

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

GABRIEL QUINTERO, *Applicant*

vs.

**WASATCH PROPERTY MANAGEMENT, INC. and HARTFORD UNDERWRITERS
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12234008
Sacramento District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on April 4, 2022, wherein the WCJ found in pertinent part that the trial record does not contain substantial medical evidence that applicant was temporarily totally disabled for the period from July 16, 2019, through October 18, 2020, and that there was good cause for applicant's employment to be terminated.¹

Applicant contends that the testimony of defendant's witness Anna Gowdey was not credible, that defendant Wasatch Property Management, Inc., did not have good cause to terminate applicant's employment, and that applicant was temporarily totally disabled for the period from July 16, 2019, through October 18, 2020.

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

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 F&O, and return the matter to the WCJ for further proceedings consistent

¹ We note that the Minutes of Hearing and various documents submitted by the parties indicate that applicant's name is Gabriel Quintero Garcia. Counsel are reminded that it is their responsibility to accurately identify their clients. (*Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (Appeals Board en banc); Cal. Code Regs., tit. 8, § 10390.)

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, back, right shoulder, right wrist, right knee, and right ankle, while employed by defendant as a maintenance man on March 5, 2018. Applicant received medical treatment from various providers at the Northern California Spine and Rehabilitation Associates. (See Applicant's Exh. 5.) Dennis Michael Hembd, M.D., stated that applicant, "Has reached maximum medical improvement. ¶ Permanent stationary" on December 20, 2018. (App. Exh. 5, p. 4.)

On May 10, 2019, Physical Medicine & Rehabilitation qualified medical examiner (QME) Manijeh Ryan, M.D., evaluated applicant. (App. Exh. 2, Manijeh Ryan, M.D., May 10, 2019.) Dr. Ryan examined applicant, took a history and reviewed the medical record. Regarding applicant's disability status Dr. Ryan stated:

It is my opinion that the claimant is at a permanent and stationary/maximal medical improvement level with regard to cervical spine, right shoulder, right wrist, lumbar spine, right hip, right knee, right ankle as of 5/10/2019. (App. Exh. 2, p. 64.)

Dr. Ryan then assigned whole person impairment (WPI) as follows: cervical spine 32% WPI; right shoulder 7% WPI; elbows 0% WPI; wrists 3% WPI; lumbar spine 13% WPI; right hip 3% WPI; knees 3%); and right ankle 16% WPI. (See App. Exh. 2, pp. 65 – 78.) She also addressed apportionment as to the various injured body parts. (App. Exh. 2, p. 79.)

In his June 11, 2019 report, treating physician Dr. Hembd stated:

However current exacerbation of pain, with underlying findings consistent with radiculitis. Absence of Achilles reflex not previously noted, may indicate worsening/new nerve root involvement. ¶ rec surgical eval [recommended surgical evaluation] will be required prior to reaching MMI. (App. Exh. 5, Dr. Hembd, June 11, 2019, EAMS pp. 10 – 11.)

Defendant terminated applicant's employment as of July 15, 2019. (Joint Exh. AA, correspondence, July 15, 2019.) In the July 17, 2019 treatment report, Dr. Hembd stated, "No change in chronic neck and right shoulder/upper extremity pain and numbness Permanent +

stationary ... ¶ ... remains permanent/stationary.” (App. Exh. 5, Dr. Hembd, July 17, 2019, EAMS pp. 14 and 17.)

QME Dr. Ryan re-evaluated applicant on August 14, 2020. As to applicant’s permanent and stationary status, Dr. Ryan stated:

It is my opinion that the claimant is at a permanent and stationary/maximal medical improvement level with regard to cervical spine, lumbar spine, right shoulder, right wrist, right hip, right knee, right ankle. ¶ The requested diagnostic tests are needed prior to the Follow-Up Medical Legal Evaluation in order to determine the permanent and stationary status, impairment rating and apportionment.

(App. Exh. 3, Dr. Ryan, August 14, 2020, p. 55.)

In her October 28, 2020 supplemental report Dr. Ryan stated:

Please note that there is a typographical error and it should be corrected to the following as you correctly point out I have not rated him nor given an MMI date. I apologize for the typographical error. ¶ It is my opinion that the claimant is not at a permanent and stationary/maximal medical improvement level with regard to cervical spine, lumbar spine, right shoulder, right wrist, right hip, right knee, right ankle. ¶ The requested diagnostic tests are needed prior to the Follow-Up Medical Legal Evaluation in order to determine the permanent and stationary status, impairment rating and apportionment.

(App. Exh. 4, Dr. Ryan, October 28, 2020, p. 10.)

The October 29, 2020 treatment notes indicate applicant’s disability status was, “Temporary total disability from 10/22/20 through 11/30/20” and a subsequent report stated that the TTD period was extended through December 4, 2020. (App. Exh. 5, EAMS pp. 78 and 81.)

The parties proceeded to trial on September 13, 2021. The trial was continued and the November 22, 2021 trial was continued for further testimony. At the January 18, 2022 trial the matter was submitted for decision. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 18, 2022.) The issues submitted for decision included temporary disability and whether there was good cause for defendant to terminate applicant’s employment. (MOH/SOE, September 13, 2021, p. 3.)

DISCUSSION

It is well established that an award, order, or decision of the Appeals Board must be supported by substantial evidence in light of the entire record. (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].) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].)

Here, our review of the medical evidence clearly indicates that the doctors' reports are inconsistent as to the issue of applicant's disability status, and the doctors did not explain the basis for their varying opinions. For example, in her initial report QME Dr. Ryan stated that applicant had reached maximum medical improvement/permanent and stationary status, she assigned percentages of WPI for the various injured body parts, and addressed the issue of apportionment. (See App. Exh. 2, pp. 64 – 79.) After re-examining applicant, Dr. Ryan reiterated her opinion that applicant's condition was permanent and stationary (App. Exh. 3, p. 55) but in her subsequent report she said it was a "typographical error" and that applicant was "not at a permanent and stationary/maximal medical improvement level." (App. Exh. 4, p. 10.) Having discussed her opinions regarding impairment and apportionment, Dr. Ryan had clearly previously determined that applicant's condition was permanent and stationary and had reached maximum medical improvement. However, she did not explain the basis for changing her opinion as stated in her October 28, 2020 report. (App. Exh. 4, p. 10.) Also, the treating doctor reports do not explain why applicant's condition was permanent stationary as of December 20, 2018, but applicant was temporarily totally disabled from October 22, 2020, through December 4, 2020.

Due to the inconsistencies in the doctors' reports as discussed herein, we are unable to determine for what period or periods applicant was temporarily totally disabled as a result of the March 5, 2018 industrial injury.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or where there is insufficient evidence to determine an issue. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Thus, under these circumstances it is appropriate that this matter be returned to the trial level for further development of the record. The parties are reminded that, 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).)

Finally, it is important to note that the issue of whether applicant's employment was terminated for "good cause" does not arise until it is determined that there were periods of temporary disability after the date of the termination (July 15, 2019; see Joint Exh. AA). Although we are not making any determination as to the issue of the termination of applicant's employment, it must be noted that an injured employee who is terminated from his or her employment for good cause is not entitled to temporary disability benefits; however, the employer has the burden of proving that the injured worker was terminated for good cause. "Good cause" in this context relates to the employee's misconduct and the employer remains liable for temporary disability benefits after terminating an employee if it fails to establish good cause by showing employee misconduct. (See for example: *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 100 (Appeals Board panel decision); *Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 (writ den.) [applicant entitled to temporary disability benefits where there was evidence he had ongoing attendance and performance problems, but those problems were not the basis for his discharge]; *Reynoso v. Lusamerica Foods* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 134 (Appeals Board panel decision) [employer's at-will termination of probationary employee is not equivalent to termination for cause and did not bar the employee's entitlement to temporary disability benefits]; *Romero v. Sunbelt USA, Inc.* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 728 (Appeals Board panel decision) [applicant not entitled to temporary disability benefits where she was terminated for good cause due to excessive absenteeism and where, but for applicant's termination the employer would have offered modified work and accommodated applicant's work restrictions]; *Flores v. Wal-Mart Associates, Inc.* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 24 (Appeals Board panel decision) [applicant not entitled to temporary disability benefits based on the stipulation that applicant was "terminated for failure to comply with company policy"]; *Tolozza v. Dolan Foster Enterprises* (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 51 (Appeals Board panel decision) [applicant not entitled to temporary disability benefits for the period following her termination due to theft from the employer].)

Accordingly, we grant reconsideration, rescind F&O, 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 applicant's Petition for Reconsideration of the Findings and Order issued by the WCJ on April 4, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 4, 2022 Findings 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 17, 2022

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

**GABRIEL QUINTERO
THE COMPENSATION LAW CENTER
LAW OFFICE OF MELODY COX
LEWIS, BRISBOIS, BISGAARD & SMITH**

TLH/pc

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