

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

JOSE LUIS VERDUZCO, *Applicant*

vs.

**MENDOZA PAINTING AND PRESSURE WASHING, and BENCHMARK INSURANCE
COMPANY, administered by BENCHMARK ADMINISTRATORS INCORPORATED,
*Defendants***

**Adjudication Number: ADJ14370402
Santa Rosa District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 3, 2022 wherein the WCJ found in pertinent part that as a result of his May 26, 2020 industrial injury, applicant was temporarily totally disabled for the period from May 27, 2020, through September 8, 2021.

Applicant contends that the reports from orthopedic qualified medical examiner (QME) James D. Mays, M.D., are substantial evidence that applicant was temporarily totally disabled for the period from May 27, 2020, through September 8, 2021, and continuing.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

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 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 right knee, and right ankle, and right foot, while employed

by defendant as a journeyman painter on May 26, 2020. Payam Tabrizi, M.D. performed an open reduction and internal fixation (surgery) of applicant's right talus (ankle) fracture on May 27, 2020.

On September 8, 2021, QME Dr. Mays evaluated applicant. (App. Exh. 2, John D. Mays, M.D., September 8, 2021.) Dr. Mays examined applicant, took a history, and reviewed the medical record. The diagnoses included a sprain/strain of the right knee, sprain/strain of the right ankle, and open reduction, internal fixation of right talar fracture. (App. Exh. 2, p. 7.) Dr. Mays later stated that:

Mr. Verduzco has not reached maximal medical improvement. He continues to have pain, locking, giving way of his right knee. He continues to have pain with ambulation in his right ankle and foot.
(App. Exh. 2, p. 8.)

In response to correspondence from applicant's counsel, Dr. Mays stated:

This examiner believes that Mr. Verduzco is temporarily totally disabled beginning date of injury through the date of the Qualified Medical Evaluation September 8, 2021. ¶ There are pending examinations to be reviewed for determination of work status or vocational rehabilitation status.
(App. Exh. 1, Dr. Mays, November 11, 2021, p. 2.)

The parties proceeded to trial on February 7, 2022. They stipulated that defendant had paid applicant temporary disability indemnity benefits for the period from May 27, 2020, through June 12, 2021. The WCJ's summary of applicant's testimony includes:

He got treatment from Dr. Hollander for his right ankle. Dr. Hollander did not treat his right knee. ¶ ... Between June of 2021 until now, the applicant has not been provided any treatment for his right knee. The applicant is currently shopping for a new doctor for his right knee, possibly Dr. Degenhardt. ¶ ... He has not obtained treatment because he needs to find a doctor who will treat his knee. Right now, as far as the applicant knows, he has no upcoming medical treatment appointments for his injury.
(Minutes of Hearing and Summary of Evidence (MOH/SOE), February 7, 2022, pp. 3 – 5.)

The issue submitted for decision was additional periods of temporary total disability: applicant claimed he continued to be temporarily totally disabled for the period from June 13, 2021, to the present an continuing, defendant contended applicant's condition was permanent and stationary as of June 17, 2021, or in the alternative, as of September 8, 2021. (MOH/SOE, p. 2.)

DISCUSSION

An injured worker's condition is deemed permanent and stationary (P&S) when the level of impairment is stable and is unlikely to change with or without treatment for a reasonable period. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 1528 [71 Cal.Comp.Cases 139]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155 [16 Cal.Comp. Cases 264].) The fact that an injured worker may need on-going and/or future medical treatment is not in and of itself substantial evidence that the injured worker is temporarily totally disabled. It is quite common for an injured worker to be awarded lifetime medical treatment after the injury condition became P&S. (see e.g. DWC-WCAB form 10214(a) - Stipulations with Request for Award.)

It has long been the law that in order to constitute substantial evidence, a medical opinion 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. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 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, as noted above, in his initial report Dr. Mays said that applicant had not reached maximal medical improvement (P&S status). (App. Exh. 2, p. 8.) In the supplemental report, Dr. Mays said that applicant was temporarily totally disabled beginning on the date of injury (May 26, 2020) and continuing through September 8, 2021, the date of the evaluation. He then stated that, "There are pending examinations to be reviewed for determination of work status or vocational rehabilitation status." (App. Exh. 1, p. 2.) Dr. Mays' statement that applicant remained temporarily totally disabled "through the date" of his evaluation is not evidence that applicant's condition was P&S as of that date. He noted that there were pending examinations to be reviewed for determining applicant's work status but he provided no further discussion or analysis as to whether applicant's condition had reached maximum medical improvement/P&S status. Also, applicant testified that he was looking for a doctor who would treat his right knee. However, as we noted, the fact that an injured worker may need medical treatment is not in and of itself evidence that the injured worker is temporarily totally disabled. Thus, based on our review of the trial record, we are not able to determine whether applicant continued to be temporarily totally disabled for any period after September 8, 2021.

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) 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).) Upon return of this matter to the WCJ, we recommend that the parties provide Dr. Mays all additional medical records relevant to the issue of applicant's disability status and request that he submit a supplemental report to clarify his opinion as to that issue, as discussed herein.

Accordingly, we 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 applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on March 3, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 3, 2022 Findings and Award 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/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



I DISSENT,

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 4, 2022

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

**JOSE VERDUZCO
LAW OFFICE OF JOHN A. BLOOM
COLEMAN CHAVEZ & ASSOCIATES**

TLH/pc

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

DISSENTING OPINION OF COMMISSIONER CRAIG SNELLINGS

For the reasons discussed below it is my opinion that applicant did not meet his burden of proof regarding any additional periods of temporary total disability. Based thereon, I respectfully dissent.

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289].) As the WCJ stated in her Report:

[Applicant] failed to offer any medical reports to support a continuing award of temporary disability after the termination date of September 8, 2021. Instead, the treatment reports admitted into evidence all occurred within the period that the defendant already paid temporary disability.
(Report, p. 4.)

I agree with the WCJ that the record contains no evidence that would support an award of ongoing temporary disability indemnity benefits, and in turn that applicant did not meet his burden of proof.

For these reasons, I disagree with the majority and I dissent.



WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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TLH/pc

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