

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

JAMES SCOTT JOHNSON, *Applicant*

vs.

**COUNTY OF SAN MATEO, Permissibly Self-Insured,
Adjusted by ATHENS ADMINISTRATORS,
*Defendants***

**Adjudication Number: ADJ17036305
Oakland 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.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 6, 2023

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

**JAMES SCOTT JOHNSON
BOXER & GERSON
LAUGHLIN, FALBO, LEVY & MORESI**

LN/pm

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

Applicant's Occupation: Deputy Director of Human Resources
Applicant's Age: 62
Date of Injury: March 9, 2022
Parts of Body Inured: Psyche
Identity of Petitioner: Defendant
Timeliness: Yes
Verification: Yes
Date of Findings and Award June 14, 2023
Defendant's Contentions: Temporary Total Disability

**II.
STATEMENT OF THE CASE AND FACTS**

Applicant was employed as a Deputy Director of Human Resources. He sustained an admitted injury to his psyche on March 9, 2023. The matter was set for Expedited Hearing on April 17, 2023. The defendant objected to the hearing proceeding remotely. The matter was continued to a trial setting for May 24, 2023. The defendant was given the opportunity to depose the applicant and Dr. Green prior to the trial. The matter was set on the issue of TTD and salary continuation.

The parties were ordered to prepare trial briefs. Defendant no longer contested substantial medical evidence as to the opinions Dr. O'Dowd and Dr. Green. Defendant picked up benefits from July 28, 2022 through April 30, 2023. At the time of trial, the defendant was working to restore the applicant's sick/vacation time. The defendant raised the issue of modified duty in its trial brief as an issue as to entitlement to temporary disability benefits.

On June 14, 2023, I issued a Findings and Award based on the medical report of Dr. Green that the applicant was entitled to temporary disability benefits from May 1, 2023, and continuing. Within my Findings of Fact, I specifically did not make a determination regarding whether an offer modified work was made. My Opinion on Decision does discuss the offer of modified work as the defendant himself raised the issue in his trial brief as to why benefits should not be provided to the applicant.

Defendant filed a timely Petition for Reconsideration or In the Alternative Removal on July 10, 2023. The defendant fails to state specifically the grounds for reconsideration. For the following reasons the defendant's petition should be denied.

III. DISCUSSION

Labor Code 5903 provides the grounds for reconsideration.

“At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

- (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.”

The defendant fails to cite specifically the grounds it is seeking Reconsideration/Removal. As such, I assume the issue is (i) excess of powers; (ii) evidence does not justify the findings of fact; or (iii) findings do not support the order, decision or award.

LC §5708 provides wide discretion when conducting a hearing. “[The appeals board] from its early days, has not been bound by common law or statutory rules of evidence and procedure, and, in addition to being allowed to receive hearsay evidence and to proceed informally, it has been authorized and permitted to adopt decidedly less stringent rules and regulations. (See *French v. Rishell* (1953) 18 CCC 82, 84) As such the matter proceeded to trial.

Temporary disability indemnity is a workers' compensation benefit, which is paid during the time 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 Bd. (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.)

The defendant raises the issue of offer of modified work but the Findings of Fact do not make a finding as to an offer of modified work. The Findings of Fact specifically only address the issue of temporary disability. Although the Opinion on Decision does discuss the offer of work as defendant raised the issue in his trial brief, temporary disability is found based on the medical reports as stated on page 2 line 1 of the last paragraph of the Opinion on Decision. "Medical reports document Mr. Johnson's temporary disability status prior to matter being set for trial." The defendant paid disability based on the medical reports of Dr. O'Dowd and Dr. Green, as stated in defendant's trial brief and acknowledged by picking up benefits. Defendant did not raise the issue of whether the medical reports were substantial evidence. Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627.) Whether the applicant is temporarily disabled is a question of fact, which is supported by the medical reports of PTP Dr. Green and QME Dr. O'Dowd. (Ex. 113 Pg. 11) (*LeVesque v. WCAB* (1970) 35 CCC 16, 25; *Scott Co. v. WCAB (Stanley)* (1983) 48 CCC 65; *LC §3202.5*; *Western Growers Insurance Co. v. WCAB (Austin)* (1993) 58 CCC 323, 327)

The defendant is of the opinion that they were entitled to Delay/Deny TTD due to modified work offer. Again, the defendant raised the issue as a defense to paying temporary disability benefits. The defendant raised the issue of modified work and then objected to the issue being raised. Therefore, at the time the matter was set for trial on April 17, 2023, temporary disability benefits were due. On May 3, 2023, an offer of work issued. (Ex. 122) On May 23, 2023, a Notice Of Delay issued. (Ex. 124) These documents were after the matter was set for trial and a day before the trial. A specific finding on offer of modified work was not found in the "Findings or Fact" however, I did address the issue in my discussion. The court may return the matter to trial level for a determination on offer of modified work.

However, the applicant is entitled to temporary total disability from May 1, 2023, and continuing.

IV.
CONCLUSION

Based upon the above, I recommend the denial of the Defendant's Petition for Reconsideration/Removal.

DATE: July 14, 2023

Tammy Homen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE