

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

ROSARIO RODRIGUEZ, *Applicant*

vs.

**SAN MATEO COUNTY TRANSIT DISTRICT, PERMISSIBLY SELF INSURED,
ADMINISTERED BY THE CITIES GROUP, *Defendants***

**Adjudication Number: ADJ11914002
San Francisco District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant San Mateo County Transit District, permissibly self-insured and administered by The Cities Group (defendant) seeks reconsideration of the October 5, 2021 Findings of Fact and Award (F&A). Therein, the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant, while employed as a bus operator on October 17, 2018, sustained industrial injury to the lumbar spine and that he was entitled to temporary disability indemnity benefits from October 25, 2018 to October 22, 2020, less reimbursement to the Employment Development Department (EDD) for overlapping periods and attorney fees.

Defendant contends that it requested supplemental reporting from the Agreed Medical Evaluator (AME) addressing, inter alia, issues of causation prior to the expedited hearing, and that trial in this matter was premature.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant claimed injury to the low back on October 17, 2018 while employed as a bus operator by defendant. She alleged that she was injured while “driving and twisting her back to check on her passengers.” (Ex. 9, report of Victoria Barber, M.D., dated May 22, 2020, p.1.) Defendant initially denied liability for the claim. (Answer to Application for Adjudication, dated March 21, 2019, p.2.)

On October 18, 2018, applicant sought medical treatment with Keith Wiley, M.D., who diagnosed an acute thoracic myofascial strain, and took applicant off work through October 25, 2018. (Ex. DD, Report of AME William Campbell, D.O., dated July 24, 2020, p.7.) On October 26, 2018, applicant was re-evaluated by Sonny Young, M.D., who noted no improvement in back and neck pain, and pending requests for diagnostic MRI testing. Dr. Young released applicant to return to work with modified duties, including no driving or operating heavy equipment. (*Ibid.*) On November 12, 2018, applicant consulted with Victoria Barber, M.D., who noted that radiographs were negative for fracture, but that MRI studies had not yet been authorized. Dr. Barber noted straight leg raise testing was positive on the right, and assessed lumbar pain with right lower extremity radiculopathy, rule out lumbar disc disease. (*Id.* at pp.7-8.)

On January 19, 2019, applicant underwent an MRI study of the lumbar spine, which demonstrated “sacral ala fracture, subacute, right side, lumbar spondylosis, lumbar neural foraminal stenosis, multiple levels, though most pronounced at L4/L5 and L5/S1 and right lower extremity radiculopathy.” (Ex. DD, Report of AME William Campbell, D.O., dated July 24, 2020, p.10.) Applicant continued to treat with Dr. Barber through 2019, who noted pain in applicant’s right leg and buttock region “consistent with sacral ala fracture.” (*Id.*, at p.9.)

On September 23, 2019, Qualified Medical Evaluator (QME) Timothy Lo, M.D. evaluated applicant. Dr. Lo noted that applicant had not been able to return to work since her injury of October 17, 2018, as well as a medical history including a prior workers’ compensation claim of 10-12 years earlier. (Ex. DD, Report of AME William Campbell, D.O., dated July 24, 2020, p.13.) Dr. Lo further noted that applicant was presently treating with Dr. Barber “on a self-cash-pay basis while her claim was denied,” and that “lumbar epidural injections were recommended but denied, and she was not able to afford lumbar epidural steroid injections on a self-procured basis.” (*Ibid.*) QME Dr. Lo indicated that applicant “seem[ed] to meet the criteria” for injury arising out of and in the course of injury (AOE/COE). (*Id.*, at p.14.)

On May 22, 2020, Dr. Barber continued to describe significant work restrictions which included lifting, pushing, and pulling limited to 15 pounds, and the ability to change position from standing to sitting at 30-minute intervals. (Ex. 9, report of Victoria Barber, M.D., dated May 22, 2020, p.3).

On July 24, 2020, AME William Campbell, D.O. evaluated applicant in orthopedics. After noting applicant's medical history and clinical examination findings, Dr. Campbell opined that "[i]t is my opinion, the patient's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the low back should be accepted as meeting AOE/COE criteria and of industrial origin relative to DOI 10/17/18." (Ex. DD, Report of AME William Campbell, D.O., dated July 24, 2020, p.17.)

On September 9, 2020, defendant issued a Notice of Temporary Disability Benefits (Delay), which indicated "[w]e are accepting liability for your injury claim to your lower back," but that no TTD benefits would be paid pending receipt of "EDD final lien and complete medical records form [sic] your treating physician Dr. Barber." (Ex. 1, letter from San Mateo County Transit District to applicant, dated September 9, 2020.)

Thereafter, applicant transferred her care to primary treating physician David Smolins, M.D. In a report of October 22, 2020, Dr. Smolins requested a repeat lumbar spine MRI, prescribed multiple treatment modalities including medication, physical therapy and weight loss, and described work restrictions including the ability to sit and stand as needed. (Ex. 4, report from David Smolins, M.D., dated October 22, 2020.) These work restrictions were reiterated through applicant's subsequent treatment with Dr. Smolins through February, 2021. (See Exs. 5 through 8, reporting of PTP David Smolins, M.D., various dates through February 4, 2021.)

AME Dr. Campbell reevaluated applicant on February 19, 2021, and determined applicant had reached a permanent and stationary status. (Ex. CC, report of AME William Campbell, D.O., dated February 19, 2021, p.25.) The AME reiterated his prior opinion that the "patient's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the low back should be accepted as meeting AOE/COE criteria and of industrial origin relative to DOI 10/17/18." (*Id.*, at p.26.) The AME described whole person impairment and apportionment, and indicated there was need for future medical care.

On March 15, 2021, defendant issued a Notice of Temporary Disability Benefits (Delay) letter, indicating that although liability for the claimed injury was accepted, no TTD benefits would

issue pending “receipt of additional medical records and further clarification from AME Dr. Campbell.” (Ex. 3, letter from San Mateo County Transit District to applicant, dated March 15, 2021.)

In a report dated March 29, 2021, PTP Dr. Smolins noted a lumbar MRI study that was positive for sacral ala fracture, and a pelvic MRI that was notable for “questionable papillary projection, likely arising from the [left] ovary.” (Ex. B, Report of David Smolins, M.D., dated March 29, 2021, p.4.) Dr. Smolins also noted his request for a repeat lumbar spine MRI had been denied, and that applicant was awaiting authorization for additional sessions of physical therapy. (*Ibid.*)

On May 6, 2021, defendant prepared a letter to AME Dr. Campbell, requesting supplemental reporting addressing whether “this papillary projection has caused or increased applicant's current symptoms and condition.” (Ex AA, letter from defendant to Agreed Medical Evaluator William Campbell, D.O., dated May 6, 2021.) The letter also enclosed additional subpoenaed records and requested the AME further address issues of apportionment.

On May 27, 2021, defendant issued a Notice of Temporary Disability Benefits (Delay) letter, indicating that although liability for the claimed injury was accepted, no TTD benefits would issue pending “receipt of additional medical records and further clarification from AME Dr. Campbell.” (Ex. BB, letter from San Mateo County Transit District to the applicant dated May 27, 2021.)

On June 3, 2021, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing (DOR) on the issue of entitlement to TTD benefits. Defendant filed a timely objection to the DOR on June 10, 2021, noting the pending request for supplemental reporting from Dr. Campbell.

Between July 12, 2021 and August 9, 2021, defendant lodged multiple follow-up requests with AME Dr. Campbell’s offices, requesting the status of the requested report. (Ex. E, Email correspondence between defense counsel and Dr. William Campbell’s office, dated July 12, 2021 through August 9, 2021.)

The parties appeared at an expedited hearing on August 11, 2021. Defendant objected to the matter proceeding, contending “it would be prejudicial to proceed without having a final medical opinion from AME Dr. Campbell regarding causation and would also be a due process violation to proceed at this time.” (August 11, 2021 Minutes of Hearing and Summary of Evidence

(Minutes), at 3:17.) Applicant responded that defendant had lodged its request for supplemental reporting only after the end of the entire period of temporary disability. (*Id.*, at 3:27.) The WCJ overruled the defendant's objection, and ordered the matter to proceed. (*Id.*, at 3:34.) The parties placed in issue the claimed period of temporary disability from October 25, 2018 through February 19, 2021, the lien of EDD, and attorney fees. Applicant testified that her primary treating physician had first identified an ovarian cyst in February, 2021. (*Id.*, at 6:32.) Applicant also confirmed that her last day of work with defendant was October 17, 2018. (*Id.*, at 7:17.)

The WCJ issued the F&A on October 5, 2021, finding that applicant sustained injury arising out of and in the course of employment (AOE/COE) on October 17, 2018. The F&A awarded temporary disability from October 25, 2018 through October 22, 2020, less reimbursement to the EDD for October 25, 2018 through October 23, 2019, less attorney fees. (F&A, Findings of Fact No. 4; Award, p.2.) In her Opinion on Decision, the WCJ reviewed the relevant medical record, including the un rebutted opinions of AME Dr. Campbell and treating physicians Dr. Barber and Dr. Smolins. Based on these reports and the aggregate medical record, the WCJ found applicant to be temporarily totally disabled from October 18, 2018 through February, 19, 2021, but also noted the limitations of Labor Code section 4656(c)(2) of TTD benefits to 104 weeks.¹ The period of compensable TTD was thus fixed as October 25, 2018 through October 22, 2020, less overlapping periods of EDD payments, less attorney fees. (F&A, Opinion on Decision, at pp.8-9.)

In defendant's Petition, it renews its objection, contending it was diligent in seeking supplemental reporting from AME Dr. Campbell on issues that included causation of injury. The Petition avers:

Here, it is clear that Defendant was actively pursuing discovery. The supplemental report request to Dr. Campbell and the request to Applicant's Attorney for treatment information were made nearly a month before the Declaration of Readiness was filed by Applicant and Defendant timely objected citing this pending supplemental AME report. Defendant's efforts did not stop there. Defendant continued to actively follow-up with Dr. Campbell's office on the status of the report repeatedly, but despite its due diligence, Defendant unfairly was forced to proceed with Trial when discovery was not complete. Depending on the forthcoming opinion of Dr. Campbell, it is possible that the

¹ All further statutory references are to the Labor Code unless otherwise stated.

outcome of Trial may have changed. Therefore, it was prejudicial to proceed with Trial. (Petition, at 3:21.)

The WCJ's Report responds that defendant's request to the AME for supplemental reporting made no mention of TTD issues, and therefore the pending AME report would not be relevant to the issues of entitlement to TTD to be decided at expedited hearing. The Report further observes:

The period of temporary disability at issue at the time of the expedited hearing began on October 25, 2018. EDD last paid benefits on October 23, 2019, almost two years prior to the expedited hearing. (Applicants Exhibit 11, Lien from the Employment Development Department dated December 11, 2019.) Defendants had been delaying payment of temporary disability, despite acceptance of the claim, since at least September 9, 2020. (Applicant's Exhibit 1, Letter from San Mateo County Transit District to the applicant dated September 9, 2020.) Based on the length of time that applicant had been without temporary disability benefits, the prejudice to the applicant by continuing the hearing outweighed any prejudice to defendants. (Report, p.4.)

DISCUSSION

Defendant contends that it requested a supplemental AME report to address, *inter alia*, issues of causation, and that the WCJ denied defendant due process by allowing the August 11, 2021 hearing to proceed without awaiting receipt of the supplemental reporting. The WCJ's Report responds that the discovery defendant was attempting to obtain was not specific to the issue of temporary disability, obviating defendant's claim of prejudice in proceeding to expedited trial. (Report, at p.4.) We note, however, that to the extent that any award of TTD is necessarily predicated on a finding of injury AOE/COE, the issue of TTD was indirectly implicated by defendant's request for supplemental reporting addressing causation. Nonetheless, and as explained below, we agree with the WCJ's decision to allow the matter to proceed, and will affirm the F&A accordingly.

We observe at the outset that notwithstanding defendant's contention it was seeking reporting on the issue of causation at the time of the expedited hearing, defendant had previously admitted liability for the injury, and further stipulated to the injury at expedited trial. As the WCJ points out in the Report, the defendant notified applicant of its acceptance of the claim as far back as September 9, 2020. (Ex. 1, letter from San Mateo County Transit District to applicant, dated September 9, 2020.) Thereafter, defendant issued multiple TTD delay notices, all of which

acknowledged liability for the claimed injury to the low back. (Exs. 2, 3, and BB, Notices re TTD, various dates.) Defendant further stipulated that applicant sustained injury AOE/COE to the lumbar spine at the expedited trial held on August 11, 2021. (August 11, 2021 Minutes, at 2:8.) The Minutes reflect no subsequent motion to withdraw from the stipulation. Additionally, defendant's Petition advances no argument in support of good cause to be relieved. Accordingly, defendant has not demonstrated good cause to be relieved of its trial stipulation that applicant sustained injury AOE/COE.

Notwithstanding the parties' trial stipulation, industrial injury is also supported in the evidentiary record. Applicant described the injury as occurring when she "rotated her torso to the right to ensure all passengers had exited the bus when she felt immediate onset of pain, stiffness and spasm through the low back with radiating complaints down the right leg." (Ex. DD, report of Agreed Medical Evaluator William Campbell, D.O., dated July 24, 2020, p.3.) AME Dr. Campbell first evaluated the applicant on July 24, 2020, conducted a thorough clinical examination, and prepared a comprehensive review of the submitted medical record.² The report concludes:

It is my opinion, the patient's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the low back should be accepted as meeting AOE/COE criteria and of industrial origin relative to DOI 10/17/18. It appears to me this claim has never been accepted. From my perspective, the patient reports really nothing more than aches and pains over the years associated with work that she has worked through prior to the specific twisting event after which point she has significantly gone downhill in terms of her low back condition. On that basis, it would seem reasonable to me to accept this as industrially related. (*Id.*, at p.17.)

Dr. Campbell confirmed his opinions of injury AOE/COE following his reevaluation of applicant on February 19, 2021, stating, "[i]t remains my opinion, the patient's need for treatment, periods of temporary disability, current symptoms and level of permanent disability with regard to the low back should be accepted as meeting AOE/COE criteria and of industrial origin relative to DOI 10/17/18." (Ex. CC, report of Agreed Medical Evaluator William Campbell, D.O., dated February 19, 2021, p.26.) The agreed medical examiner has been chosen by the parties because of his

² Although not offered into evidence by the parties, AME Dr. Campbell also reviewed a report dated September 23, 2019 by Qualified Medical Examiner Timothy Lo, M.D., who reviewed the medical record, performed a clinical evaluation, and concluded that, "it is more likely than not that [applicant] developed painful symptoms in the lumbar spine as a result of her work-related exposure and employment." (Ex. DD, report of Agreed Medical Evaluator William Campbell, D.O., dated July 24, 2020, p.14.)

expertise and neutrality, and the AME's opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal. App. 3d 775, 782 [51 Cal.Comp.Cases 114].) The opinion of AME Dr. Campbell is unrebutted, is framed in terms of reasonable medical probability, is based on pertinent facts and on an adequate examination and history, and clearly sets forth the reasoning in support of its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc).) We conclude therefore that the reporting of AME Dr. Campbell provides substantial evidence that applicant sustained injury AOE/COE.

Addressing the claimed periods of TTD, the WCJ observed that starting October 16, 2018 and continuing, applicant's treating physicians had authorized her return to modified duties. (F&A, Opinion on Decision at p.6.) The WCJ explained that applicant's subsequent periods of temporary total disability arose not out of a total inability to perform any work, but rather out of the employer's failure to show it offered modified or alternative work within applicant's work restrictions.³ The Opinion on Decision provides a comprehensive survey of the work restrictions described by applicant's treatment physicians between 2018 and 2021, and also notes that the record offers no evidence of a timely, valid offer of modified or alternative work by the employer. (F&A, Opinion on Decision, at pp. 6-8.) Based on the contemporaneous medical reporting, the WCJ concluded that applicant was temporarily disabled from October 18, 2018 through February 19, 2021, but that pursuant to section 4656(c)(2), any award of TTD would be limited to 104 weeks. Accordingly, the WCJ identified the appropriate period of TTD as October 25, 2018 to October 22, 2020. (F&A, Opinion on Decision, p.8.) We note that the WCJ's analysis of the periods of disability is not challenged in defendant's Petition, and we discern no good cause to disturb the WCJ's sound reasoning regarding the basis and periods of temporary disability to which applicant is entitled.

We observe, however, "[t]he broad purpose of workmen's compensation is to secure an injured worker *seasonable cure or relief* from industrially caused injuries in order to return him to the work force at the earliest possible time." (*Davison v. Industrial Acc. Com.* (1966) 241 Cal.App.2d 15, 18 [50 Cal.Rptr. 76].) Thus, the prompt payment of statutory benefits is crucial to

³ "If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Huston v. Workers Compensation Appeals Bd. of California* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].)

the operation of the statutory compensation plan and its central purpose of expeditious treatment of industrial injuries and timely return to work. (*Carver v. Workers' Comp. Appeals Bd.* (1990) 217 Cal.App.3d 1539, 1547 [55 Cal.Comp.Cases 36, 41], *emphasis added.*)

Here, defendant initially denied liability for the October 17, 2018 injury and paid no benefits. (Answer to Application for Adjudication, dated March 21, 2019, p.2.) EDD provided state disability benefits from October 25, 2018 through October 23, 2019. (August 11, 2021 Minutes, at 2:32.) Following compensable reporting from QME Dr. Lo, and AME Dr. Campbell, defendant notified applicant that it was accepting liability for the claim on September 9, 2020, but would not pay temporary disability benefits, stating “we cannot pay you temporary disability at this time pending receipt of EDD final lien and complete medical records form [sic] your treating physician Dr. Barber.” (Ex. 1, letter from San Mateo County Transit District to the applicant dated September 9, 2020.) Defendant issued a similar notice admitting injury but declining to pay TTD indemnity on December 3, 2020. (Ex. 2, letter from San Mateo County Transit District to the applicant dated December 3, 2020.) On February 19, 2021 AME Dr. Campbell affirmed his prior opinion that applicant had sustained injury AOE/COE, declared applicant to have reached Permanent & Stationary status, and assigned permanent work restrictions. (Ex. CC, report of Agreed Medical Evaluator William Campbell, D.O., dated February 19, 2021, p.25.) Notwithstanding two compensable AME reports of Dr. Campbell, the reporting of QME Dr. Lo, and the various reports of applicant’s treating physicians, all of which supported industrial injury with concomitant periods of temporary disability, defendant continued to decline to indemnify applicant for periods of TTD. (Ex. 3, letter from San Mateo County Transit District to the applicant dated March 15, 2021; Ex. BB, letter from San Mateo County Transit District to the applicant dated May 27, 2021.)

On this record, we do not find that defendant provided “seasonable cure or relief from industrially caused injuries in order to return [her] to the work force at the earliest possible time.” (*Carver v. Workers' Comp. Appeals Bd.*, *supra*, 217 Cal.App.3d 1539, 1547.) Applicant sought an expedited hearing more than two years after the injury, and following defendant’s fourth notice that it had accepted the claim but would not pay temporary disability benefits pending receipt of additional documentation. The WCJ appropriately weighed the constitutional mandate for expeditious proceedings and the delay in provision of TTD indemnity against defendant’s due

process rights to challenge the findings of the AME through additional discovery.⁴ After evaluating these factors, the WCJ concluded that, “[b]ased on the length of time that applicant had been without temporary disability benefits, the prejudice to the applicant by continuing the hearing outweighed any prejudice to defendants.” (Report, at p.4.) We agree with the WCJ’s determination, and decline to disturb the resulting findings of injury or periods of TTD. We further observe that defendant retains the ongoing right to challenge the findings of the AME through timely discovery, in accordance with the dictates of due process.

In summary, even if defendant’s request for supplemental report challenging causation of the injury necessarily implicated the issue of TTD, we agree with the WCJ’s analysis of the equities and decision to allow the expedited hearing to proceed. Based on the record before us, the WCJ correctly awarded the appropriate period of temporary disability based on substantial medical evidence. We will affirm the F&A, accordingly.

⁴ The California Workers’ Compensation Act (Lab. Code, § 3200 et seq.) is a statutory system enacted pursuant to constitutional grant of plenary power to the Legislature to establish a complete and exclusive system of workers’ compensation including “full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State...” (Cal. Const., art. XIV, § 4; Lab. Code, § 3201; *Crawford v. Workers’ Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 163 [54 Cal.Comp.Cases 198].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 5, 2021 Findings of Fact and Award is **AFFIRMED**.

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 22, 2022

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

**ROSARIO RODRIGUEZ
BUZZELL LAW GROUP
LAUGHLIN, FALBO, LEVY & MORESI**

SAR/abs

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