

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

SALVADOR MORALES, *Applicant*

vs.

**TAYLOR FRESH FOODS;
AMERICAN ZURICH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ14498065
Salinas District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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 grant reconsideration, affirm the Findings and Award, except that we will amend it to defer the issue of whether applicant is entitled to more than 104 weeks of temporary disability under Labor Code section 4656(c)(3) (Finding 8, Award), and as recommended by the WCJ, to clarify that EDD's recovery would come from indemnity owed to applicant (Finding 10).

The parties proceeded to trial in this matter on May 2, 2023. As relevant herein, the parties stipulated that applicant sustained injury to his left fingers and claimed injury to his psyche, left hand, and left upper extremity. Among the issues identified for trial was whether applicant was entitled to temporary disability from March 11, 2022, "subject to the 104-week cap." Applicant testified in relevant part that he was "working as a maintenance mechanic at Taylor Fresh Foods when he was injured while sharpening blades. Four fingers and the tip of his thumb were severed. He was flown to Stanford for medical care." (Minutes of Hearing, Summary of Evidence, May 2, 2023, p. 5.)

In his Answer, applicant contends that the issues at trial were whether he sustained injury in the form of psyche and whether he was entitled to *retroactive* temporary disability from March 11, 2022 to March 10, 2023. He further alleges that applicant continues to be temporarily disabled.

Labor Code section 4656 sets a cap for temporary disability indemnity of 104 weeks of temporary disability except as follows:

(3) Notwithstanding paragraphs (1) and (2), for an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:

- (A) Acute and chronic hepatitis B.
- (B) Acute and chronic hepatitis C.
- (C) Amputations.
- (D) Severe burns.
- (E) Human immunodeficiency virus (HIV).
- (F) High-velocity eye injuries.
- (G) Chemical burns to the eyes.
- (H) Pulmonary fibrosis.
- (I) Chronic lung disease.

In *Cruz v. Mercedes-Benz of San Francisco* (2007) 72 Cal. Comp. Cases 1281 [2007 Cal. Wrk. Comp. LEXIS 247] (Appeals Bd. en banc), we determined that “amputations,” as used in section 4656(c)(2)(C) meant severance or removal of limb, part of limb, or other body appendage. The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Here, our review of the record indicates that because applicant suffered an amputation, he may fall within the enumerated categories in Labor Code section 4656(c)(3). As the issue at trial was whether applicant was entitled to retroactive temporary disability indemnity benefits, the issue was not raised at the trial in this matter, and it has not been decided. We cannot interpose our own findings without violating the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals*

Bd. (2001) 89 Cal.App.4th 1284, 1295 [108 Cal. Rptr. 2d 1, 66 Cal.Comp.Cases 584] citing *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158, 97 Cal. Rptr. 2d 852). Thus, for the purposes of clarity, we will defer the issue so that the issue can be raised by the parties at the trial level in the first instance.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of August 11, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of August 11, 2023 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

8. Applicant is entitled to temporary disability benefits commencing on March 11, 2022, less reimbursement to EDD for overlapping periods, and less permanent disability advances paid for the same period. The issue of whether applicant is entitled to more than 104 weeks of temporary disability benefits under Labor Code section 4656(c)(3) is deferred.

10. Duplicate payments to applicant were made by defendant and EDD from February 6, 2022 through March 10, 2022, so that EDD's recovery would come from indemnity owed to applicant. EDD is entitled to reimbursement paid at a differential rate from February 6, 2022 to April 13, 2022, and at the full rate of \$1,284.00 per week from April 14, 2022 through December 2, 2022, in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the case of a dispute.

AWARD

Temporary disability from March 11, 2022 and continuing, payable at \$1,305.86 per week, less reimbursement to EDD for overlapping periods, and less permanent disability advances paid by defendant during the same period, and less reasonable attorney's fees of 15% of the net value of the temporary disability indemnity awarded herein, payable to the Gimbel Law Firm, PC. The issue of whether applicant is entitled to more than 104 weeks of temporary disability benefits under Labor Code section 4656(c)(3) is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

**SALVADOR MORALES
GIMBEL LAW FIRM PC
BAVA & ASSOCIATES, PC**

AS/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On 9/7/23, Defendant filed a timely (if Rule 10605(a)(2) is applied), verified Petition for Reconsideration (EAMS Doc. ID: 48068904) of the undersigned's Findings and Award that issued on 8/11/23. (EAMS DOC ID: 77041888).

II

FACTS

Applicant, Salvador Morales, while employed on 3/12/21 at Salinas, California, by Taylor Fresh Foods, then insured by American Zurich Insurance Company, sustained injury AOE/COE to his left fingers and psyche and claims to have sustained injury AOE/COE to his left hand (deferred) and left upper extremity (deferred). (Findings & Award, 8/11/23, Finding 1, at p. 1)

The matter was tried on 5/2/23 and submitted on 5/16/23. (MOH & SOE, 5/2/23 Trial, at p. 1.) The primary issues were injury AOE/COE to the applicant's psyche, temporary disability, permanent and stationary status, treatment for the applicant's psyche, EDD's lien, and whether psych QME Hosein Tahami, D.O.'s opinions constitute substantial medical evidence. The undersigned found that Dr. Tahami's opinions constituted substantial medical evidence and, on that basis, found compensable injury to the applicant's psyche, need for medical treatment, and temporary disability. (F&A, Findings 1, 8-11, 13, at pp. 1-2) The court awarded "temporary disability from 3/11/22 and continuing, payable at \$1,305.86 per week, subject to the 104-week cap, less reimbursement to EDD for overlapping periods, and less permanent disability advances paid by Defendant during the same period, and less reasonable attorney's fees of 15% of the net value of the temporary disability indemnity awarded herein, payable to the Gimbel Law Firm, PC." (F&A, at p. 3.) It is from the above findings and award that Defendant appeals for reconsideration.

III DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." [City of San Diego v. WCAB (Rutherford) (1989) 54 Cal. Comp. Cases 57 (writ den.); Smales v. WCAB (1980) 45 Cal. Comp. Cases 1026 (writ den.)] To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

The court found that the applicant sustained injury AOE/COE to his psyche pursuant to Labor Code section 3208.3. Per QME Dr. Tahami, actual events of employment (the partial/full amputation of all fingers on his left hand) were predominant as to all causes combined of the applicant's adjustment disorder with depressed and anxious mood. R/O PTSD. (Joint Ex. J-7: Report, Hosein Tahami, D.O., 8/4/22, at p. 9) Dr. Tahami diagnosed the disorder utilizing the DSM-IV, as required by section 3208.3. (Joint Ex. J-6: Deposition of Hosein Tahami, D.O., 10/12/22, at pp. 7:13-21, 15:19-17:5, 16:4-21, and 19:24-20:23)

The court's decision must be based upon substantial evidence. In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [McAllister v. WCAB (1968) 69 Cal.2d 408, 413, 416-417, 419; 33 Cal. Comp. Cases 660] To be substantial evidence, a medical opinion must also be based on relevant facts, adequate medical histories or examinations, on correct legal theories, and not on "surmise, speculation, conjecture, or guess." (Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604, 620-621.) Dr. Tahami's opinions were given within reasonable medical "certainty," although probability is sufficient. (Joint Ex. J-7, supra, at p. 9)

Based on a thorough review of the record and consideration of the applicant's credible testimony, the court concluded that Dr. Tahami's opinions constitute substantial medical evidence. Dr. Tahami examined the applicant; obtained a history of the injury; noted the applicant's complaints; listed the records reviewed; took the employee's medical history; reported his findings; provided a diagnosis; opined on work limitations, causation of disability,

and P&S status; provided a determination of the percentage of the psych injury caused by actual events of employment; and gave reasons for his opinions. (See Rule 10682.)

While the applicant was declared MMI/P&S for his fingers on 2/4/22 by QME Jason Hymes, M.D. (Joint Ex. J-3: Report, Jayson Hymes, M.D., 2/4/22), Dr. Tahami opined that the applicant was not yet P&S. Dr. Tahami stated that the applicant is not temporarily totally disabled, but he would not be able to work at Taylor Farms or with a trim press. (Joint Ex. J-7, supra, at p. 9)

“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.” (Huston v. WCAB (1979) 95 Cal.App.3d 856, 868; 44 Cal. Comp. Cases 798) Applicant continues to have significant work restrictions and requires further medical treatment. Applicant is still within his healing period for his psychological injury. It is Defendant's burden to prove that modified work was available and was offered. If the employer does not make such a showing, the Applicant is entitled to temporary total disability indemnity. (General Foundry Serv. v. WCAB (1986) 42 Cal.3d 331, 339, fn. 5) Applicant is entitled to temporary disability from 3/11/22, subject to the 104-week cap, and less reimbursement to EDD for overlapping periods, and less permanent disability advances paid for the same period.

In a supplemental report, Dr. Tahami determined that psychological factors contributed to the applicant being temporarily disabled. Dr. Tahami stated, “the claimant was experiencing significant depression, anxiety, and avoidance. He was having major decline in sleep. He experienced nightmares and night terrors, often waking up screaming with night sweats. Many times, he had tried to stay awake fearing that he may continue with the same dreams. His energy level had declined significantly. He was quite ashamed of displaying his left upper extremity, left hand fearing judgment by others. He continuously hid his left hand; thus, the psychological symptoms clearly contributed to his need to be off work.” (Joint Ex. J-4: Report, Hosein Tahami, D.O., QME, 1/16/23, at pp. 2-3)

With respect to EDD's lien and Finding 10 of the F&A, the undersigned would amend the Finding to make it clear that duplicate payments to the applicant were made by Defendant and EDD from 2/6/22 through 3/10/22, so EDD's recovery for that period would come from indemnity owed to the applicant.

The court would also correct the typographical error indicating that EDD would be reimbursed \$52,135.00, which was actually the amount EDD has paid to the applicant. The total amount due to EDD is to be determined. Subject to proof, EDD paid SDI at a differential rate from 2/6/22 to 4/13/22 and at the full rate of \$1,284.00 from 4/14/22 through 12/2/22. Defendant is entitled to credit for payments made to the applicant and to EDD against its liability for indemnity.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied, with the exception of the two clarifications made above.

[Date omitted]

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation Judge

Served 10/2/2023