WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VINCENT OWENS, *Applicant*

vs.

CITY OF RICHMOND, permissibly self-insured, its claims administered by ACCLAMATION INSURANCE MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ16819535
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued on November 1, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as an equipment operator during the period ending June 1, 2021, applicant sustained injury in the form of valley fever (coccidioidomycosis); (2) the injury caused temporary disability from June 4, 2021 through October 24, 2023; (3) earnings at the time of injury warranted a temporary disability indemnity rate of $966.95 per week; (4) there is need for medical treatment to cure or relieve applicant from the effects of injury; and (5) the reasonable value of the services of applicant's attorney is $15,552.00.

The WCJ issued an award in favor of applicant of (1) temporary disability indemnity at the rate of $966.95 per week beginning on October 1, 2021, and continuing for 104 weeks, for a total of $103,682.80, less an attorney's fee of $15,552.00; and (2) further medical treatment.

Defendant contends that the WCJ erroneously (1) failed to determine whether or not applicant would have retired before October 24, 2023, had he not sustained injury; and (2) relied upon a medical report received after applicant filed his declaration of readiness (DOR) for expedited hearing.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, we will grant the Petition, and, as our Decision After Reconsideration,

we will rescind the F&A and substitute findings that defer the issues of temporary disability and attorney's fees; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On October 11, 2024, applicant filed a DOR, requesting an expedited hearing on the issue of temporary disability and asserting under penalty of perjury that discovery was complete. (Declaration of Readiness, October 11, 2024, pp. 1-7.)

On October 31, 2024, the matter proceeded to expedited hearing on the issues of "temporary disability and fees thereon." (Minutes of Expedited Hearing, October 31, 2024, p. 2:11.)

The parties stipulated that (1) applicant sustained industrial injury in the form of valley fever (coccidioidomycosis) during the period ending June 1, 2021; (2) applicant's earnings warranted temporary disability indemnity at a rate of $966.95 per week; (3) applicant's first day off work as a result of injury was June 4, 2021; (4) applicant exhausted his leave time on October 1, 2021; and (5) applicant retired in November 2021. (*Id*., p. 2:2-10.)

At expedited hearing, defendant's attorney objected to the admission of an exhibit titled PQME Report of Robert Noriega, Jr., M.D., dated October 18, 2024, on the grounds that it was received after applicant filed his DOR. (*Id.*, p. 3:3-5.) The WCJ overruled the objection and admitted the exhibit in evidence. (*Id.*)

The PQME Report of Dr. Noriega dated October 18, 2024 states:

> This supplemental report issues in response to my receipt of a letter of inquiry from David Angelo, Esquire dated 08/20/2024 asking additional questions which will be summarized and answered herein.
> . . .
> Question 1: Please confirm Mr. Owens has been temporarily totally disabled for at least 104 weeks since June of 2021.
>
> The claimant became incapacitated from performing his usual job duties beginning in June 2021 and has remained so until a finding of MMI at which point the temporary disability is considered permanent-i.e. on or about 10/24/2023 as discussed below. It therefore appears that the period of TTD exceeded 104 weeks-i.e. greater than 2 years.
>
> Question 2: Please state if Mr. Owens has reached maximum medical improvement, and if so, the date on which he became permanent and stationary.

Recall, the claimant's condition is insidious and progressive-disease progression is more likely than not (medically probable) with available treatment modalities, therefore not meeting the AMA Guides definition of MMI. However, for probative purposes, the condition is relatively stable and may be considered permanent and stationary for rating purposes upon 10/24/2023 reevaluation.

Question 3: Please state the work restrictions and limitations applicable to Mr. Owens. Please state if Mr. Owens is capable of sustaining regular, dependable employment ill tire open labor market.

In the open labor market, the claimant would be able to perform job duties in a congenial work environment with the current neurological (brain) impairments; for example, performing sedentary work[fn] while working under the oversight of others without sole executive decision-making responsibilities; and accommodation for working part time at a slowed pace. The mental limitations hinder the claimant's decision making, ability to recognize and/or correct mistakes; and ability to work in a full, unsupervised work capacity. These restrictions would probably preclude most if not all reasonable opportunities for regular, dependable employment.
(Ex. 5, PQME Report of Robert Noriega, Jr., M.D., dated October 18, 2024, pp. 1-2.)

In the Report, the WCJ states:

Applicant first became unable to work in June, 2021, after visiting the emergency department at Kaiser in Walnut Creek, where he was seen for shortness of breath and given an EKG, atrial fibrillation, a branch block, and chest x-rays. Extensive treatment ensued. At the point in time when Mr. Owens went off work, he had a bank of leave time on the books of the City of Richmond, and he used that leave until it was exhausted on October 1, 2021. He retired from his position with the city the following month. The diagnosis of valley fever appears to have been made in March, 2022.

After receiving that diagnosis, applicant applied for workers' compensation. His claim was denied. At that time, no medical evidence in the record shows any other health-related reasons for his inability to continue working. The parties engaged a qualified medical evaluator (QME), Dr. Robert Noriega. After initially requesting more documentation, the QME then reviewed medical records and data regarding the exposure Mr. Owens had likely received at home and at work, and issued his second report, dated January 8, 2023, in which he determined, within reasonable medical probability, that applicant's employment had caused his condition.[fn] Defendant continued to deny liability.

Dr. Noriega reexamined Mr. Owens on October 24, 2023, reporting a number of abnormalities and requesting further medical records. He then issued his supplemental report of July 26, 2024, reviewing reports by an infectious disease specialist and a neuropsychologist, test results, three MRIs[fn] of the brain and two

CT[fn] scans and medical records. The QME reports that applicant's condition is sufficiently stable for rating purposes, while acknowledging "the presence of insidious and progressive disease. He concludes:

• The claimant is permanently and substantially incapacitated from performing his usual job duties due to a brain injury that has caused permanent mental incapacity.

• The period of temporary total disability (TTD) or incapacity began in approximately June 2021.

For the first time, in January 2024, defendant admitted liability for applicant's injury. However, to date, it has paid no benefits. (The evidentiary record does not reveal whether defendant has provided any medical treatment.)

. . .

Defendant's substantive argument is that applicant's earning capacity must be assessed in light of his retirement. As applicant points out in his answer, *this issue has been raised for the first time in defendant's petition for reconsideration*. There is no indication in the record that applicant's entitlement to temporary disability benefits was formally questioned, on this or any other ground. Defendant has not deposed Mr. Owens, and did not call him as a witness at the expedited hearing. There is no medical evidence of any health-related reason for his retirement other than the effects of his work-related valley fever. At the time he applied for his PERS[fn] pension, that is, upon exhaustion of his sick and vacation leave, his condition, while disabling, had not been diagnosed, nor reported as work-related, and his claim had not been accepted. No evidence supports the availability of any other source of income. To raise this issue for the first time on reconsideration threatens applicant's due process, at the very least.

(Report, pp. 2-4.)

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:

(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 December 23, 2024, and 60 days from the date of transmission is February 21, 2025. This decision is issued by or on February 21, 2025, 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 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 December 23, 2024, and the case was transmitted to the Appeals Board on December 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 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 December 23, 2024.

II.

Defendant contends that the WCJ failed to determine whether or not applicant would have retired before October 24, 2023, had he not sustained industrial injury.

But defendant did not raise this issue for trial or present any evidence suggesting that applicant may have retired before October 24, 2023, had he not sustained injury. (Report, pp. 3-4; Minutes of Expedited Hearing, October 31, 2024, p. 2:11.)

Because the issue was not raised, it is waived. (See *U.S. Auto Stores v. Workers' Comp. Appeals Bd*. (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173]; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd*. (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ den.).)

Accordingly, we are unable to discern merit to the argument that the WCJ failed to determine whether or not applicant would have retired before October 24, 2023 had he not sustained injury.

Defendant also contends that the WCJ erroneously relied upon a medical report obtained after applicant filed his DOR. More specifically, defendant argues that applicant's October 11, 2024 DOR requested an expedited hearing on the grounds that discovery was complete, that the PQME Report of Dr. Noriega dated October 18, 2024 was generated after discovery closed, and that the admission of the October 18, 2024 Report into evidence deprived it of due process.

WCAB Rule 10742 provides:

> (a) Except when a hearing is set on the Workers' Compensation Appeals Board's own motion, **no matter shall be placed on calendar unless one of the parties has filed and served a Declaration of Readiness to Proceed** in the form prescribed by the Appeals Board.
>
> . . .
>
> (c) **All declarations of readiness** to proceed shall state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the Declaration of Readiness to Proceed, and shall state with specificity on the Declaration of Readiness to Proceed the efforts made to resolve those issues. Unless a status or priority conference is requested, **the declarant shall also state under penalty of perjury that the moving party has completed discovery and is ready to proceed on the issues specified in the Declaration of Readiness to Proceed**.
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> (Cal. Code Regs., tit. 8, § 10742(a)-(c) [Emphasis added].)

These requirements of statements under penalty of perjury apply to expedited hearings as well. (Lab. Code § 5502(b) and WCAB Rule Cal. Code Regs., tit. 8, § 10782.)

As the Court of Appeal stated in *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 704 [57 Cal.Comp.Cases 230]:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citation.] (*Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases

> 537].) Due process requires that all parties' must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. [Citations.]' (*Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd*. (*Harris*) (1980) 103 Cal.App.3d 1001, 1015 [45 Cal.Comp.Cases 381].)
> (*Katzin*, *supra*, at 711-712.)

Here, the October 18, 2024 PQME Report of Dr. Noriega opined on the primary issue framed for trial, i.e., whether and for what period applicant is entitled to temporary disability benefits, yet was not produced until after discovery was alleged to have been complete. (Ex. 5, PQME Report of Robert Noriega, Jr., M.D., dated October 18, 2024, pp. 1-2; Declaration of Readiness, October 11, 2024, pp. 1-7.) Defendant was thus deprived of the opportunity to conduct discovery of the bases for Dr. Noriega's reporting and its objection to its admission into evidence was well taken. (Minutes of Expedited Hearing, October 31, 2024, pp. 2:1-3:5.)

Because defendant was deprived of the opportunity to develop and present evidence regarding the reliability of the October 18, 2024 PQME Report of Dr. Noriega, we conclude that it was denied of due process.

Hence, we will substitute a finding that defers the issue of temporary disability so that defendant may conduct discovery of the October 18, 2024 PQME Report of Dr. Noriega and present evidence thereon at a further hearing. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will grant the Petition, and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that defer the issues of temporary disability and attorney's fees; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on November 1, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on November 1, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Vincent Owens, born _____, while employed during the period ending June 1, 2021, in Richmond, California, as an equipment operator, by the City of Richmond, permissibly self-insured for workers' compensation, its claims administered by Acclamation Insurance Management Services, sustained an injury arising out of and in the course of employment in the form of valley fever (coccidioidomycosis).
2. The issue of temporary disability is deferred.
3. Earnings at the time of injury were sufficient to warrant a temporary disability indemnity rate of $966.95.
4. There is need for medical treatment to cure or relieve from the effects of said injury.
5. The issue of applicant's attorney's fees is deferred.
6. All other issues are deferred.

AWARD

Award is made in favor of applicant and against defendant City of Richmond, permissibly self-insured, its claims administered by Acclamation Insurance Management Services, of further medical treatment consistent with finding of fact number 4.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 21, 2025

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

VINCENT OWENS
BROWN & DELZELL
RTGR LAW

SRO/*cs*

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