WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GRISELDA AGOSTO-CISNEROS, *Applicant*

vs.

HACK'S FOOD SAFETY SPECIALISTS; EMPLOYERS COMP SAN FRANCISCO, *Defendant*

Adjudication Number: ADJ16010702
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues. This is our decision after reconsideration.

Defendant seeks reconsideration of the September 14, 2022, Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that applicant while employed by defendant on July 27, 2021 as a kitchen production worker, sustained injury to her lumbar spine and right shin; at the time of her injury, applicant's average weekly wages were $600 per week, subject to proof giving rise to a temporary disability rate of $400 per week, subject to proof; and applicant is entitled to total temporary disability beginning June 3, 2022 and continuing based upon the medical reporting of Lance L. Miller, D.C.

Defendant contends that applicant is not entitled to total temporary disability benefits because intervening events that likely affected applicant's entitlement to total temporary disability benefits were disregarded by, or not provided to Dr. Miller, rendering his reports not substantial evidence. Defendant also contends that applicant is not entitled to TTD benefits ongoing or otherwise at the rate of $400 a week according to proof. [1]

[1] Defendant's Petition relies heavily on information from applicant's deposition which has been identified on the record and in the Electronic Adjudication Management System (EAMS), but was not admitted into evidence. We caution defendant that documents which have not been admitted into evidence may not be referred to in a petition for reconsideration. (Cal. Code Regs., tit. 8, § 10945(b).) The Appeals Board's record of proceedings is maintained in the electronic adjudication file includes: the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits identified but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. (Cal. Code Regs., tit. 8, § 10803(a)(1)(2).) ". . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings."

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition For Removal (Report), recommending that the petition be denied.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report by the WCJ. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will affirm the F&A.

BACKGROUND

Applicant while employed by defendant, as a kitchen production worker, sustained injury to her lumbar spine and right shin on July 27, 2021. At the time of her injury, applicant was pushing a heavy cart full of water down a ramp, a wheel got stuck in an uncovered drain and the cart tipped over. Applicant fell onto the cart causing injuries to her right shin, low back, and jaw including mandible.

On April 19, 2022 applicant filed a Declaration of Readiness to Proceed (DOR) requesting that the case be set for an expedited hearing and decision on the following issues: "Entitlement to medical treatment per Labor Code §§ 4610 and 4610.5[2] Applicant alleged:

> "APPLICANT ¿ S [*SIC*] APRIL 6, 2022 REQUEST THAT THE MAA IDENTIFY THREE MPN TREATERS THAT ARE AVAILABLE TO TREAT APPLICANT WITHIN THE TIMEFRAMES AND DISTANCES AS REQUIRED BY 8 CCR 9767.5 (A), (F) AND (G) HAS GONE IGNORED. ACCORDINGLY, APPLICANT'S REQUEST FOR A CHANGE OF TREATER HAS BEEN UNREASONABLY DELAY AND/OR REFUSED. THIS CONSTITUTES A DENIAL OF CARE. THEREFORE APPLICANT SEEKS AUTHORIZATION TO TREAT OUTSIDE THE MPN."

On April 29, 2022 defendant objected to applicant's DOR.

On May 4, 2022 the parties filed and the WCJ approved a Stipulation and Award and/or Order in which the parties stipulated as follows:

> "1. Applicant names Lance Miller, D.C., as the MPN PTP. 2. Defendant shall issue written treatment authorization to Dr. Miller by the end of day on 5/4/22 and copy AA office w/ the same. 3. All issues related to applicant's entitlement to treat outside the MPN are deferred. 4. MAA to set initial appointment with Dr. Miller forthwith."

On June 3, 2022, treating physician Dr. Miller issued a Doctor's First Report of Occupational Injury or Illness. (Exhibit 1, Dr. Miller's report, 6/3/22.) According to the report, item number 24 states: "If further treatment required, specify treatment plan/estimated duration. "2x a week for 6

[2] All further statutory references are to the Labor Code unless otherwise stated.

weeks referrals MRI lumbar/ortho spine consult pain management -Dr. Guiterrez"" (Exhibit 1, Dr. Miller's report, 6/3/22 at p. 2.) According to the report, item number 26 states: "Work Status - Is patient able to perform usual work? Yes X No. If "no", date when patient can return to Regular work 07/05/2022." (Exhibit 1, Dr. Miller's report, 6/3/22 at p. 2.) The report further states that a delay in treatment and in referrals may cause an increase in the whole person impairment and losses in activities of daily living. (Exhibit 1, Dr. Miller's report, 6/3/22 at p. 2.)

On July 28, 2022 applicant's attorney filed a DOR for an Expedited Hearing and alleged that:

> "MET AND CONFERRED WITHOUT RESOLUTION. THERE IS A DISPUTE OVER TD ENTITLEMENT PER THE PTP REPORT DATED JUNE 3, 2022, DUELING QME PANELS AND ENTITLEMENT TO TREAT OUTSIDE THE MPN DUE TO THE MAA¿ [*SIC*] S FAILURE TO RESPOND TO AA¿ [*SIC*] S REQUESTS TO IDENTIFY AVAILABLE MPN TREATERS AND SCHEDULE APPOINTMENTS."

On August 9, 2022, defendant objected to applicant's July 28, 2022 DOR For Expedited Hearing.

On August 17, 2022, the WCJ held an expedited trial. The following facts were admitted:

> "1. Griselda Agosto Cisneros, born xx-xx-xxxx, while employed on July 27, 2021, in California, as a production worker, by Hack Food Specialists, insured for workers' compensation by Employers Assurance, sustained injury arising out of and in the Course of employment to her lumbar spin and right shin.
>
> 2. At the time of injury, the average weekly wages were $600, and the temporary disability rate was $400 per week, both subject to proof.
>
> 3. No temporary disability indemnity has been paid." (Minutes of Hearing and Summary of Evidence, 8/17/22 expedited trial, 10:43a.m. – 10:48 a.m. at 2:8-2:18.)"

The issues were: applicant's entitlement to temporary disability and QME panel specialty. At trial, the parties stipulated as follows:

> "1. Defendants shall issue written treatment authorization for an orthopedic consult with Jason Huffman, M.D. and a pain consult with Susan Gutierrez, M.D. forthwith w/ a copy served on AA's office. 2. MAA shall set up consults w/ both Dr. Huffman and Dr. Gutierrez forthwith. 3. All other issues related to applicant's entitlement to treat outside the MPN are deferred."

The matter was submitted on the record without testimony.

DISCUSSION

Temporary disability indemnity is a workers' compensation benefit that is paid while an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J.T. Thorp, Inc. v. Workers' Comp. Appeals Board (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra,* at p. 1478.) Even though an injured employee is temporarily unable to work at their usual job, they are nevertheless expected to accept suitable work if it is available. (*Pacific Employers Ins. Co. v. IAC (Stroer)* (1959) 52 C2d 417, 420, 24 CCC 144.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§4650-4657; *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 829 [45 Cal.Comp.Cases 1106]; *Huston v. Workers' Comp. Appeals Bd*. (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.3d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal App. 4th 227, 236 [58 Cal.Comp.Cases 323].) In *Huston*, supra, 95 Cal.App.3d 856, 868 the Court of Appeal stated:

> In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [Citation.] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [Citation.] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [Citation.] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [Citation.] 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*, supra, 95 Cal.App.3d at p. 868.)

The holding in *Huston* ties an employer's showing that modified work is available and offered with an injured worker's entitlement to temporary disability. Thus, in order for an employer to be relieved of potential liability for temporary disability for an injured worker capable of returning

to modified duties, the employer must establish that work within applicant's restrictions is both available and offered.

The Report states that there is only one uncontradicted and unimpeached medical report from Dr. Miller dated June 3, 2022 which was presented at the August 17, 2022 expedited hearing. The June 3, 2022 report completed by Dr. Miller indicates that applicant is entitled to temporary total disability and should receive medical treatment. Based on Dr. Miller's report, applicant's condition at the time of Dr. Miller's examination on June 3, 2022 was that applicant was unable to perform her regular job duties.

Here, according to the record, defendant did not offer evidence that work was available and that it offered applicant modified work. Moreover, it appears from the record that defendant did not authorize applicant's required medical treatment ordered by Dr. Miller on June 3, 2022 in a timely manner. It appears that prior to the stipulation at trial on August 17, 2022, applicant was denied an opportunity to cure or materially improve her medical condition from her industrial injury. The statutory duty to pay temporary disability compensation continues during the period in which an injured worker, while unable to work, is undergoing medical diagnostic procedure and treatment for an industrial injury. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 159, 168 [666 P.2d 14, 193 Cal. Rptr. 157, 48 Cal. Comp. Cases 566].) The duty ends when the worker is able to return to work or when his or her medical condition becomes permanent and stationary. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd*. (2003) 30 Cal.4th 1281, 1291-1292 [70 P.3d 1076, 135 Cal. Rptr. 2d 665, 68 Cal. Comp. Cases 831].)

We observe that if defendant promptly authorized the referrals to the specialists within the MPN indicated by Dr. Miller in his June 3, 2022 first report, applicant would have most likely been seen by the specialists and there would be additional medical reports. Hence, defendant's failure to authorize the referrals to the specialists in a timely manner made it difficult for applicant to be seen by the appropriate specialists in a timely manner and most likely contributed to the lack of medical evidence in the record.

We now turn to the issue of defendant's contention that applicant is not entitled to payment of temporary disability benefits of $400 per week. However, defendant stipulated at trial, "At the time of the injury, the average weekly wages were $600, and the temporary disability rate was $400 per week, both subject to proof."

Stipulations are an indispensable part of workers' compensation proceedings where the expeditious determination of disputes is, "…expressly declared to be the social public policy of this State." (Cal. Const., art. XIV, § 4.) Thus, section 5702 states:

> "The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. . . The appeals board may thereupon make its findings and award based upon such stipulation or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy."

Stipulations in a workers' compensation proceedings are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, "A stipulation…serves '*to obviate need for proof or to narrow range of litigable issues*' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall, supra*, 77 Cal.App.4th at p. 1119, emphasis added.)

To determine whether there is good cause to rescind the awards and stipulations, the circumstances surrounding their execution and approval must be assessed. (See Lab. Code, § 5702; *County of Sacramento v. Workers' Comp. Appeals Bd*. (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1118-1121 [65 Cal.Comp.Cases 1]; *Robinson v. Workers' Comp. Appeals Bd*. (*Robinson*) (1987) 194 Cal.App.3d 784, 790-792 [52 Cal.Comp.Cases 419]; *Huston v. Workers' Comp. Appeals Bd.* (*Huston*) (1979) 95 Cal.App.3d 856, 864-867 [44 Cal.Comp.Cases 798].) As recognized in *Weatherall*, the Appeals Board may also, in its discretion, reject factual stipulations and set the matter for hearing and further investigation. (*Weatherall*, *supra*, at p. 1119; Lab. Code, § 5702.)

Here, the parties stipulated to the average weekly wages and disability rate. Further, as the WCJ states, the temporary disability rate and average weekly wages are subject to proof, which allows for adjustments to the amount of temporary disability benefits, if necessary. Here, we decline to disturb the stipulation.

As our decision after reconsideration, we affirm the Findings and Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award dated September 14, 2022, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 15, 2023

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

GRISELDA AGOSTO CISNEROS
WELTIN, STREB & WELTIN
MULLEN & FILIPPI

DLM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR REMOVAL

I.
INTRODUCTION

1.	Applicant's Occupation:	Safety
	Specialist Age:	41
	Parts of Body Injured:	Lumbar spine, right leg
2.	Identity of Petitioner:	Defendants
	Timeliness:	The Petition was timely filed.
	Verified:	The Petition was verified.
3.	Date of Minutes of Hearing:	August 17, 2022

4. The Petitioner contends:

A. That this WCJ acted without or in excess of her powers:
B. That the evidence does not justify the Findings of Fact:

II.
SUMMARY OF FACTS

Applicant, while employed by DHL Hack's Food, as a safety specialist, sustained an admitted injury to her lumbar spine and right shin on July 27, 2021. The matter came to an expedited trial on August 17, 2022, based on the Declaration of Readiness to Proceed filed by applicant, which indicated that there was a dispute over temporary disability entitlement, as well as an issue with dueling panels. As the parties could not reach resolution on the date of the expedited trial, the matter was submitted on the record with no testimony taken.

III.
DISCUSSION

Defense counsel, in their petition, discuss incidents related to the applicant's health that are not admitted facts, and to which no testimony was given. They rely on information contained in their exhibit "A", the transcript of the deposition of the applicant. These "facts" include a motor vehicle accident approximately 2 weeks after the injury, for which the defendants claim the applicant both lost a baby and treated for the same body parts that are claimed in this admitted injury.

Defendants claim that "[I]t has been well established by the Court of Appeals that any

award, order, or decision of the Appeals Board must be supported by "substantial evidence" in light of the entire record. (emphasis in the original). Labor Code Section 5952(d); Garza (1970) 3 Cal.3d 312, 317; LeVesque (1970) 1 Cal.3d 627. The Appeals Board must accept as true the intended meaning of evidence that is both uncontradicted an unimpeached. LeVesque (1970) 1 Cal.3d 627; Lamb v. Workers' Comp. Appeals Bd; 11 Cal.3d at 281; Garza (1970) 3 Cal.3d 312, 317."

Defendants point out this authority as support for their own arguments, however, the undersigned would argue that this authority supports the Findings and Award that issued in this matter. The Board was presented with only one medical report, that of Dr. Lance Miller, DC, dated June 3, 2022 (Applicant's exhibit 1). In that report, which is uncontradicted and unimpeached by any evidence admitted at the expedited trial, the treating physician finds the applicant TTD. The report is a form issued by the State of California, titled Doctor's First Report of Occupational Injury or Illness. All required information is filled in and noted. The mechanism of injury appears consistent with the applicant's complaints. A physical examination was done. Diagnoses were issued, medical treatment needed to cure or relieve the applicant of her injuries is addressed. The report is bare bones but is not insubstantial.

The issues that Defendants are raising would appear to be more appropriately be related to apportionment of any eventual permanent disability. However, temporary disability cannot be apportioned. *Granado v. WCAB* (Haslett Warehouse)(1968) 69 C2d 399, 71 CR 678, 33 CCC 647. Labor Codes 4663 and 4664, which deal with apportionment, apply only to permanent disability. Furthermore, "the rule that temporary disability may not be apportioned between industrial and nonindustrial injuries is not limited in application to situations in which a prior nonindustrial injury is aggravated by a subsequent industrial injury -an employer is fully liable even if there is a prior industrial injury and a *subsequent nonindustrial* injury that both contribute to the temporary disability." *City of National City v. WCAB (Shelton)* (1977) 42 CCC 742 (writ denied)(Emphasis added); *McGlinn v. WCAB* (1977) 42 CCC 214, 219.

In this case we have an admitted injury and a subsequent nonindustrial injury. If the need for temporary disability is even slightly attributable to the industrial injury, defendants are liable for payment of that temporary disability. Should it later be found by the medical legal evaluator, or a treating physician, that the disability is due solely to the nonindustrial injury, a credit can be asserted by defendants against the amount they have paid.

The ongoing award of temporary disability is also supported. Dr. Miller indicates that the applicant is expected to be able to return to regular work on July 5, 2022 (Applicant's Exhibit A, page 2). However, the only medical reporting that was submitted and accepted into evidence indicates temporary total disability. There is no report subsequent to that report that indicates that the applicant is able to return to her usual and customary duties. As such, until such time as the applicant is released back to either full duty or with restrictions that the employer can accommodate, the finding of ongoing temporary disability is appropriate.

Lastly, in regard to the temporary disability rate, the Minutes of Hearing reflect that the parties stipulated at trial that the "average weekly wages were $600, and the temporary

disability rate was $400 per week, both subject to proof." (Minutes of Hearing and Summary of Evidence, page 2, lines 14-16). There were no objections to the stipulations. It is disingenuous of Defendants to now state that additional evidence was needed for the matter to be ready to proceed to trial on that issue. Further, as noted, the temporary disability rate and average weekly wages are *subject to proof.* (Findings and Award, finding number 2). This allows for any adjustments needed to the amount owed for any concurrent employment, or adjustments for wage loss, evidence of which was not presented at Trial by Defendants.

Defendants also raise the issue that the undersigned should have developed the record, allowing for additional evidence to be brought in. While it is clear that the WCJ does have a duty to develop a record if it is not fully developed. *Kuykendall v. WCAB* (2000) 65 CCC 264, 269; *Raymond Plastering v. WCAB (King)* (1967) 32 CCC 287, 291; *West v. IAC (Best)* (1947) 12 CCC 86. However, a WCJ may not exercise his or her duty to develop the record if doing so unfairly would reward a party who, due to his or her own negligence, cannot meet the burden of proof. *Gaytan v. Payless Shoesource, Inc.,* 2011 Cal. Wrk. Comp. P.D. LEXIS 159. See *Pure v. Center Line Electric, Inc.,* 2011 Cal. Wrk. Comp. P.D. LEXIS 182

If Defendants wished to produce additional evidence, including evidence of other wages, or evidence that the temporary disability was caused by some intervening event, they had a duty to do so at the Expedited Trial. The issues presented at Trial were solely entitlement to temporary disability and QME panel specialty (which was not appealed). The rate was stipulated to, and defendants did not object at the time of trial to that stipulation. It is not the duty of this WCJ to rescue defendants from their failure to present evidence or in their failure to list the wages as an issue.

IV

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied for the reasons stated above.

Respectfully submitted,

Dated: 17 October 2022

Joanna Stevenson
Workers' Compensation Judge