

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

MARK JUDGE, *Applicant*

vs.

**TOSCA SERVICES, LLC; OLD REPUBLIC INSURANCE, administered by
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ14365258
Van Nuys District Office**

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

Defendant Tosca Services, LLC, insured by Old Republic Insurance (defendant) seeks reconsideration of the July 12, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a forklift driver/operations driver on September 25, 2020, sustained industrial injury to his right eye. The WCJ found in relevant part that applicant sustained temporary total disability from November 1, 2020, to March 31, 2021, and September 14, 2021, to the present and continuing, up to a maximum of 240 weeks, and that applicant's injury arose out of either a chemical burn to the eye or high-velocity eye injury under Labor Code¹ Section 4656(c)(3)(F) and (G).

Defendant contends that the medical record does not support the award of temporary disability from November 1, 2020 to March 31, 2021, that the injury was not the result of either a chemical burn or a high-velocity eye injury, and that the F&A is unclear as to whether defendant is to hold attorney's fees in trust.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ All further references are to the Labor Code unless otherwise noted.

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 discussed below, we will grant reconsideration, rescind the F&A, and substitute a new Findings and Award which restates the WCJ's decision except that we will defer the issues of temporary disability between November 1, 2020 and March 31, 2021, and whether applicant sustained a high-velocity eye injury or chemical burn for purposes of section 4656(c)(3). We will then return the matter to the trial level for development of the record.

FACTS

Applicant sustained injury to his right eye while employed as a forklift driver by defendant on September 25, 2020.

On December 19, 2020, applicant sought medical treatment at the emergency department at Loma Linda University Medical Center (LLUMC), noting a loss of vision in his right eye. (Ex. 8, Report from Mary Ann Savory NP (Emergency Department), dated December [1]9, 2020.) Applicant reported that two months previously he had sustained injury due to a foreign body in his eye. Applicant noted that he had reported the injury and had received a telephone visit with a doctor who prescribed antibiotic eyedrops. (*Ibid.*)

Also on December 19, 2020, optometrist Nancy Kwan, O.D., evaluated applicant and diagnosed corneal keratitis, severe on the right, "likely due to contact lens overwear/abuse." (Ex. 9, Report of Nancy Kwan, O.D., dated December 9, 2020.) Ophthalmologist Alanna James, M.D., also evaluated applicant and noted that applicant "works with chemicals every Sunday and could have gotten some chemicals in his eye, despite always wearing safety glasses, but unsure which eye if any and did not remember any significant pain afterwards." (Ex. 2, Report of Boban Joseph, M.D., dated February 28, 2022, at p. 21.) Applicant was prescribed medication and discharged. (Ex. B, Subpoenaed records from Loma Linda Hospital, dated December 19, 2020, at p. 19.)

On January 14, 2021, defendant denied liability for applicant's claim of injury. (Ex. C, Notice of Denial, dated January 14, 2021.)

On February 11, 2021, applicant was evaluated by Primary Treating Physician (PTP) Gabriel del Campo, M.D. The PTP noted applicant's report of a bilateral eye injury where "something went into right eye while operating forklift." (Ex. 5, Report of Gabriel Martin del

Campo, M.D., dated February 11, 2021, at p. 1.) Dr. del Campo noted his impression of bilateral eye chemical irritation and right eye corneal opacity of undetermined etiology. (*Id.* at p. 2.) However, Dr. del Campo also opined that applicant could “perform usual work.” (*Ibid.*)

On February 25, 2021, Dr. del Campo reevaluated applicant, and noted that applicant had been seen at LLUMC and had been informed by an ophthalmologist that he needed surgery to the right eye. (Exhibit 4, Report of Gabriel Martin del Campo, M. D., dated February 25, 2021, at p. 1.) Dr. del Campo updated his diagnosis to reflect an unspecified corneal scar and opacity, and bilateral acute toxic conjunctivitis. (*Id.* at p. 2.)

On September 13, 2021, defendant terminated applicant’s employment. (Ex. A, Email regarding confirmation of date of termination, dated August 28, 2023.)

On February 28, 2022, Qualified Medical Evaluator (QME) Boban Joseph, M.D., evaluated applicant in ophthalmology. (Ex. 2, Report of Boban Joseph, M.D., dated February 28, 2022.) Applicant reported a history of injury as follows:

The patient states that when he was driving the forklift and lifting some pallets above his head, something fell into his right eye. Mr. Judge felt a sense of irritation to the right eye. However, he ignored it for the moment and then later washed it all out. The patient is a contact lens wearer and he removed the contact lens at the time of irrigation. Mr. Judge felt better for a little while, but the next morning, it started bothering him again. Mr. Judge reported toward his supervisor and he was directed to talk to a doctor on a telemedicine call.

(*Id.* at p. 24.)

Dr. Joseph reviewed the submitted medical record, conducted a clinical evaluation, and ultimately reached a medical impression that included corneal opacity, corneal vascularization of the right eye, and a history of “possible foreign body versus contact lens overwear, right eye.” (*Id.* at p. 27.) Dr. Joseph concluded that applicant’s medical findings were consistent with his report of injury, that applicant sustained a specific injury, and that applicant was “not completely disabled at this time,” and “could work with some restrictions.” (*Ibid.*) Dr. Joseph opined that “temporary functional work restrictions are deferred to the primary treating physician. Absent modified duty, the patient is temporarily totally disabled.” (*Id.* at p. 28.)

On July 14, 2022, ophthalmologist Faris Ghosheh, M.D., evaluated applicant and noted applicant’s reported history of injury wherein “a foreign object went into his right eye.” (Ex. 7,

Report of Faris Ghosheh, M.D., dated July 14, 2022, at p. 1.) Applicant's corneal scar and opacities were noted to be "severe," and would require a full corneal transplant. (*Id.* at p. 2.)

On December 20, 2022, QME Dr. Joseph reevaluated applicant. (Ex. 1, Report of Boban Joseph, M.D., dated December 20, 2022.) The QME's report restated applicant's history of injury as follows:

Poor vision in the right eye after an injury sustained on September 25, 2020. The applicant reportedly was driving a forklift, stacking pallets, and something fell into his right eye. He tried to remove it, was not sure if he was able do it successfully. He tried to blink it out but that did not help either. The patient went to the bathroom and washed the eye out; however, he continued to have irritation in the eye. He was subsequently seen by his optometrist, Dr. Quan, who told him that it was possibly related to contact lens overwear. He was then referred to Loma Linda University, where multiple doctors saw him. He was noted to have corneal vascularization and an opacity in the right eye. He was asked to return for further care but, according to the patient because of neuropathic problems, he was not able to see doctors there again. He was subsequently seen by Dr. Ghosheh in Mission Viejo, California, who has recommended corneal transplantation for the right eye.

(*Id.* at p. 11.)

Dr. Joseph further noted his clinical reevaluation of applicant and his review of the submitted medical record. In response to interrogatories from the parties, the QME reiterated his opinion that applicant's "medical findings are consistent with the original injury as reported by the applicant." (*Id.* at p. 17.) With respect to the issue of disability, the QME opined that applicant was not currently disabled, but that "there will be restrictions to his work because of his poor binocular vision," and that applicant was "temporarily partially disabled in the immediate aftermath of injury." (*Ibid.*)

On April 24, 2023, ophthalmologist Dr. Ghosheh certified applicant for California EDD state disability benefits beginning July 14, 2022. (Ex. 2, California State Disability documents, various dates.)

On August 29, 2023, defendant denied temporary total disability benefits to applicant due to a lack of records from a treating physician supporting time lost due to the injury. (Ex. D, Notice of Denial, dated August 29, 2023.)

On August 30, 2023, PTP Dr. del Campo authored an interim PR-2 report in which he noted an assessment of "bilateral eye chemical irritation," and a right corneal opacity deemed to

be industrial by the QME. (Ex. 3, Report of Gabriel Martin del Campo, M.D., dated August 30, 2023, at p. 3.) Dr. del Campo noted that applicant was able to return to full duty.

On December 14, 2023, Kris Storkersen, M.D., of the Arrowhead Regional Medical Center issued a Certificate of Disability and/or Return to School/Work noting that applicant would be “unable to drive forklift with monocular vision,” and “will be off until corneal transplant 3/2024.” (Ex. 6, Report of Kris Storkersen, M.D., dated December 14, 2023.)

On April 25, 2024, the parties proceeded to trial and stipulated to industrial injury to the right eye, and that defendant had commenced TTD indemnity payments as of December 14, 2023. (Minutes of Hearing and Summary of Evidence (Minutes), dated April 25, 2024, at p. 2:2.) Applicant alleged he was temporarily totally disabled from November 1, 2020 to March 31, 2021, and again from September 14, 2021 through the present and continuing. (*Id.* at p. 2:13.) Applicant offered a brief statement into the record, and the WCJ ordered the matter submitted for decision the same day.

On July 12, 2024, the WCJ issued his F&A, finding in relevant part that applicant’s industrial injury caused temporary disability from November 1, 2020 to March 1, 2021, and again from September 14, 2021 to the present and continuing. (Finding of Fact No. 7.) The WCJ also determined that because applicant’s injury was the result of either a high-velocity eye injury or a chemical burn, the provisions for up to 240 weeks of temporary disability available under section 4656(c)(3)(F) or (G) would apply.

Defendant’s Petition contends that no medical evidence supports temporary disability between November 1, 2020 and March 31, 2021. (Petition, at p. 4:13.) Defendant further contends that no medical evidence establishes that applicant’s injuries were the result of a chemical burn or a high velocity eye injury, obviating the extended periods of temporary disability available under section 4656(c)(3). (*Id.* at p. 5:8.) Defendant also contends the F&A does not specify whether attorney’s fees are to be held in trust by defendant.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.” Here, according to Events, the case was transmitted to the Appeals Board on August 23, 2024, and the next business day that is 60 days from the date of transmission is October 22, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on the next business day after October 22, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on August 23, 2024, and the case was transmitted to the Appeals Board on August 23, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers’ Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 23, 2024.

II.

Applicant alleges he was temporarily totally disabled from November 1, 2020 to March 31, 2021, and again from September 14, 2021 to the present. The WCJ agreed and awarded corresponding temporary disability benefits. (Finding of Fact No. 7.) Defendant's Petition challenges the award of temporary disability between November 1, 2020 and March 31, 2021, contending the award is not supported by contemporaneous medical evidence. (Petition, at p. 4:13.)

The record establishes that applicant sustained an industrial injury to his right eye on September 25, 2020, reported the injury, and received a telehealth evaluation. (Minutes, at p. 2:2; Ex. 8, Report from Mary Ann Savory NP (Emergency Department), dated December 9, 2020.)

On December 19, 2020, applicant sought emergency medical treatment at the LLUMC, noting difficulty with a loss of vision in the right eye. (Ex. B, Subpoenaed records from Loma Linda Hospital, p. 15.) Applicant was referred to an ophthalmologist for continued care without a determination of return to work status.

On February 11, 2021, applicant sought treatment with PTP Dr. del Campo, who noted industrial injury and recommended applicant continue to treat with the ophthalmologist at Loma Linda University. Applicant was noted to be able to return to his "usual work." (Ex. 5, Report of Gabriel Martin del Campo, M.D., dated February 11, 2021, at p. 3.) A February 25, 2021 follow-up report from Dr. del Campo deferred applicant's work status to the University Medical Center ophthalmologist. (Exhibit 4, Report of Gabriel Martin del Campo, M.D., dated February 25, 2021, at p. 2.)

QME Dr. Joseph evaluated applicant on February 28, 2022. Applicant reported that he had returned to work from approximately April, 2021 to September 2021. (Ex. 1, Report of Boban Joseph, M.D., dated December 20, 2022, at p. 11.) The QME identified industrial injury, and recommended applicant continue his treatment with the corneal specialists at Loma Linda University. (Ex. 2, Report of Boban Joseph, M.D., dated February 28, 2022, at p. 27.) With respect to applicant's disability status, the QME deferred "temporary functional work restrictions" to applicant's PTP, but also noted that "absent modified duty, the patient is temporarily totally disabled."

On July 14, 2022, evaluating physician Dr. Ghosheh reiterated that applicant needed a corneal transplant, but offered no opinion as to applicant's return to work status. (Ex. 7, Report of Faris Ghosheh, M.D., dated July 14, 2022.)

On December 20, 2022, Dr. Joseph reevaluated applicant and reiterated his opinion that applicant sustained industrial injury. With respect to applicant's disability status, Dr. Joseph stated that applicant was not currently disabled, but that "there will be restrictions to his work because of his poor binocular vision." (Ex. 1, Report of Boban Joseph, M.D., dated December 20, 2022, at p. 17.) Dr. Joseph also opined that applicant was "temporarily partially disabled in the immediate aftermath of injury." (*Ibid.*) However, Dr. Joseph did not identify any current or prior work restrictions.

On April 24, 2023, ophthalmologist Dr. Ghosheh completed an EDD state disability certification stating that applicant was medically disabled commencing July 14, 2022. (Ex. 2, California State Disability document, various dates, p. 2.) However, Dr. Ghosheh's May 23, 2023 response to an EDD "Request for Medical Information," stated that applicant had been "incapable of performing his/her regular work" since September 25, 2020. (*Id.* at p. 5.)

On December 14, 2023, evaluating physician Kris Storkersen, M.D., completed a disability certificate indicating applicant was restricted from driving a forklift and could return to work/school as of March, 2024 pending corneal transplant surgery. (Ex. 6, Report of Kris Storkersen, M.D., dated December 14, 2023.) Defendant initiated TTD payments to applicant the same day. (Minutes, at p. 2:11.)

The WCJ's Report states that with respect to the claimed periods of temporary total disability, "the only reasonable inference that could be made was that (1) modified duty was absent, and (2) absent modified duty, it is probable that Mr. Judge was at all relevant times temporarily totally disabled." (Report, at p. 9.)

We agree with the WCJ that defendant bears the burden of establishing that modified work within applicant's restrictions was available and offered during the claimed period of temporary disability of November 1, 2020 to March 31, 2021. (*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.2d 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].)

We conclude, however, that the existing record does not adequately address the issue. The record offers conflicting opinions as to applicant's disability status, including the opinion of Dr. del Campo in both of his reports of February, 2021 that applicant could return to his usual work, but also deferring applicant's work status to the treating ophthalmologist at LLUMC. (Ex. 5, Report of Gabriel Martin del Campo, M.D., dated February 11, 2021, at p. 3; Ex. 4, Report of Gabriel Martin del Campo, M.D., dated February 25, 2021, at p. 3.) The record regarding assigned work restrictions and whether the employer was able to accommodate those restrictions is similarly ambiguous. While the December 20, 2022 report of QME Dr. Joseph posits the existence of work restrictions, none are identified with specificity. (Ex. 1, Report of Boban Joseph, M.D., dated December 20, 2022, at p. 17.) And while the QME states applicant was temporarily partially disabled following the industrial injury, the QME reporting does not disclose the applicable restrictions or date those restrictions applied. (*Ibid.*) In the absence of substantial medical opinion as to applicant's disability status during the claimed periods of TTD, and in the absence of evidence that the employer offered a return to work and/or modified duties during this period, we conclude the record is inadequate to fully address the temporary total disability claimed between November 1, 2020 to March 31, 2021.

We are similarly persuaded that the record is deficient with respect to the mechanism of injury. The WCJ determined that applicant is entitled to the extended periods of temporary total disability available under section 4656(c)(3) because his injury involved either a high-velocity eye injury or a chemical burn to the eyes. (Lab. Code, § 4656(c)(3)(F) & (G).) Pursuant to section 4656(c)(3) either mechanism of injury would allow applicant to receive TTD benefits up to 240 compensable weeks within five years from the date of injury.

The records of LLUMC from December 19, 2020, reflect a history of injury involving a foreign object in his eye. (Ex. B, Subpoenaed records from Loma Linda Hospital, various dates, at p. 15 ["2 months ago he had a foreign body in his eye rubbed his eye"].) However, the ophthalmology consult notes of Alanna James, M.D., also on December 19, 2020, observed that applicant "works with chemicals every Sunday and could have gotten some chemicals in his eye, despite always wearing safety glasses, but unsure which eye if any and did not remember any significant pain afterwards." (Ex. 2, Report of Boban Joseph, M.D., dated February 28, 2022, at p. 21.) Two months later applicant reported to PTP Dr. del Campo that the injury involved a foreign body falling into his eye. (Ex. 5, Report of Gabriel Martin del Campo, M.D., dated February 11,

2021, at p. 1 [“something went into right eye while operating forklift”].) In his reevaluation of applicant in December, 2022, Dr. Joseph again concluded that applicant’s “need for medical care stems from the industrial injury,” based on applicant’s reported history of an object falling into his eye while he was stacking pallets. (Ex. 1, Report of Boban Joseph, M.D., dated December 20, 2022, at p. 11.)

Thus, while it is clear from the medical record and the stipulation of the parties that applicant sustained an industrial injury to his right eye, the specific mechanism of injury has not been identified to a reasonable medical probability. (See Lab. Code, § 3202.5; *McAllister v. Workmen’s Comp. App. Bd.* (1968) 69 Cal.2d 408, 413, 416–417, 419 [33 Cal.Comp.Cases 660].) Moreover, to the extent that the applicant alleges his disability was the result of a high-velocity eye injury, there is no substantive discussion in the medical record of whether such injury was “high-velocity” as contemplated in section 4656(c)(3)(F). (See, e.g., *Glick v. Knight-Swift Transportation Holdings* (2022) 88 Cal.Comp.Cases 145 [2022 Cal. Wrk. Comp. P.D. LEXIS 306]; *Glover v. ACCU Construction* (June 15, 2009, ADJ665716 (BAK 0154393) [2009 Cal. Wrk. Comp. P.D. LEXIS 301].)

In the absence of a discussion of the mechanism of injury, expressed to a reasonable medical probability, we are persuaded that the record does not afford a sufficient basis for adjudication of whether the extended period of temporary disability available under section 4656(c)(3)(F) or (G) would apply herein.

It is well established that decisions by 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 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (*Tyler*); see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . .

the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete.” (*Id.* at p. 141.) The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers’ compensation claims. (*Tyler, supra*, at p. 928.)

Here, following our independent review of the record occasioned by defendant’s Petition, we are persuaded that the medical reporting must be developed pursuant to section 5701 to adequately address the issue of whether applicant was temporarily partially or totally disabled during the period November 1, 2020 to March 31, 2021. We are further persuaded that the record must be developed to ascertain the mechanism of injury and expressed to a reasonable medical probability. (*McAllister, supra*, 69 Cal.2d 408, 413 [“to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability].)

In addition to the above, we find it necessary to admonish defense counsel for citing evidence outside the evidentiary record. Defendant’s Petition makes repeated reference to applicant’s deposition testimony, which was not admitted into the record. Workers’ Compensation Appeals Board Rule 10945(b) requires that “every petition for reconsideration...support its evidentiary statements by specific references to the record.” (Title 8, Cal. Code Regs., § 10945(b).) We therefore admonish attorney Janet John and Manning & Kass, Ellrod, Ramirez, Trester, LLP, and expect future compliance with our rules.

Finally, we note that defendant’s Petition raises the issue of whether attorney’s fees should be withheld from the award of temporary disability. However, as the WCJ notes in the Report, “[a]ttorney fees were not addressed in the Findings and Award because it was not one of the submitted issues, and applicant’s former counsel of record did not appear at the either the trial setting conference or the noticed trial hearing to request that the issue be raised.” (Report, at p. 11.) We therefore decline to disturb the WCJ’s award of benefits to the applicant.

Based on the above, we will grant defendant’s petition, rescind the F&A, and substitute new Findings of Fact that restate the WCJ’s decision, except that we will defer the issues of temporary disability between November 1, 2020, and March 31, 2021, and whether applicant sustained a high-velocity eye injury or chemical burn as described in section 4656(c)(3). We will then return this matter to the WCJ for further proceedings.

We recommend the WCJ direct the parties to augment the record with supplemental medical reporting addressing the issues of the periods of disability and/or any applicable work restrictions arising out of applicant's industrial injury, as well as the periods during which the disability or restrictions would apply, and any corresponding return to work offers, if any. We also recommend the WCJ direct the parties to augment the record with respect to the mechanism of injury, expressed to a reasonable medical probability, as relevant to the question of whether the extended periods of temporary disability of section 4656(c)(3) are available herein.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 12, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award dated July 12, 2024 is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Mark Judge, while employed on September 25, 2020, as a forklift driver/operations driver, Occupational Group Number 351, at San Bernardino, California, by Tosca Services, LLC, sustained injury arising out of and in the course of employment to his right eye.
2. At the time of the injury, the employer's workers' compensation carrier was Old Republic Insurance, administered by Gallagher Bassett Services.
3. At the time of the injury, the employee's earnings were \$1,108.62 per week, warranting indemnity rates of \$739.08 for temporary total disability (TTD) and \$290.00 for permanent disability.
4. The employer has furnished some medical treatment.
5. No attorney fees have been paid, and no attorney fee arrangements have been made.
6. Defendants picked up TTD as of December 14, 2023.
7. The injury caused Temporary disability, for which indemnity is due at the rate of \$739.08 per week for the period September 14, 2021, to the present and continuing, up to a maximum of 104 weeks, less credit for sums paid, and less reimbursement to the California Employment Development department (EDD) for all state disability insurance benefits

paid by during this period at the rate of \$562.00 per week, as shown in EDD's benefits printout.

8. The injury will require further medical treatment, subject to utilization review.
9. The issue of temporary disability for the period of November 1, 2020 to March 31, 2021 is deferred.
10. The issue of whether applicant is entitled to a maximum of 240 weeks of temporary total disability because he sustained a chemical burn or high-velocity eye injury pursuant to Labor Code section 4656(c)(3)(F) & (G) is deferred.
11. More evidence will be required to determine whether there was unreasonable delay of benefits, for which penalties are due under Labor Code Sections 4650 and 5814, so that issue is deferred.

AWARD

AWARD IS MADE in favor of **MARK JUDGE** against **TOSCA SERVICES LLC**

of:

- a. Temporary disability, for which indemnity is due at the rate of \$739.08 per week for the period September 14, 2021, to the present and continuing, up to a maximum of 104 weeks, less credit for sums paid, and less reimbursement to the California Employment Development department (EDD) for all state disability insurance benefits paid by during this period at the rate of \$562.00 per week, as shown in EDD's benefits printout.

IT IS FURTHER ORDERED and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2024

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

**MARK JUDGE
LAW OFFICE OF JAMIE S. ADLER
MANNING AND KASS**

SAR/abs

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