

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

NOUREDDINE MANSER, *Applicant*

vs.

RETURN-TO-WORK SUPPLEMENT PROGRAM, *Defendants*

**Adjudication Number: ADJ10813026
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Nouredine Manser. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the November 9, 2023 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to a second Return-to-Work Supplement Program (RTWSP) benefit under Rule 17302(b). Rule 17302(b) prohibits a second or subsequent RTWSP benefit "except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement." (Cal. Code Regs., tit. 8, Rule 17302(b).)

Applicant contends that the word "injury" in Rule 17302(b) should be liberally construed in favor of applicant and should include compensatory injury.

We received an answer from the Director of Industrial Relations as Administrator of the RTWSP. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the November 9, 2023 Findings of Fact.

FACTS

The facts are undisputed in this matter. As the WCJ states:

Noureddine Manser, while employed on March 19, 2017, as a taxi driver at San Francisco, California, by Barrett Business Services, sustained injury arising out of and in the course of employment to his head, neck, back, upper extremities, bilateral knees, and lower extremities. The sole issue for trial was whether the applicant was entitled to the Return-to-Work Supplement Program (RTWSP) benefit in relation to this March 19, 2017 claim in ADJ10813026.

The applicant had already received a Return-to-Work Supplement for a September 17, 2020 injury at the time he applied for a Return-to-Work Supplement related to the March 19, 2017 injury. The applicant argued that the March 19, 2017 injury continued to affect the applicant in an ongoing manner, and therefore was an injury occurring subsequent to his receipt of RTWSP benefits. (Applicant's Trial Brief filed 8/15/2023, p. 1, line 22-p. 2, line 8.)

...

. . . [Those] stipulations and documentary evidence were summarized in my November 9, 2023 Opinion on Decision as follows:

...

The applicant had a re-evaluation by neurology Qualified Medical Evaluator (QME) Robert Shorr, M.D. on September 3, 2020, just prior to his subsequent injury. (Applicant's exhibit 4, pp. 1, 5.) At the time the applicant was not yet at a state of maximum medical improvement. (*Id.* at p. 7.) Dr. Shorr noted in his January 27, 2022 report that:

"It is not clear if any of my previous recommendations have been followed through with, including the ophthalmological QME evaluation, medical/legal neuropsychological assessment, and neurological treatment of the claimant's headaches per the headache treatment guidelines from the American Academy of Neurology." (Applicant's exhibit 3, pp. 3-4.)

In his January 27, 2022 report, Dr. Shorr had no change to his opinions expressed in his September 3, 2020 report. (Applicant's exhibit 3, p. 4)

Even after the September 17, 2020 injury the applicant continued treating for the March 19, 2017 injury. (Applicant's exhibits 6 and 10.) He treated with primary treating physician Dr. Rutchik, M.D. from November 11, 2021 through September 14, 2022. (Applicant's exhibit 10.) Through the August 17, 2022 appointment, the applicant continued to be temporarily totally disabled by Dr. Rutchik who opined that the applicant's condition was not permanent and stationary. (*Id.* at p. 10.) During a September 14, 2022 telephonic appointment with his primary treating physician, the applicant indicated that he was declining further treatment in the interest of resolving his claim. (*Id.* at 10, pp. 1-2.) This included declining the scheduling of an authorized ophthalmology exam. (*Id.* at 10, p. 2.)

On March 11, 2022 and December 6, 2022, defendant issued temporary disability delay notices in the March 19, 2017 injury claim. (Applicant's exhibits 1 and 4.) Both notices stated that defendant was unable to pay temporary disability benefits for the period from December 10, 2021. (*Ibid.*) Defendant was seeking medical records, subsequent employment records, and records from the September 17, 2020 workers' compensation injury. (*Ibid.*) An order for an additional QME panel in ophthalmology was issued December 1, 2022 citing a need for development of the record in that specialty. (Applicant's exhibit 7.) No ophthalmology QME evaluation occurred. (8/16/2023 MOH, p. 2, line 28.)

The applicant received a Supplemental Job Displacement Benefit Voucher (SJDBV) and a Return-to-Work Supplement for the September 17, 2020 injury. (8/16/2023 MOH, p. 2, lines 30-32.) The RTWSP benefit related to the September 17, 2020 injury was received prior to receipt of an SJDBV for the earlier March 19, 2017 injury. (*Id.* at p. 2, lines 30-34.) The SJDBV for the March 19, 2017 injury was issued January 30, 2023. (Applicant's exhibit 9, pp. 2, 6.)

The applicant then applied for the Return-to-Work Supplement, which was denied per California Code of Regulations Title 8, Section 17302(b). (8/16/2023 MOH, p. 2, lines 32-35.) The applicant timely appealed the RTWSP denial in connection with the March 19, 2017 injury. (*Id.* at p. 2, lines 37-38.) The appeal was not introduced as evidence, but judicial notice [] may be taken of the EAMS file. (Evidence Code 452(d); *Faulkner v. WCAB* (2004) 69 CCC 1161 (writ denied).) The appeal of the RTWSP denial was filed March 15, 2023. (EAMS Doc. ID no. 45498027.)" (November 9, 2023 Opinion on Decision, pp 1-3.)

(Report, pp. 1-3.)

DISCUSSION

Labor code,¹ section 139.48 provides:

- (a) There is in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars (\$120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Moneys shall remain available for use by the return-to-work program without respect to the fiscal year.
- (b) Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determinations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.
- (c) This section shall apply only to injuries sustained on or after January 1, 2013. (§ 139.48.)

In accordance with section 139.48, the following relevant regulations were adopted:

Rule 17302

- (a) To be eligible for the Return-to-Work Supplement, the individual must have received the Supplemental Job Displacement Benefit (SJDB) Voucher for an injury occurring on or after January 1, 2013.
- (b) An individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to Work-Supplement, except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement. (Cal. Code Regs., tit. 8, § 17302.)

Rule 17309

An individual dissatisfied with any final decision of the Director on his or her application for the Return-to-Work Supplement may, file an appeal at the Workers' Compensation Appeals Board (WCAB) District Office. The appeal must contain the name of the individual, the ADJ number of the case in which a voucher was provided, and a clear and concise statement

¹ All statutory references are to the Labor Code unless otherwise indicated.

of the facts constituting the basis for the appeal. A copy of the appeal shall be served on the Return-to-Work Program located at 1515 Clay Street, 17th Floor, Oakland, California, 94612. Any appeal must be filed with the WCAB within 20 days of the service of the decision. After an appeal has been timely filed, the Return-to-Work Program may, within the period of fifteen (15) days following the date of filing of that appeal, amend or modify the decision or rescind the decision and take further action. Further action shall be initiated within 30 days from the order of rescission. The time for filing an appeal will run from the filing date of the new, amended or modified decision. Any such appeal will be subject to review at the trial level of the WCAB upon the same grounds as prescribed for petitions for reconsideration. (Cal. Code Regs., tit. 8, § 17309.)

We first examine whether the Appeals Board has jurisdiction to consider applicant's petition. The Director of Industrial Relations contends that section 139.48 limits review of the Director's determinations at the trial level of the Workers' Compensation Appeals Board (WCAB).

Section 139.48 specifically provides that, "Determinations of the director [with respect to RTWSP payments] shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration." WCAB's trial level workers' compensation administrative law judges operate under delegated authority from the Appeals Board. (§§ 5309-5310.) The Appeals Board can therefore revoke this delegation of authority at any time in any proceeding and retains full authority to conduct judicial proceedings in the first instance, including the taking of evidence and testimony. (§§ 5309-5310, 5701.) The Appeals Board also retains continuing jurisdiction over all workers' compensation orders, decisions and awards, which may be rescinded or amended for good cause, granting it the ability to modify final awards to a degree far greater than the ability of a civil court to modify a final judgment. (See §§ 5803-04.)

We note that section 139.48 and Rule 17309 do not prohibit appeals to the Appeals Board. RTWSP's argument that an appeal stops at the trial level of the WCAB would not only prevent a person from seeking review from the Appeals Board but also from the Court of Appeal and the Supreme Court. Section 5900 specifically provides that any person may seek reconsideration from the Appeals Board of a WCJ's final order, decision, or award. (§ 5900.) Section 5950 provides that any person may seek a writ of review from the Court of Appeal or the Supreme Court of an order, decision, or award of the Appeals Board. (§ 5950.) In contrast, section 139.48(b) and Rule 17309 are silent as to any remedy after the trial level of the WCAB. Prohibiting review from the Appeals Board will also prohibit review from the Court of Appeal and Supreme Court, which

violates the constitutional right to due process. We do not believe that the language in section 139.48 and Rule 17309 create such draconian limitation. Accordingly, we determine here that applicant's petition for reconsideration of the WCJ's denial of a second RTWSP payment is properly before us.

The next question is whether applicant is entitled to a second RTWSP payment. Rule 17302(b) states that an "individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to-Work-Supplement, except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement." (Cal. Code. Regs., tit. 8, § 17302(b).) Applicant contends that the word "injury" should be liberally construed to include a continuing injury, one which affects applicant's health continually on a daily basis. (Petition, pp. 1:19-2:14.) We decline to accept such interpretation as there is no basis to support it. Furthermore, there is no definition as to what constitutes a continuing injury. All permanent disabilities, arguably, could be continuing injuries affecting an employee's health continually on a daily basis.

We next explore whether Rule 17302(b) is valid. Section 139.48 authorizes the Director of Industrial Relations to adopt regulations regarding the eligibility and the amount of the RTWSP benefit. (§ 139.48(b).) The Director's authority to develop regulations for the eligibility and amount of the RTWSP payments is governed by the Administrative Procedures Act (APA) found in Government Code, section 11340 et seq. Government Code, section 11350 provides that, "Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure." In *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389, 403 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we invalidated Rule 10133.54, a regulation promulgated by the Administrative Director of the Division of Workers' Compensation. Rule 10133.54, unlike Rule 17302(b), was not governed by the APA. (Gov. Code, § 11351(c) [Judicial review as to the validity of a regulation in the Superior Court "shall not apply to the Division of Workers' Compensation."].) Here, Rule 17302(b) is subject to judicial review in the Superior Court. That is, applicant's remedy in his quest to invalidate Rule 17302(b) lies with the Superior Court.

Therefore, while we sympathize with applicant's predicament as to the timing of his RTWSP payments, for the reasons set forth above, we affirm the November 9, 2023 Findings of Fact.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 9, 2023 Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 27, 2025

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

**NOUREDDINE MANSER
KURLANDER, BURTON & MACK
DIR – OFFICE OF THE DIRECTOR - LEGAL**

LSM/pm

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