

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

**WALTER ZALDIVAR, *Applicant***

**vs.**

**SAN MATEO COUNTY TRANSIT DISTRICT,  
permissibly self-insured, adjusted by THE CITIES GROUP, *Defendants***

**Adjudication Number: ADJ18656564  
Oakland District Office**

**OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued on August 30, 2024, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) while employed as a bus driver on June 14, 2023, applicant sustained injury arising out of and in the course of employment to his right shoulder; and (2) the injury caused an additional period of temporary disability beginning on April 19, 2024 and continuing indefinitely thereafter.

The WCJ awarded applicant temporary disability benefits from April 18, 2024 and continuing indefinitely thereafter.

Defendant contends that the finding that applicant is entitled to temporary disability benefits beginning on April 19, 2024 and continuing indefinitely is unsupported by substantial medical evidence.

We received an Answer.

The WCJ filed a Report and Recommendation on the Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

**BACKGROUND**

On June 17, 2024, the matter proceeded to trial on the following relevant issues:

1. Temporary disability with the applicant claiming entitlement from December 1, 2023 through the present date and continuing.

2. Permanent and stationary date with the applicant claiming that he is not permanent and stationary and defendant claiming a permanent and stationary date of December 1, 2023 pursuant to the opinion of Dr. Ting.  
(Minutes of Hearing and Summary of Evidence, June 17, 2024, p. 2:13-16.)

The WCJ admitted the Report of PQME Dr. Arthur Ting dated December 1, 2023, into evidence. (*Id.*, p. 2:25.) It includes the following:

**PERMANENT AND STATIONARY**

The claimant has reached maximum medical improvement and therefore is permanent and stationary. It has been approximately 6 mos since the claimant first injured his right shoulder. The diagnosis of a torn biceps tendon no retraction and surgical consult chose to treat conservatively and nonoperatively. The claimant has undergone physical therapy, ns aids and HEP and now is permanent and stationary. (Ex. 103, Report of PQME Dr. Arthur Ting, December 1, 2023, p. 11.)

The WCJ admitted the Report of Dr. Warren King dated March 18, 2024 into evidence. (*Id.*, p. 3:7.) It includes the following:

The qualified medical examiner felt he should be referred to an orthopedic surgeon.

...

Assessment:

1. Right shoulder possible rotator cuff tear.
2. Right shoulder ruptured proximal biceps tendon.
3. Right shoulder impingement syndrome.

Discussion:

A lengthy and comprehensive discussion was carried out with the patient regarding the nature of his condition and the treatment options and alternatives available him. I would like to see an MRI of his right shoulder to rule out a rotator cuff tear. This is perhaps the reason he has not improved. Usually, a proximal biceps tendon tear is not painful. His work status is determined by the QME physician. . . . If he does indeed have a rotator cuff tear, then surgery will be warranted [and] would explain the reason he has not improved despite a lengthy amount of time.

(Ex. 4, Report of Dr. Warren King, March 18, 2024, pp. 1-2.)

In the Opinion on Decision, the WCJ states:

At trial, applicant testified on direct examination that he has been a bus driver for 24 years with this employer, and he likes the job and wants to return.

On 6/14/23, he was driving his morning route and was making a left turn and pulled his right shoulder. He drove the bus back and his supervisor took him to Kaiser and he was taken off work.

He got therapy in Foster City, but it didn't work. He got an x-ray and asked Dr. Moody for an MRI. Dr. Moody then sent him to see a surgeon, who told him that his shoulder was fine and asked applicant if he wanted to get a cortisone shot, which he received.

He was recommended for further PT and seen by Dr. Moody. Two days later he got a call from Kaiser and he was told that everything was cancelled because the claim was denied.

He saw scheduled to see Dr. Ting on 9/29/23, and Dr. Ting never showed up. The appointment was reset for 12/1/23 with Dr. Ting. Applicant told Dr. Ting that he was upset because he was waiting for benefits and the QME appointment. He told Dr. Ting that the shoulder was bothering him, and Dr. Ting said that the problem was the bicep. Dr. Ting didn't tell him about a tear in the bicep. Dr. Ting recommended that he get PT.

Dr. Ting never asked him anything about if surgery was offered. Applicant's attorney quoted from the 4/19/24 report of Dr. Ting (Exh. 101) at p. 2: "During that time, Mr. Zaldivar was clear on the options for surgery and at that time chose not to pursue surgical options and had a cortisone injection." Applicant stated that this is not true. He was told that by Dr. Haber that he was not going to perform surgery, but applicant never declined surgery. Applicant did not have a discussion regarding shoulder surgery with Dr. Ting. Dr. Ting didn't bring up surgery with applicant. Dr. Ting told applicant he would need additional therapy.

The injury was accepted, and he returned to work in January. Dr. Rakkar was his new primary treating physician, and Dr. Rakkar told him he should not be working because of the bicep tear. He was then seen by Dr. Saunders, because Dr. Rakkar became unavailable due to military service. Dr. Rakkar took him off of work.

He then saw Dr. King, who told him the problem was a tear in his bicep. He wanted applicant to get an MRI which hasn't happened yet. He hasn't been contacted by the carrier regarding an MRI.

If surgery was an option, he would undergo it.

On cross-examination, applicant stated that the 8/31/23 examination was with Dr. Haber, who told him he didn't need surgery, and told him his shoulder was fine. He discussed there was a tear, but applicant understood this to be in his shoulder.

The first MRI was done with Dr. Moody, after he had an xray. The surgeon told him of an MRI. He has a disc that was the xray, but not an MRI. Applicant thought the MRI was on the disc that he gave to Dr. King.

At Dr. Ting's 12/1/23 exam, he told him about the Dr. Haber consultation, and discussions he had with Dr. Haber and the bicep issue. He told Dr. Ting that Dr. Haber didn't recommend surgery at that time.

He applied for EDD benefits, and Dr. Saunders certified him for SDI. The benefits would start on 3/7/24, if he gets them. He hadn't heard a final response yet. (Minutes of Hearing and Summary of Evidence, June 17, 2024.)

Medically, applicant was seen by Dr. Daniel Haber on August 31, 2023 (Exh. 5), wherein Dr. Haber reviewed a right shoulder MRI which showed a "rupture of the proximal long head of the (right) biceps tendon." He stated that applicant was agreeable to "taking a conservative approach for now," and he then provided applicant with a cortisone injection.

Applicant then was evaluated by Dr. Arthur Ting as a QME on December 1, 2023. In his first report (Exh. 101), Dr. Ting diagnosed applicant with a "right shoulder long head of biceps tear without biceps retraction, impingement syndrome, and interstitial tear of the supraspinatus." He also found some adhesive capsulitis of the right shoulder. He found these conditions to be permanent and stationary, noting that applicant "chose to treat conservatively and nonoperatively." Dr. Ting provided applicant with 3% Whole Person Impairment to the right shoulder, based upon measurements for loss of range of motion. Under future medical care, Dr. Ting did not discuss any need for surgery.

Dr. Ting provided a supplemental report of January 31, 2024 (Exh. 102), in which he stated that his reference at p. 2 of his initial report of December 1, 2023 to a surgical consultation on September 22, 2023 with Dr. Haber was based on applicant's retelling of the surgical consultation, and that Dr. Ting did not actually review the surgical consult report. He did not change any opinions in the January 31, 2024 report.

Applicant was then seen for treatment with Dr. George Rakkar. In his March 7, 2024 report, Dr. Rakkar diagnosed the right biceps tendon injury, with pain in the right shoulder. Dr. Rakkar recommended that applicant "see orthopedics as soon as possible for surgical evaluation." He was then seen by Dr. Warren King on March 18, 2024 (Exh. 4) who requested to review a right shoulder MRI, and deferred work status to the QME. Dr. King stated that if the MRI showed a rotator cuff tear, then applicant would be a surgical candidate.

Applicant then had his treatment taken over by Dr. James Saunders, who first reported on April 18, 2024 (Exh. 2), wherein he found that applicant is recommended off work by Dr. Rakkar until June 30, 2024. Dr. Saunders also diagnosed a right biceps tendon injury. Although Dr. Saunders refers to off work status by Dr. Rakkar, the only report in evidence from Dr. Rakkar of March 7, 2024 does not discuss applicant's work status.

Dr. Ting provided his final report on April 19, 2024 (Exh. 103), in which he determined that the March 7, 2024 report from Dr. Rakkar did not change his opinion on permanent and stationary status. He also stated that as of an August 24, 2023 report of Dr. Moody, applicant “was clear on the options for surgery and at that time chose not to pursue surgical options and had a cortisone injection.” Dr. Ting then referred to literature which supports conservative, non-surgical treatment for a biceps tendon rupture, concluding that there is no change in his opinion that applicant is at maximum medical improvement (MMI). He also, however, allowed for the possibility that applicant could be found to be in need of surgical intervention, which would result in a new period of temporary disability.

The final medical report is the May 30, 2024 report of Dr. Saunders (Exh. 1), along with a work status report which finds applicant unable to work until June 30, 2024. Dr. Saunders also referred applicant for a right shoulder MRI.

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At the time that applicant was evaluated by Dr. Ting on December 1, 2023, applicant was determined by Dr. Ting to have reached MMI. There is no reporting which supports temporary disability status until the April 18, 2024 report of Dr. Saunders. Dr. Ting’s report of April 19, 2024 does not review any reporting which finds applicant to be temporarily disabled. I also note that although Dr. Ting provides support for the proposition that applicant should not undergo surgical intervention, he nonetheless allows for this possibility as well as an additional period of temporary disability in his April 19, 2024 report. Dr. Rakkar’s report could potentially support temporary disability status as of March 7, 2024, but the report is silent on this issue, despite what Dr. Rakkar may have told applicant and Dr. Saunders.

Also of importance is applicant’s credible and un rebutted testimony regarding whether he ever chose not to undergo surgery. Applicant clarified at trial that he was told by Dr. Haber that he would not pursue surgery at that time, but applicant did not decline surgery presumably because it was not recommended at the time. Furthermore, applicant testified at trial that he [n]ever had a discussion with Dr. Ting about surgery, and that Dr. Ting never brought up the issue of surgery with him. Applicant also stated at trial that he would undergo surgery if it was an option.

Accordingly, I find that applicant is temporarily disabled as of the April 18, 2024 reporting of Dr. Saunders, and continuing indefinitely thereafter.  
(Opinion on Decision, pp. 1-5.)

In the Report, the WCJ states:

As set forth in my Opinion, applicant provided credible and un rebutted testimony regarding whether he would undergo surgery, and that Dr. Ting never brought up the issue of surgery with him. . . . [T]he April 18, 2024 report of Dr. Ting does not review any reporting which found applicant to be temporary disabled.  
(Report, p. 5.)

## DISCUSSION

### I.

Former Labor Code 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, Labor Code 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 Labor Code 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 Management 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 October 2, 2024, and 60 days from the date of transmission is December 1, 2024. The next business day that is 60 days from the date of transmission is Monday, December 2, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>1</sup> This decision is issued by or on Monday, December 2, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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

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<sup>1</sup> 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.

Board to act on a petition. Labor Code 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 October 2, 2024, and the case was transmitted to the Appeals Board on October 2, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 2, 2024.

## II.

Defendant contends that the finding that applicant is entitled to temporary disability benefits beginning on April 19, 2024 and continuing indefinitely thereafter is unsupported by substantial medical evidence. Specifically, defendant argues that Dr. Ting opined that applicant was permanent and stationary as of December 21, 2023, and that Dr. Ting's opinion is consistent with the reporting of Dr. Haber and Dr. King because they have not "submit[ted] an RFA for surgery." (Petition, p. 4:10.)

All decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].) Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and must be more than a mere scintilla. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566].) To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation,

conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [93 Cal. Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

Here, Dr. Ting opined that applicant was permanent and stationary as of December 21, 2023 on the grounds that six months had elapsed since the injury and applicant had decided not to undergo surgery. (Ex. 103, Report of PQME Dr. Arthur Ting, December 1, 2023, p. 11.) Dr. Ting subsequently reiterated that opinion on the grounds that Dr. Moody's August 24, 2023 report made it clear that applicant decided not to pursue surgery. (Opinion on Decision, p. 4.)

However, Dr. Ting's opinion was based upon inadequate medical history as demonstrated by applicant's credible testimony that Dr. Ting did not discuss the option of surgery and he had not declined that option. (Opinion on Decision, p. 5; Report, p. 5; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660] (stating that the WCJ's assessment of a witness's credibility is entitled to great weight and should not be rejected without contrary evidence of considerable substantiality).)

In addition, as the WCJ stated in the Report, Dr. Ting's opinion was not based upon medical reporting from other physicians. (Report, p. 5.) Moreover, our review of the record from applicant's consulting and treating physicians reveals no evidence that applicant declined surgery when he met with them or was deemed permanent and stationary by them. On August 31, 2023, Dr. Haber reviewed a right shoulder MRI showing a "rupture of the proximal long head of the (right) biceps tendon," and found applicant agreeable to "taking a conservative approach for now," suggesting that the issue of surgery remained open. (Opinion on Decision, p. 3.) On March 18, 2024, Dr. King opined that applicant had a possible right shoulder rotator cuff tear, recommended an MRI of the right shoulder, and referred to the fact that applicant's "work status is determined by the QME physician" without suggesting that he was aware of any reporting from Dr. Ting other than that applicant should be referred to an orthopedic surgeon. (Ex. 4, Report of Dr. Warren King, March 18, 2024, pp. 1-2.)

Accordingly, we are unable to discern merit to defendant's contention that the finding that applicant is entitled to temporary disability benefits beginning on April 19, 2024 and continuing indefinitely thereafter is unsupported by substantial medical evidence.



For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings and Award issued on August 30, 2024 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**DECEMBER 2, 2024**

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

**WALTER ZALDIVAR  
BRIAN J. THORNTON, A LAW CORPORATION  
LAUGHLIN, FALBO, LEVY & MORESI**

**SRO/cs**

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