

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

JOHN METZ, *Applicant*

vs.

**WESTROCK COMPANY; ACE AMERICAN INSURANCE COMPANY;
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ13069597; ADJ13069596
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 15, 2022

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

**JOHN METZ
SPRENKLE, GEORGARIOU & DILLES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

PAG/pc

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

Applicant has filed a timely, verified Petition for Reconsideration from the Findings & Award of 12/27/2021. He claims the Judge erred in denying his claim for temporary disability benefits after 09/04/2020 and contends that the evidence did not support this decision. The Petition is without merit and should be denied.

II STATEMENT OF MATERIAL FACTS

Applicant, John Metz, while employed as a stacker by Westrock Company on 4/3/18 in ADJ 13069596 sustained injury AOE/COE to his right shoulder and cervical spine; and on 4/24/19 in ADJ 13069597, sustained injury AOE/COE consisting of rhabdomyolysis (hereinafter, “rhabdo”) (MOH/SOE 11/23/2021, p. 2). On 06/03/2018, Applicant was released to return to regular work by his then treating physician, Dr. Reddy, with no restrictions or limitations. (Ex. D-2). He continued to work after the 2018 injury, albeit with some symptoms and modified duties for a time, until the second injury in April of 2019 (Report, Lucy Lin, MD, 03/04/2021, Ex. J-7, p. 8; report, Melinda Brown, MD, 06/16/2020, p. 4, part of Ex. D-3). There is no evidence of treatment for the 2018 injury after Dr. Reddy’s release in June of 2018, until after the 2019 injury, when he came under the care of Dr. Melinda Brown in June of 2020.

In her June 16, 2020 report, Dr. Brown stated that Applicant was able to work full duty “...but is off due to his chronic rhabdo as he can’t work in heat now...” and was receiving disability payments for his 2019 injury from EDD (Ibid, pp. 6-7). She repeated this information in her many progress reports in July and August of 2020, all of which are collected in Exhibit D-3. In Dr. Brown’s PR-4 report of 02/05/2021, Exhibit J-8, pp. 2, 7, she stated: “He did develop rhabdomyolysis in March, 2019 and then did work until July, 2019, when he had recurrent rhabdo. He has not worked since this time due to this injury due to metabolic derangement...he is unable to work due to his other injury...” (i.e., due to the 2019 injury).

Dr. Lucy Lin was chosen to be the AME for the 2018 injury. She obtained the same history as Dr. Brown (Op. Cit., p. 8). She stated (p. 10): “I concur with Dr. Brown that the applicant reached a permanent and stationary status on February 5, 2021 referable to the neck and right shoulder. I believe that the original permanent and stationary date of June 13, 2018 was premature, as the applicant had not undergone diagnostic testing including MRI of the spine or EMG/NCV studies.”

The 2019 injury was assigned to Dr. Robert Noriega for the QME evaluation. He reported that Applicant was permanent and stationary for the 2019 injury as of the date of his 09/04/2020 evaluation. (Report, 10/03/2020, Ex. J-3, p. 14)

III DISCUSSION

Petitioner confuses temporary disability status and permanent and stationary status: one can be working, or be able to work, and not be permanent and stationary. In the case of Petitioner, the only reason he was off work after July of 2019 was because of his rhabdo injury in April of 2019, for which EDD was paying SDI benefits. This is what Dr. Melinda reported in every single medical report she authored, while she was treating the 2018 injury. As far as the evidence reflects, no physician ever took Applicant off work due to the effects of his 2018 injury. Furthermore, Applicant was accommodated with modified work following the 2018 injury and did not incur wage loss, until after the 2019 injury.

Dr. Robert Noriega was the QME for the 2019 injury. He concluded Applicant was permanent and stationary for the 2019 injury as of the date of his 09/04/2020 evaluation. His finding of P&S status represents substantial medical evidence for ending entitlement to temporary disability benefits as of that date.

IV RECOMMENDATION

I recommend that the Petition for Reconsideration be Denied.

Respectfully submitted,
MICHAEL H. YOUNG
Workers' Compensation
Administrative Law Judge

OPINION ON DECISION

ENTITLEMENT TO SJDB

Dr. Lucy Lin supports entitlement to the SJDB voucher for the 2018 injury. Although not directly addressing ability to return to work vis a vis the 2019 injury, Dr. Noriega's report of 7/19/2021 (Ex. J-1) appears to limit Applicant permanently to light work by reason of his rhabdomyolysis ("rhabdo") condition. Additionally, the employer witness confirmed that the employer was unable to accommodate the restrictions imposed for the rhabdo condition. Applicant is entitled to receive an SJDB voucher for each of the two subject injuries.

TEMPORARY DISABILITY

Defendant paid TD at the rate of \$794.58 per week from 08/25/2020 through 10/19/2020. Applicant was paid SDI benefits in connection with the 2019 injury, according to several reports from Dr. Brown. Her reports indicate that Applicant's shoulder problem was evolving and not MMI/P&S until 2/5/21. Dr. Lin, who was the AME for the 2018 injury, concluded in her 3/24/21 report (Ex. J-7) that the original P&S date by Lucy Mumm, PA-C, of 6/3/18 was premature. Dr. Brown reported on 6/16/20 (part of Ex. D-3) that following Ms. Mumm's discharge in June of 2018, Applicant resumed his regular work at Westrock, then had a recurrence of his rhabdo in April 2019 (he was hospitalized for this on 4/25/19 and 4/26/19, per Dr. Noriega's history, Ex. J-4), returned to work until July, 2019 and then stopped working at Westrock, because of his rhabdomyolysis.

For the rhabdo, Dr. Noriega stated (Ex. J-3) that according to Kaiser, Applicant was released to work with limited exertional activities as of 11/8/19. In his 3/24/21 report (Ex. J-2), Dr. Noriega stated Applicant was permanent and stationary on 9/4/20. In his 7/19/21 report (Ex. J-1), Dr. Noriega stated that Applicant was TTD from his rhabdo for three months after 4/24/19, briefly returned to work, had a recurrence on 7/24/19 and went off work again, TTD. He opined Applicant's TTD totaled 6 months but that Applicant was temporarily partially disabled thereafter.

Applicant credibly testified at his 11/23/21 trial that following his 2018 shoulder injury, he was released to full duty after three months and continued full duty until he was injured on 4/24/19. He lost no time from work, until his second injury on 4/24/19. Following this injury, he was off work completely until 7/10/19, due solely to his rhabdo condition. His only work restrictions were due to that condition.

After Dr. Melinda Brown took over treatment in June 2020, she only treated the neck and right shoulder, not the rhabdomyolysis. Under cross-

examination, Applicant testified that Dr. Brown did not impose work restrictions for his c-spine or right shoulder. However, under re-direct examination by his attorney, Applicant testified Dr. Brown told him to avoid lifting over 50 lbs., avoid straining and avoid overhead reaching. The Westrock work required lifting over 50 lbs. Furthermore, Dr. Brown never released Applicant to return to unlimited work, as far as the neck and right shoulder were concerned.

On 7/10/19, Applicant returned to modified duty, with some wage loss, until 7/25/19, when he had a flare-up in his rhabdo, causing him to stop working the modified duty as of 7/25/19. Applicant acknowledged that he lost no time from work while he was on modified duty at Westrock, but he never returned to Westrock after 7/25/19.

In November of 2020, he began working for Instacart delivering groceries, continuing with this employment through the start of February 2021. The work there did not exceed his medical restrictions. In between Westrock and Instacart, he continued to have problems with his right shoulder and neck and was never offered work by Westrock within the medical restrictions imposed for both his right shoulder and for the rhabdo. He would have accepted work within his restrictions, if it was offered.

The employer witness at trial, James Alan Murkison, essentially confirmed Applicant's testimony about lost time from work after the 2019 injury and that the employer was unable to accommodate the work restrictions imposed for that injury, although it could have accommodated a restriction from lifting more than 50 lbs. Mr. Murkison was aware of work restrictions imposed for the 2019 injury but was not aware of the Lin evaluation, although the company did not offer Applicant any kind of work after Dr. Lin's evaluation. After 4/24/2019, the witness did not receive any medical reports containing restrictions with respect to the right shoulder or cervical spine.

- (a) **TTD 4/24/19 through 6/30/19.** Based on Applicant's testimony, supported by the medical evidence, Applicant was temporarily totally disabled during this period by reason of the 2019 injury. He would be entitled to TTD benefits from Defendant during this time, less reimbursement to EDD at the weekly rate of \$794.58, for its payments, if any, during this time, for the effects of the 2019 injury. The parties are ordered to adjust this TTD claim informally, with jurisdiction reserved.
- (b) **TPD from 7/1/2019 through 7/25/19.** The evidence is conflicting on Applicant's work history after 7/1/2019. The Summary of Evidence from the 11/23/21 trial indicates Applicant was off work completely from 4/24/19 until 7/10/19. However, the evidence as a whole indicates Applicant returned to modified work in July of 2019, and the Westrock wage records (Ex. J-6) appear to show a reduction in hours and wages following the July return to work, until Applicant ceased all work for Westrock on 7/29/19. Applicant

would be entitled to wage loss TD during this time, in an amount to be adjusted informally by the parties, not exceeding \$967.68, with jurisdiction reserved. If EDD paid SDI for Applicant's rhabdo condition within this time period, it would be entitled to reimbursement by Defendant, but only to the extent of the wage loss TD.

- (c) **TTD from 7/26/19 through 2/5/21.** The weight of the evidence for the period starting 7/26/19 supports entitlement to temporary disability benefits based solely on Applicant's rhabdo condition from the 2019 injury. The effects of the 2018 injury did not result in temporary disability during this time. Dr. Noriega declared Applicant permanent and stationary from his rhabdo as of 9/4/2020. He also found that Applicant did not require further medical treatment for his 2019 injury. Applicant is entitled to TTD benefits from 7/26/2019 through 9/4/2020, less credit for Defendant's indemnity payments during that time and less reimbursement to EDD at the weekly rate of \$794.58, for SDI benefits paid, if any, for the effects of Applicant's 2019 injury, during the period 7/26/20 through 9/4/20. The parties are ordered to adjust this claim informally, with jurisdiction reserved.

CREDIT FOR OVERPAYMENT OF TEMPORARY DISABILITY

Defendant overpaid its liability for temporary disability after 9/4/20, but Defendant did not provide evidence as to how the overpayment occurred, whether Applicant played any role in causing the overpayment, or any other evidence supporting entitlement to credit for the overpayment. Its claim for credit for the TD overpayment is denied.

PERMANENT AND STATIONARY DATES

Applicant's condition relative to the 2018 injury was permanent and stationary on 2/5/21, based on the opinion of AME Dr. Lucy Lin. However, the effects of the 2018 injury did not cause or contribute to Applicant's temporary disability after 7/25/2019. The 2019 injury became permanent and stationary on 9/4/2020.

FURTHER MEDICAL TREATMENT

Based on the findings of Drs. Lin and Brown, Applicant is entitled to further medical treatment for the effects of the 2018 injury. Based on Dr. Noriega's opinion, Applicant requires no further treatment for the 2019 injury.

ATTORNEY'S FEES

Applicant's attorney is entitled to a fee of 15% of the net retroactive temporary disability awarded, after deducting the amount reimbursable to EDD and the amount of TD previously paid by Defendant through 9/4/20.

MICHAEL H. YOUNG

Workers' Compensation Administrative Law Judge