WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL GARCIA, ***Applicant***

vs.

EXPERT TRUCKING, LLC; CLEAR SPRING PROPERTY & CASUALTY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, ***Defendants***

Adjudication Number: ADJ19258673
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the April 22, 2025 Findings and Award (F&A) wherein the workers' compensation administrative law judge (WCJ) found that applicant's condition was not yet permanent and stationary and that applicant had not been offered modified or alternative work and was therefore entitled to "additional temporary partial disability" commencing December 10, 2024 and continuing "in an amount to be determined by the parties." (F&A, p. 1.)

Defendant contends that applicant's failure to obtain regular medical treatment since December 10, 2024 renders the WCJ's award of continued temporary disability improper. (Petition, p. 8.) Defendant further contends that if the reporting from the panel Qualified Medical Evaluator (PQME), Dr. Anoush Ehya, is found to be substantial evidence, applicant is entitled, at most, to 45 additional days of temporary partial disability starting from the date of the January 30, 2025 evaluation. (*Ibid*.)

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

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant claimed that, while employed by defendant as a driver/loader/unloader on November 2, 2023, he sustained an injury arising out of and in the course of employment (AOE/COE) to his right knee, right leg/foot, and low back.

Applicant sought treatment and retained Dr. Ronald Glousman as his primary treating physician.

On December 10, 2024, Dr. Glousman completed a medical-legal evaluation of applicant and issued a report opining that "in all medical probability[,] the orthopedic complaint of the right leg and right knee was caused by the industrial accident on November 2, 2023." (Exhibit A, p. 6.) He noted that applicant had "reached a medical plateau" and was therefore "permanent and stationary" as of December 10, 2024 with "permanent work restrictions for the right knee" consisting of no "repetitive squatting, kneeling, or climbing" and "no lifting over 25 pounds." (*Id*. at pp. 5-6.)

Thereafter, the parties continued with discovery and retained Dr. Anoush Ehya as the orthopedic PQME.

On January 30, 2025, Dr. Ehya evaluated the applicant and issued a report opining that "with reasonable medical probability" applicant sustained an industrial injury to his right leg, right knee, and lumbar spine. (Exhibit X, p. 22.) Dr. Ehya further noted that applicant had not yet reached "maximum medical improvement" and that "a period of three days of temporary total disability would have been reasonable following the industrial injury of November 2, 2023" and "[a]fter that time, modified work duties would have been reasonable," with "work restrictions of no lifting, carrying, pushing, or pulling greater than 15 pounds; no repetitive squatting or kneeling on the lower extremities; and standing or walking to tolerance." (*Ibid*.) Also noted was the fact that applicant had been "self-employed since 2018" and was "accepting disability checks" from defendant "while receiving an income from his personally owned company." (*Ibid*.) Applicant, however, indicated that the self-employment did "not increase his right knee pain." (*Ibid*.) In order to provide "[f]urther treatment recommendations," Dr. Ehya recommended additional diagnostics including x-rays and an MRI of the lumbar spine, EMG and nerve conduction studies of the bilateral lower extremities, MRI with arthrogram of the right knee, and MRIs of the right tibia and fibula. (*Ibid*.)

On March 19, 2025, applicant filed a Declaration of Readiness to Proceed to an Expedited Hearing on the issue of entitlement to additional temporary disability indemnity.

On April 10, 2025, trial was held on the issue of entitlement to additional temporary disability indemnity from January 30, 2025 and continuing. At trial, the parties stipulated that applicant sustained injury AOE/COE to his right knee and leg. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 10, 2025, p. 2.)

On April 22, 2025, the WCJ issued an F&A which held that applicant's condition was not yet permanent and stationary and that applicant had not been offered modified or alternative work and was therefore entitled to "additional temporary partial disability" commencing December 10, 2024 and continuing "in an amount to be determined by the parties." (F&A, p. 1.) The WCJ noted that his decision was based upon Dr. Ehya's reporting. (F&A and Opinion on Decision (OOD), p. 3.)

DISCUSSION

I.

Preliminarily, former Labor Code[1] 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 under the

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

Events tab 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 May 21, 2025, and 60 days from the date of transmission is July 20, 2025, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, July 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on July 21, 2025, 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 shall constitute notice of transmission.

Here, according to the proof of service for the Report, it was served on May 21, 2025, and the case was transmitted to the Appeals Board on May 21, 2025. 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 the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on May 21, 2025.

II.

Turning now to the merits of the Petition, defendant contends that applicant's failure to obtain regular medical treatment since December 10, 2024 renders the WCJ's award of continued temporary disability indemnity improper. (Petition, p. 7.)

Temporary disability indemnity is a workers' compensation benefit 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

[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.

[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.) Generally, a defendant's liability for payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (§§ 4650-4657; *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].)

In Huston, 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. [citations]"

(*Huston*, *supra*, at p. 868.)

Thus, Huston reflects that an employer's failure to show that modified work was available and offered affects an injured worker's entitlement to temporary disability indemnity.

Here, the WCJ's award of temporary disability indemnity was based upon the January 30, 2025 report of Dr. Ehya. (F&A and OOD, p. 3.) In that report, Dr. Ehya opined that "with reasonable medical probability" applicant sustained an industrial injury to his right leg, right knee, and lumbar spine. (Exhibit X, p. 22.) Dr. Ehya further noted that applicant was not at "maximum medical improvement" and that "a period of three days of temporary total disability would have been reasonable following the industrial injury of November 2, 2023" and "[a]fter that time, modified work duties would have been reasonable," with "work restrictions of no lifting, carrying, pushing, or pulling greater than 15 pounds; no repetitive squatting or kneeling on the lower

extremities; and standing or walking to tolerance." (*Ibid*.) Dr. Ehya indicated that according to applicant, "[the] employer told him there was no[t] modified duty." (Ex. X, p. 4.) Defendant failed to provide any rebuttal evidence showing that an offer of modified or alternative work was provided to applicant.

Further, pursuant to *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) A medical opinion proffered as substantial evidence must be framed in terms of reasonable medical probability, be based on pertinent facts, an adequate examination, and history, set forth reasoning in support of its conclusions, and not be speculative. (*E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Bd. en banc).) Reasonable medical probability, however, does not require that applicant prove causation by "scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700- 1701 [58 Cal.Comp.Cases 313].) Also, "[a] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)" (*Gatten*, *supra*, at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

In the instant case, based upon our review of the evidentiary record and the January 30, 2025 report of Dr. Ehya, we believe that Dr. Ehya provided adequate reasoning and relied upon relevant facts and history, including a thorough examination of the applicant and detailed analysis of various medical records in reaching her conclusions. As such, we believe that Dr. Ehya's findings are substantial evidence. Accordingly, we agree with the WCJ that applicant is entitled to continuing temporary disability indemnity.

Section 4453 addresses calculation of temporary total disability and sections 4654 and 4657 address temporary partial disability. Pursuant to section 4453, [i]f the injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." (Lab. Code, § 4453.) Pursuant to section 4654, "[i]f the injury causes temporary partial disability, the disability payment is two-thirds of the weekly loss in wages during the period of such disability." (Lab. Code, § 4654.)

Pursuant to the April 10, 2025 Minutes of Hearing and Summary of Evidence, the parties stipulated to payment and receipt of prior temporary disability indemnity payments from November 3, 2023 through December 26, 2024 at a rate of $786.67 weekly. (MOH/SOE, April 10, 2025, p. 2.) In the April 22, 2025 F&A, however, the WCJ indicated that applicant is entitled to "additional temporary partial disability commencing [December 10, 2024] and continuing in an amount to be determined by the parties[.]" (F&A, p. 1.) Any credits for amounts previously paid may therefore be adjusted by the parties.

Further, applicant indicated he "has been self-employed since 2018" and was "accepting disability checks" from defendant "while receiving an income from his personally owned company." (Exhibit X, pp. 20-21.) Applicant, however, has indicated that his "self-employment work does not increase his right knee pain" and defendant has provided no evidence to rebut this. (*Ibid*.) As such, applicant's self-employment should not be an issue except that the parties will need to determine the start date of applicant's self-employment, hours worked, and rate of pay, in order to calculate the proper rate(s) for payment of retroactive and ongoing temporary partial disability.

III.

Lastly, defendant attaches to their Petition, documents that are not: part of the evidentiary record, listed as exhibits in the Pre-trial Conference Statement, offered into evidence at trial, or

alleged to be evidence newly discovered, which could not, through the exercise of reasonable diligence, have been obtained prior to the close of discovery. (Lab. Code, § 5502(d)(3); see also Cal. Code Regs., tit. 8, § 10974.) Defendant also attaches the report of Dr. Glousman, which has already been admitted into the evidentiary record.

WCAB Rule 10945 sets out the required content of Petitions for Reconsideration, and subdivision (c) specifically provides that:

> (1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.
>
> (2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.
>
> (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).)

The attachment of the above noted records is contrary to our rules and incompatible with the closure of discovery mandated by section 5502(d)(3). (Lab. Code, § 5502(d)(3).) We therefore admonish defendant for failing to comply with our rules and observe that future noncompliance may result in the imposition of monetary or other sanctions.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 22, 2025 Findings and Award is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 18, 2025

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

MIGUEL GARCIA
INJURED WORKERS LAW GROUP
FABIANO CASTRO & CLEM

RL/*cs*

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