate resolution. Otherwise, jurisdiction has been reserved and the parties may participate in further proceedings with the WCJ as necessary.

Regarding defendant's argument that if applicant was able to work, was looking for work, and receiving UI benefits, then he did not have the right to make a claim for wage loss, we note that an injured worker may qualify for UI benefits while being temporarily partially disabled. If an injured worker has temporary medical restrictions, is unable to perform his usual and customary job duties, and no modified work was offered or provided, the injured worker is temporarily partially disabled, and may be able to seek and obtain other work within those medical restrictions. Defendant cites no legal authority in support of its argument to the contrary.²

Accordingly, we grant reconsideration, and affirm the F&A except that we amend the F&A to find that the EDD is entitled to reimbursement for the amount of Unemployment Insurance benefits it paid to applicant from November 7, 2015, through February 6, 2016, and that the award of temporary disability indemnity will be reduced by the amount of those benefits (Finding of Fact 4); and we amend the F&A to defer the issues of the actual amount of the Unemployment Insurance benefits for which the EDD will be reimbursed (Finding of Fact 5); and the amount of attorney fees to be awarded (Finding of Fact 9). Based thereon, we amend the Award and return the matter to the WCJ for further proceedings consistent with this opinion.

² It is also important to note that the English translation of the "Request for Continuing Benefits" forms referred to by defendant in footnote 2 of the Petition was not placed into evidence and "simply plugging them into Google translate" does not render them evidence to be considered.(Petition, p. 10, footnote 2.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on July 6, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 6, 2021 Findings and Award, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The injury caused temporary disability from October 23, 2015, to November 17, 2016, a period of 392 days, which at \$1,103.29 per week, equals \$61,784.24; the award of temporary disability indemnity will be reduced by the amount of State Disability Insurance benefits and Unemployment Insurance benefits paid to applicant during the period of his temporary disability

5. The EDD is entitled to recover \$23,963.57 on their lien, plus interest per Unemployment Insurance Code §2629.1; the EDD is entitled to be reimbursed the amount of Unemployment Insurance benefits it paid to applicant from November 7, 2015, through February 6, 2016, the amount of the reimbursement is deferred, with jurisdiction reserved.

* * *

9. The issue of the reasonable value of the service of Applicant's attorney is deferred.

AWARD

* * *

- (a) The award of temporary disability indemnity is deferred pending further development of the record.
- (b) The amount of benefits for which the EDD will be reimbursed is deferred pending further development of the record.

* * *

- (e) The award of attorney fees is deferred pending further development of the record.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 24, 2021

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

**MIGUEL AHUMADA
LAW OFFICE OF JOSEPH PLUTA
LAW OFFICE OF BRADFORD & BARTHEL
EMPLOYMENT DEVELOPMENT DEPARTMENT**

TLH/pc

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