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

**TOMMY ALCARAZ, *Applicant***

**vs.**

**SAN BERNARDINO COUNTY SHERIFF'S DEPARTMENT,**
**Permissibly Self-Insured, *Defendant***

**Adjudication Number: ADJ13565822**
**San Bernardino District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

We admonish defense attorney Tiffany Liu with the firm of Michael Sullivan & Associates for citing to an online article that was not in evidence (Petition for Reconsideration, at pp. 5:22 – 6:1) in violation of WCAB Rule 10945(c)(2)j. (Cal. Code Regs., tit. 8, § 10945(c)(2).) Future compliance with the Appeals Board's rules is expected.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**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 25, 2022**

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

**TOMMY ALCARAZ**
**STRAUSSNER SHERMAN**
**MICHAEL SULLIVAN & ASSOCIATES**

**PAG/ara**

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

**REPORT AND RECOMMENDATION**
**ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

| | | |
|---|---|---|
| 1. | Applicant's Occupation: | Deputy Sheriff |
| | Applicant's Age: | 51 |
| | Date of Injury: | July 1, 1995 through September 8, 2020 |
| | Parts of Body Injured: | Left Shoulder |
| 2. | Identity of Petitioner: | Defendant has filed the Petition |
| | Timeliness: | The petition is timely |
| | Verification: | A verification is attached to the petition |
| 3. | Date of service of Findings and Award: | February 4, 2022 |

## II
## CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers;
2. The evidence does not justify the Joint Findings of Fact;
3. The Findings of Fact do not support the Decision.

## III
## FACTS

The Applicant, Tommy Alcaraz, born [], alleged a cumulative trauma injury from July 1, 1995 through August 13, 2020, claiming injury to his ear in the form of hearing loss, skin in the form of dermatitis, back, and nervous system resulting from his usual and customary duties as a Deputy Sheriff with Defendant San Bernardino County Sheriff's Department. Though the cumulative trauma was alleged through August 13, 2020, the last date of injurious exposure was on or around July 1, 2019. (MOH/SOE, Dec. 27, 2021, page 5, line 19.) The Applicant filed his Application for Adjudication of Claim for this cumulative trauma injury on September 8, 2020; case number ADJ13565822 was assigned. Defendant subsequently denied liability for this injury on November 20, 2020. (Defendant's Exhibit B.)

The Applicant was evaluated by Orthopedic Panel QME Dr. John Steinman on April 2, 2021. Dr. Steinman found industrial causation for this cumulative trauma injury, and found the Applicant to be permanent and stationary. (Defendant's Exhibit A.) Defendant eventually accepted liability for this cumulative trauma injury as to the left shoulder only on May 6, 2021. (Applicant's Exhibit 3.)

The Applicant then commenced treatment with Primary Treating Physician Dr. Jonathan Nassos on October 21, 2021. Dr. Nassos found the Applicant to be temporarily totally disabled.

The parties proceeded to an Expedited Hearing on December 27, 2021 on the issue of whether the Applicant is entitled to temporary disability benefits.[1] The undersigned WCJ issued an Opinion on Decision on February 4, 2022, finding that the Applicant was temporarily totally disabled as to his left shoulder from October 21, 2021 through December 16, 2021 based on the opinions of Dr. Jonathan Nassos. In turn, the undersigned awarded benefits pursuant to Labor Code section 4850. The undersigned further opined that the benefits for Applicant's left shoulder did not run concurrently with his companion claim, a July 1, 2019 slip and fall accident, case number ADJ13556879, upon which the Applicant received a combined 104-weeks of Labor Code section 4850 benefits and temporary disability indemnity from September 6, 2019 through September 2, 2021.

The WCAB served the Opinion on Decision on February 4, 2022. On February 23, 2022, the Defendant filed a Petition for Reconsideration, contending that the undersigned WCJ acted without or in excess of its powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

## IV
## DISCUSSION

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a "final" order, decision, or award. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers' Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

> (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
>
> (b) That the order, decision, or award was procured by fraud.
>
> (c) That the evidence does not justify the findings of fact.
>
> (d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.
>
> (e) That the findings of fact do not support the order, decision, or award.

Petitioner asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

[1] Given Applicant's occupational, he specifically sought benefits under Labor Code section 4850.

Petitioner does not explain with any specificity as to how the undersigned acted in excess of his powers. Thus, the undersigned now addresses whether the evidence justifies the findings of fact and whether the findings of fact supports the decision issued.

**Whether PQME Dr. John Steinman's Report is Substantial Medical Evidence as to the Issue of Applicant's Disability Status**

The undersigned WCJ found that Orthopedic PQME Dr. Steinman's April 2, 2021 report is not substantial medical evidence as to Applicant's disability status due to Dr. Steinman's opinions being internally inconsistent. Petitioner asserts that Orthopedic PQME Dr. Steinman's opinions within his April 2, 2021 report are not internally inconsistent, and that Dr. Steinman's further recommendations of daily aggressive low impact aerobic conditioning does not run counter with his MMI finding. (Defendant's Petition, page 6, lines 9 through 11.)

A disability is considered permanent when the employee has reached maximum medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment. (*Cal. Code of Regs., tit. 8,* § 10152.)

The undersigned remains convinced that Dr. Steinman's reporting is internally inconsistent, and therefore not substantial medical evidence as it relates to the Applicant's disability status. Immediately preceding Dr. Steinman's declaration that the Applicant has reached the point of maximum medical improvement, Dr. Steinman suggested that the Applicant can still "obtain substantially higher levels of functioning" through aggressive low impact aerobic conditioning. (Defendant's Exhibit A, page 11.) This strongly suggests that the Applicant's condition can substantially change within the next year by way of obtaining higher levels of functioning.

To the Petitioner's point, the undersigned acknowledges that Dr. Steinman does not specifically reference the Applicant's left shoulder within the context of his discussion regarding aggressive low impact aerobic conditioning. However, Dr. Steinman unambiguously references the need for the Applicant to focus on his "musculoskeletal impairments" as opposed to health and fitness, and that the recommended aggressive low impact aerobic conditioning was for Applicant's current musculoskeletal problems. There does not appear to be any dispute that the Applicant's "musculoskeletal problems" contemporaneous with the April 2, 2021 evaluation included the left shoulder.[2] In fact, the left shoulder was the only part of body of which Dr. Steinman found to have ratable whole person impairment.

Along with her discussion regarding Dr. Steinman's reporting, Petitioner further asserts that the undersigned applied the incorrect standards for determining MMI status versus TTD status; specifically, Petitioner contends that the undersigned disagreed with Dr. Steinman's MMI finding *because* the Applicant had not yet received treatment for the left shoulder, and that treatment, or lack thereof, is not the determinative factor for MMI status. However, this is argument is misplaced.

[2] During his April 2, 2021 evaluation, the Applicant's subjective complaints included the left shoulder, right, wrist, lumbar spine, right knee, left knee, and right ankle. (Defendant's Exhibit A, pages 2-3.)

Though the undersigned certainly considered Applicant's lack of treatment to the left shoulder as a contributing factor, this was not the determinative factor in rejecting Dr. Steinman's MMI opinion. As aforementioned, the undersigned interpreted Dr. Steinman's opinions to mean that the Applicant has the capacity to substantially improve his "musculoskeletal problems," including the left shoulder, specifically the capacity to achieve higher levels of functioning. If the Applicant has the potential to substantially improve his condition and achieve higher levels of functioning through treatment, then the undersigned cannot find that the Applicant's disability has well-stabilized and is unlikely to change substantially within the next year with or without medical treatment.

To the contrary, Petitioner states that the Applicant's left shoulder clearly has been stabilized for well over a year, even without treatment, given that the Applicant had already been nearly 1 year and 7 months removed from his last date of work; to support this conclusion, she relies upon the fact that Applicant had not sought any medical treatment and that Applicant only had minimal findings that resulting in of 2% whole person impairment. (Defendant's Petition, page 7, lines 14-16.) However, Petitioner has neither established herself as a medical expert so as to definitively conclude that Applicant's left shoulder has stabilized nor provided any authority that would suggest that a "relatively" low whole person impairment rating directly correlates to an injured worker's temporary disability status. More significantly, the Petitioner has not directed the Court's attention to any medical reports within the admitted record that would explain how and why the Applicant's left shoulder has stabilized beyond the following conclusory statement by Dr. Steinman: "It is my opinion this patient has reached the point of maximum medical improvement." And a medical opinion must disclose the underlying basis for its conclusions in order to constitute substantial evidence. (*Zemke v. WCAB* (1968) 33 CCC 358, 361.)

Thus, the undersigned maintains that Dr. Steinman's opinions are not substantial medical evidence as it relates to the issue of Applicant's disability status.

**Whether PTP Dr. Jonathan Nassos' Opinions regarding Applicant's Disability Status are Substantial Medical Evidence**

The undersigned relied upon the reporting from PTP Dr. Jonathan Nassos dated October 21, 2021 and November 18, 2021, to find that the Applicant was temporarily totally disabled as to the left shoulder from October 21, 2021 through December 16, 2021. (Applicant's Exhibit 1 and 2.) Petitioner asserts that Dr. Nassos' reporting is not substantial medical evidence.

An award, order, or decision by the WCAB must be supported by substantial medical evidence in light of the entire record. (Lab. Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637.) To be substantial medical evidence, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts, an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Granados v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408; *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc).)

The test of substantiality must be measured on the basis of the entire record, rather than by simply isolating evidence, which supports the board and ignoring other relevant facts of record which rebut or explain that evidence. (*Garza, supra,* 3 Cal. 3d at 503.)

As it relates to the issue of Applicant's entitlement to temporary disability, the undersigned remains persuaded that Dr. Nassos' opinions are substantial evidence so as to support a finding of periods of temporary total disability when measured against the entire record. Dr. Nassos takes a detailed history of the Applicant's duties as a San Bernardino County Sheriff and the history of the injuries as reported by the Applicant. He further documents the Applicant's subjective complaints, specifically as to the left shoulder, which include daily constant aching pain with stiffness and weakness that travels down the arm and hand, among other subjective complaints. Dr. Nassos further corroborates these subjective complaints with a comprehensive physical examination, which revealed approximately half of the normal range of motion for the left shoulder, tenderness, and positive Hawkins sign and Jobe's test that reveal potential impingement and instability, respectively. Specific to the left shoulder, Dr. Nassos recommended physical therapy.

Upon consideration of the entire admitted record as a whole, including the Applicant's subjective complaints, Dr. Nassos' objective findings on physical examination, and Dr. Nassos' recommendations for physical therapy recommendations combined with PQME Dr. Steinman's comments regarding the Applicant's capacity to achieve substantially higher levels of functioning, the undersigned finds Dr. Nassos' opinions regarding Applicant's disability to be sufficiently substantial to award temporary disability.

**Whether there are Concurrent Periods of Temporary Disability**

When independent injuries result in concurrent periods of temporary disability, the 104-week, two-year limitation under Labor Code section 4656(c)(1) likewise runs concurrently. (*Foster v. WCAB* (2008) 73 Cal. Comp. Cases 466, 472.)

The period from October 21, 2021 through December 16, 2021 does not run concurrently with any of the periods of benefits and temporary disability indemnity paid on the Applicant's July 1, 2019 specific injury claim, which were paid from September 6, 2019 through September 2, 2021. Thus, there are no overlapping periods of temporary disability between the Applicant's two independent injuries, either partial or complete, to support a finding that such periods ran concurrently as contemplated under *Foster*.

Petitioner asserts that if in fact the Applicant was temporarily disabled for the left shoulder, *arguendo*, the periods of temporary disability should logically start on September 6, 2019, which was the Applicant's date of last injurious exposure.[3] However, the issue of whether an Applicant is temporarily disabled is one that typically requires medical evidence. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856.) Though it would seem logical for temporary disability to start after the last date of injurious exposure, Petitioner did not offer into evidence any medical reports that show that the Applicant's left shoulder was temporarily disabled starting from

[3] Defendant identified September 6, 2019 to be the date the Applicant stopped working. However, the Applicant testified that he has been off of work since his July 1, 2019 specific injury.

September 6, 2019 (or July 1, 2019) forward to substantiate an overlap in disability periods. And it is significant that the Applicant did not have access to treatment for his left shoulder given that his cumulative trauma claim was initially denied by the Defendant.

Thus, the undersigned maintains that Applicant was temporarily totally disabled from October 21, 2021 through December 16, 2021, and that based on the current record there are no concurrent periods of disability between ADJ13565822 and ADJ13556879.

## V
## RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

DATE: March 9, 2022

**JASON L. BUSCAINO**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE