

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

**ELIZABETH HALEY, *Applicant***

**vs.**

**UNITED PARCEL SERVICE, and LIBERTY MUTUAL INSURANCE, *Defendants***

**Adjudication Number: ADJ11837708  
Stockton District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) 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, Award, and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 25, 2020, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her right wrist and that applicant was entitled to temporary disability indemnity benefits for the period from February 1, 2020, through July 1, 2020.

Defendant contends that applicant's wage loss from the Manteca Unified School District (Manteca) was not a result of her July 24, 2018 right wrist injury, and that if applicant is entitled to temporary disability indemnity, it would be for the period from March 20, 2020, through May 29, 2020.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending Finding of Fact 3 and the Award to state: "Applicant is entitled to temporary disability indemnity benefits for the period of 2/1/2020 to 7/1/2020, less benefits paid, less credit for wages received and less Attorney fees." We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to defer the issues of applicant's disability for the period from February 1, 2020, through March 19, 2020, and the proper indemnity rate for that period, (Finding

of Fact 3), and we will return the matter to the WCJ for further proceedings consistent with this opinion.

## **BACKGROUND**

Applicant claimed injury to her right wrist while working in data acquisition for defendant on July 24, 2018. Applicant underwent a right wrist arthroscopic surgery on October 29, 2019, performed by Gregory Horner, M.D. (Joint Exh. 100, Leonard Gordon, M. D., April 27, 2020, p. 3.) In his February 5, 2020 report, Dr. Horner indicated that applicant could return to modified work, with the restriction of “no lifting more than 10lbs.” (Joint Exh. 108, Dr. Horner, February 5, 2020, p. 1.) Applicant was seen by her primary treating physician, (PTP) Madelaine Aquino, M.D., on February 10, 2020. Dr. Aquino stated applicant was, “Off work until next appointment due to recent surgery.” (Joint Exh. 103, Dr. Aquino, February 10, 2020, p. 2.) In the March 12, 2020 report, Dr. Aquino released applicant to, “Modified work with specific restrictions (TTD if not accommodated): use of right hand as tolerated.” (Joint Exh. 104, Dr. Aquino, March 12, 2020, p. 2; see also Joint Exh. 105, Dr. Aquino, April 14, 2020, p. 2; Joint Exh. 106, Dr. Aquino, May 21, 2020, p. 2.)

On April 27, 2020, applicant was re-evaluated by orthopedic hand/wrist agreed medical examiner (AME) Leonard Gordon, M.D. (Joint Exh. 100, Dr. Gordon, April 27, 2020.)<sup>1</sup> Regarding applicant’s disability status, Dr. Gordon stated:

[S]he has improved to the point where I am hopeful that she will be able to get back to work. I do, however, feel that the clicking and symptoms should be investigated with an MRI and an x-ray, considering that they are persistent. There has not been an MRI done since the surgery, and she states there are new symptoms. ¶ If these studies are negative, then I do not feel that anything further needs to be done, and I am hopeful that she can then go back to work. I think this should be tried and does depend on her level of pain. ¶ ... It appears to me that the MRI and x-ray will be negative, and I would then recommend that she return to work, as stated, and she would become permanent and stationary one month after that. (Joint Exh. 100, p. 8.)

In her June 30, 2020 report, PTP Dr. Aquino said, “She [applicant] states that she wants to try to do regular work. She still follows up with Dr. Horner.” (Joint Exh. 107, Dr. Aquino, June

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<sup>1</sup> Dr. Gordon initially evaluated applicant on July 16, 2019. (Joint Exh. 100, p. 2.) The report based on that evaluation was not submitted as an exhibit.

30, 2020, p. 1.) In the Work Status section of the report, Dr. Aquino indicated applicant could return to regular work. (Joint Exh. 107, p. 2.)

AME Dr. Gordon reviewed additional medical records and submitted a supplemental report wherein he concluded:

The recent MRI does not show any significant problem other than some increased fluid in the radioulnar joint and a tear of the midportion of the cartilage, and with these findings, she should be able to return to work. ¶ I therefore feel that the patient should attempt a return to work to see whether this is possible, and her condition can be judged permanent and stationary one to three months after, assessing whether she is able to continue or not, considering that I saw her by telehealth.

(Joint Exh. 101, Dr. Gordon, July 13, 2020, pp. 2 - 3.)

The parties proceeded to trial on September 30, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 30, 2020). They stipulated that defendant paid applicant temporary disability indemnity benefits at the weekly rate of \$128.29 from October 20, 2018, to October 28, 2019; at the weekly rate of \$843.34 from October 29, 2019, to January 31, 2020; and at the weekly rate of \$181.83 from February 1, 2020, to July 1, 2020. (MOH/SOE, p. 2.)

The WCJ's summary of applicant's testimony included:

Her last day at work at Manteca was 10/28/2020. She had surgery 10/29/ 2020, of the right wrist; this was an injury at UPS in July 2019. ... Manteca Unified had no modified duty. ... No offer of modified duty up until July 1st. The district required lifting 50 pounds, that was Manteca Unified's job requirement. ¶ ... She was not told that there will be no pay due to her restrictions. She [did not have] on-call status due to the restrictions, because Darla Sanborn (phonetic) said they were too vague. If applicant was on-call, she would have been working. ¶ On July 1, 2020, she did not return to work, there was no school in session. ¶ ...

Darla Sanborn indicated that if she's not on full duty, she gets no pay. The employer said that the applicant's restrictions were too vague. Applicant tried to get the restrictions clarified by her doctors, and the employer kept indicating they were too vague.

(MOH/SOE, pp. 4 - 5.)

The issue submitted for decision was whether applicant was entitled to temporary disability indemnity for the period from February 1, 2020, to July 1, 2020, at the weekly rate of \$843.34. (MOH/SOE, p. 2.)

## DISCUSSION

When an industrial injury causes an employee to be restricted from working, either totally or partially, the employee may be entitled to receive temporary disability indemnity. (Lab. Code §§ 4650, 4653, 4655, and 4656). The purpose of temporary disability indemnity is to provide interim wage replacement assistance to an injured worker during the period of time he or she is healing and incapable of working. The employer's obligation to pay temporary disability benefits is the result of the employee's inability to perform the tasks usually encountered in his or her employment and the wage loss resulting therefrom. (*Meeks Building Center v. Workers' Comp. Appeals Bd.* (2012) 207 Cal.App.4th 219 [77 Cal.Comp.Cases 615]; *Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254 [34 Cal.Comp.Cases 382]; *Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1963) 211 Cal.App.2d 821, [28 Cal.Comp.Cases 11].) A worker who is only partially disabled may receive temporary total disability payments if the partial disability results in a total loss of wages. (*Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) The burden is on the employer to show that work within the capabilities of the partially disabled employee was available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. (*Id.*, at p. 422.)

As noted above, on February 5, 2020, Dr. Horner indicated that applicant could return to modified work, with the restriction of “no lifting more than 10lbs.” (Joint Exh. 108, p. 1.) In her March 12, 2020 report, PTP Dr. Aquino released applicant to, “Modified work with specific restrictions (TTD if not accommodated): use of right hand as tolerated.” (Joint Exh. 104, p. 2.) AME Dr. Gordon, in his April 27, 2020 report stated that if the MRI and x-ray he was recommending were negative, then applicant should return to work, “...and she would become permanent and stationary one month after that.” (Joint Exh. 100, p. 8.) In her June 30, 2020 report, Dr. Aquino said applicant wanted to try to do regular work and Dr. Aquino released applicant to, “return to regular work.” (Joint Exh. 107, p. 2.) On July 13, 2020, after reviewing the MRI he had requested, Dr. Gordon said applicant should return to work and that applicant’s condition would be permanent and stationary one to three months after assessing whether she was able to continue working. (Joint Exh. 101, p. 3.)

At trial, applicant testified that administrator/supervisor Darla Sanborn repeatedly said applicant's restrictions were too vague, and that Manteca did not offer her modified work.

Applicant also testified that on July 1, 2020, she could not return to work because, "... there was no school in session." (MOH/SOE, pp. 4 - 5.)

Applicant's testimony, considered in the context of the medical record, is evidence that her work restrictions were the result of the July 24, 2018 right wrist injury and the October 29, 2019 right wrist arthroscopic surgery. Review of the record indicates that but for her wrist injury applicant would not have had any issues with Manteca regarding work restrictions or her on-call work status. There is no evidence in the record, other than applicant's testimony, regarding the issues of when and/or why she was not working for Manteca.<sup>2</sup> Based thereon, defendant did not meet its burden of proof that modified work, consistent with applicant's restrictions, was available and was offered to applicant. Thus, applicant is entitled to temporary disability indemnity benefits at the stipulated weekly rate of \$843.34.

Regarding the period to which applicant is entitled to temporary disability indemnity benefits; applicant was released to regular duty by Dr. Aquino as of July 1, 2020, and in his July 13, 2020 report, AME Dr. Gordon said applicant should return to work. The reports from Dr. Horner, Dr. Gordon, and Dr. Aquino indicate that applicant had not been working for the period from October 29, 2019, the date of the wrist surgery, through July 1, 2020, the date she was released to regular work by Dr. Aquino. However, applicant testified that she did not return to work until February 1, 2020. She then testified that she stopped bus driving from March 20, until May 29, 2020. (MOH/SOE, p. 4.)

The record contains substantial evidence that applicant was not working for Manteca as of March 20, 2020, because the work restrictions were "vague" and she was not offered modified work. As such, she is entitled to temporary disability indemnity benefits based on her loss of wages from both employers, for the period from March 20, 2020, through July 1, 2020. As discussed above, the record is not clear as to applicant's wage loss from February 1, 2020, through March 19, 2020. 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].) The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue

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<sup>2</sup> We note that at the trial applicant's exhibits 1 and 2 were admitted for "ID ONLY" and they were not ordered admitted into evidence by the F&O. Therefore, they are not evidence to be considered.

that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter it is appropriate that we defer the issues of applicant's disability for the period from February 1, 2020, through March 19, 2020, and the proper indemnity rate for that period, pending further development of the record.

Accordingly, we affirm the F&O except that we amend the F&O to defer the issues of applicant's disability for the period from February 1, 2020, through March 19, 2020, and the proper indemnity rate for that period, (Finding of Fact 3), and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Award, and Order of November 25, 2020, is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

3. Applicant is entitled to temporary disability indemnity for the period of March 20, 2020, to July 1, 2020, at the weekly rate of \$843.34; the issues of applicant's disability for the period from February 1, 2020, through March 19, 2020, and the proper indemnity rate for that period are deferred.

\* \* \*

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**APRIL 13, 2022**

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

**ELIZABETH HALEY  
RATTO LAW FIRM  
LAW OFFICES OF TIMOTHY HUBER**

***TLH/pc***

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