

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

EDUARDO LOPEZ SOTO, *Applicant*

vs.

**PALO ALTO CONCRETE AND CONSTRUCTION, and REDWOOD FIRE AND
CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY
HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ14028414
San Francisco District Office**

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

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on October 19, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his low back and right lower extremity, and that applicant's condition reached maximum medical improvement/permanent and stationary status on November 4, 2020.

Applicant contends that the reports from David F. Smolins, M.D. are substantial evidence that applicant continues to be temporarily totally disabled.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition for Reconsideration (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, and affirm the Findings except that we will rescind Finding of Fact 4, and we will amend the Findings to find that based on the current record, applicant is not entitled to temporary disability indemnity beginning on November 26, 2020 (Finding of Fact 5, now Finding of Fact 4); and to re-number Finding of Fact 6.

BACKGROUND

Applicant claimed injury to his low back and right lower extremity while employed by defendant as a construction laborer on September 20, 2019.

Orthopedic qualified medical examiner (QME) Patrick J. McGahan, M.D., evaluated applicant on November 4, 2020. Dr. McGahan examined applicant, took a history, and reviewed the medical record. He diagnosed applicant as having an “L5-S1 disc herniation with right-sided lumbar radiculopathy, industrial injury.” (Joint Exh. AA, Dr. McGahan, November 8, 2020, p. 9.) Dr. McGahan then stated:

At this point, I can state with reasonable medical probability that he is permanent and stationary as of the date of this examination on November 4, 2020. I do not anticipate any significant improvement or deterioration in his condition over the next 12 months.
(Joint Exh. AA, p. 10.)

Applicant underwent a course of treatment by Dr. David Smolins starting February 19, 2021. After the initial consultation Dr. Smolins requested that applicant have a surgical consult by spinal surgeon Dimitriy Kondrashov, M.D. (App. Exh. 3, Dr. Smolins, February 19, 2021, p. 5.)

QME Dr. McGahan was provided additional medical records to review, and in his supplemental report he stated:

After my review of the medical records, there is no change to my permanent and stationary date. Even if the patient is undergoing additional treatment as well as a surgical consultation, this has not necessarily changed the permanent and stationary date if the condition does not change in any substantial fashion. If however, Mr. Lopez Soto does indeed undergo surgery, then certainly his permanent and stationary date would change.
(Joint Exh. BB, Dr. McGahan, May 23, 2021, p. 3.)

In his July 14, 2021 treatment report, treating physician Dr. Smolins noted:

Dr. Kondrashov, spine surgeon, uncertain of pain generator and currently holds no opinion of surgery candidate, would like to do SI injection before considering surgery. ... ¶ Pt will schedule Dr. Clement Jones for 2nd opinion spine surgeon. Dr. Kondrashov did not hold an opinion for surgery and requested SI injection, which has been denied. He is interested in getting a second opinion.
(App. Exh. 11, Dr. Smolins, July 12, 2021, pp. 5 – 6.)

DISCUSSION

We first note, the fact that an injured worker is receiving 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 permanent and stationary. (See e.g. DWC-WCAB form 10214(a) - Stipulations with Request for Award.)

“A temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].) A defendant’s duty to pay temporary disability indemnity ends when the worker is able to return to work or when his or her medical condition becomes permanent and stationary. (See, *Department of Rehabilitation v. Workers’ Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1291–1292 [68 Cal. Comp. Cases 831]; *J.C. Penney Co. v. Workers’ Comp. Appeals Bd.* (2009) 175 Cal. App. 4th 818, 830 [74 Cal. Comp. Cases 826].) An injured worker’s condition is deemed permanent and stationary when the level of impairment is stable and is unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, § 10152; § 9785(a)(8); *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].)

A determination regarding whether an applicant is permanent and stationary or temporarily disabled typically requires medical evidence. (*Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 867 [44 Cal.Comp.Cases 798]; *Bstandig v. Workers’ Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].) In each of his reports Dr. Smolins assigned work restrictions but he did not address the issue of applicant’s maximum medical improvement/permanent and stationary status. (See App. Exhs. 2 – 9, Work Status Report.) Thus, his reports are not substantial evidence that applicant is temporarily totally disabled. As noted above, in both of his reports, QME Dr. McGahan stated that applicant’s condition was permanent and stationary as of November 4, 2020. There is no medical evidence in the record that contradicts or is inconsistent with Dr. McGahan’s opinion. It is important to note that in his most recent treatment report, Dr. Smolins stated that applicant was “interested in getting a second opinion” as to whether he should undergo surgery. (App. Exh. 11, p. 6.) In that context, it is also important to note that in his second report, Dr. McGahan explained that, “If ... Mr. Lopez Soto does indeed undergo surgery, then certainly his permanent and stationary date would change.” (Joint Exh. BB, p. 3.)

Our review of the trial record clearly indicates that as it now exists, there is no evidence in the record that applicant was temporarily totally disabled as of November 26, 2020. However, as

Dr. McGahan stated, if applicant does undergo surgery, “then certainly his permanent and stationary date would change.” (Joint Exh. BB, p. 3.) Under the circumstances of this matter, applicant’s disability status may change, and in turn, additional proceedings regarding applicant’s disability status may or may not be necessary in the future.

Accordingly, we grant reconsideration, and affirm the Findings except that we rescind Finding of Fact 4, and we amend the Findings to find that based on the current record, applicant is not entitled to temporary disability indemnity beginning on November 26, 2020 (Finding of Fact 5, now Finding of Fact 4); and to re-number Finding of Fact 6.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on October 19, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 19, 2021 Findings of Fact, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. Based on the current record, applicant is not entitled to temporary disability indemnity beginning on November 26, 2020.
5. There is no basis to award attorneys' fees at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 3, 2022

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

**EDUARDO LOPEZ SOTO
LAW OFFICES OF PETER M. GIMBEL
MICHAEL SULLIVAN & 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