WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JESUS (CHUY) ESPARZA, JR. (Deceased), *Applicant*

vs.

STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS & REHABILITATION, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ9485691 (MF), ADJ9860729, ADJ2020760, ADJ3570186, ADJ906767, ADJ1935509, ADJ8625546, ADJ4297137, ADJ1535342
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Facts, Awards, Orders and Opinion on Decision (F&A) issued on November 3, 2021, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part in ADJ9485691, that (1) while employed as a correctional lieutenant by defendant during the period ending April 10, 2014, applicant sustained injury arising out of and in the course of employment (AOE/COE) to hypertensive heart disease (diastolic dysfunction and borderline left atrial enlargement), lungs, (non-oat cell cancer of the lungs with metastases to the spine and brain), bones, CNS, weakness of lower extremities, neck and headaches; (2) at the time of injury, applicant's earnings were sufficient to warrant the maximum for temporary disability and permanent disability; (3) the injury caused temporary disability from January 16, 2015 through August 22, 2019, for a total of 1,680 days; (4) applicant became entitled to permanent disability advances following the last payment of temporary disability benefits on August 23, 2019; (5) defendant paid temporary disability benefits from January 16, 2015 through January 14, 2016, for a total of 364 days; and (6) applicant's attorney provided reasonable services in the amount of $38,247.94.

The WCJ also found, as relevant, in ADJ8625546, that (1) while employed as a correctional lieutenant by defendant on March 25, 2012, applicant sustained injury AOE/COE to the neck,

[1] Commissioner Lowe, who was on the panel that granted reconsideration of this matter, no longer serves on the Appeals Board. Commissioner Capurro has been substituted in her place.

back, head, and headaches; (2) defendant paid industrial disability leave (IDL) benefits from March 26, 2012 through March 25, 2013, and temporary disability benefits from March 26, 2013 through March 24, 2014; (3) the injury caused permanent disability of 4%; (4) applicant's attorney performed reasonable services in the amount of $522.00; and (5) applicant is in need of medical treatment to cure or relieve from the effects of the injury.

The WCJ issued awards in applicant's favor in ADJ9485691 and ADJ8625546 in accordance with these findings.

In ADJ9485691, defendant contends that applicant is not entitled to more than 104 weeks of temporary disability benefits on the grounds that he did not have a chronic lung disease within the meaning of Labor Code section 4656(c)(3)(I).[2]

In ADJ8625546, defendant contends that (1) the record fails to show that applicant sustained injury AOE/COE; (2) it is entitled to a credit for temporary disability benefits paid in the amount of $52,546.00; and (3) the WCJ erroneously found that applicant sustained permanent disability of 4%.

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 dismissed on the grounds that it was filed only in ADJ4297137 or denied on the merits.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the findings in ADJ9485691 and amend the findings in ADJ8625546 to find that (1) defendant is entitled to a credit for temporary disability benefits paid during the period of February 4, 2014 through March 24, 2014, to be adjusted by the parties, with jurisdiction reserved by the WCAB in the event of a dispute; and (2) the issues of permanent disability and attorney's fees are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

FACTUAL BACKGROUND

Applicant claimed industrial injury as a result of nine separate claims, both specific and cumulative, to multiple parts of body while employed by defendant. On March 24, 2021, the parties proceeded to trial on all cases. In ADJ9485691, which was designated as the master file, the parties stipulated that while employed by defendant during the cumulative period ending April 10, 2014, applicant sustained injury AOE/COE to hypertensive heart disease, lungs, bones, CNS, weakness of lower extremities, neck, and headaches, and claims to have sustained injury AOE/COE in the form of coronary artery disease, cognitive impairment, and hearing impairment.

In ADJ8625546, the parties stipulated that on March 25, 2012, while employed by defendant, applicant sustained injury AOE/COE to his neck, head, headaches, and back.

The WCJ admitted into evidence medical reports from Agreed Medical Evaluators (AMEs), Jonathan Ng, M.D., Robert Steiner, M.D., and Robert Carson, M.D., as well as those of the Panel Qualified Medical Evaluator (PQME) Larry Woodcox, D.C.

The Supplemental PQME Report of Dr. Woodcox dated March 22, 2019 states the following:

> You then state, "As for the other injuries, I remind you of the following allegations: ADJ8625546, Mr. Esparza. alleged a specific injury on 3/25/12, from falling when a chair broke, resulting in injury to his neck, head, headaches, and back. It does not appear you apportioned any impairment to this injury."
>
> Comment: You are correct. I believe that I concluded in my July 29, 2018, report that the 3/25/2012, injury was a flare of his previous industrial injury, and no new injury occurred. Therefore, I did not provide apportionment to that injury. I did apportion injuries of 1998, 2002, 2005, and 2007, to the 1/16/2015 injury.
>
> (Jt. Ex. 15, Supplemental PQME Report of Larry Woodcox, March 22, 2019, p. 3.)

In the Report, the WCJ states:

> On November 3, 2021, WCJ John Durr issued a Findings of Facts, Awards Orders, And Opinion on Decision in the following seven cases: ADJ9485691MF; ADJ9860729; ADJ8625546; ADJ1535342; ADJ4297137; ADJ2020760; ADJ3570186; ADJ906767; and ADJ193550.
>
> Defendant . . . filed a timely and verified Petition for Reconsideration in only one of the cases: ADJ4297137 challenging the decision issued by WCJ Durr. . . . .The pleading then makes no reference to any of the findings made in the aforementioned decision related to case ADJ4297137, as such, with no arguments pertaining to the decision in ADJ4297137, the Petition for Reconsideration is prima facie defective

and should be dismissed. However, in an abundance of caution, the two specific issues raised in the petition pertaining to the portions of the decision related to ADJ8625546 and ADJ9485691 will be addressed in this report and recommendation.

. . .

This matter was originally heard by WCJ Stuart Crymes on March 24, 2021. Judge Crymes issued an Order Rescinding Submission and provided Proposed Finding of Facts in all cases on May 20, 2021. Judge Crymes subsequently became unavailable and the matter was reassigned to WCJ John Durr. Following a conference with the parties, confirming that no objection to the proposed finding of facts had been made, the matter was submitted on September 3, 2021 with an additional 15 day period for any potential objection. No objection to the Proposed Findings of Facts, as proposed by Judge Crymes on May 20, 2021, was received.

. . .

The petitioner filed a timely and verified Petition for Reconsideration on November 29, 2021, in only one of the associated cases: ADJ4297137. This was obviously not a "placeholder" petition and any future Petition for Reconsideration or proposed amendment to the petition would be untimely.

. . .

The applicant was employed as a lieutenant with the State of California Department of Corrections & Rehabilitation, at the time of all claimed dates of injury and therefore was entitled to the presumptions in the Labor Code as a correctional officer. The applicant, now deceased, passed away on January 8, 2021 from lung cancer and secondary brain cancer.

. . .

This matter came on for hearing in front of WCJ Stuart Crymes on March 24, 2021.The parties stipulated to a number of things across the 9 cases that were consolidated, for purposes of receiving evidence, at the time of trial. On page 2 of the Minutes of Hearing, made by the reporter at the time of trial, one of the following pertinent stipulations was agreed to by the parties: That on March 25, 2012 in AD8625546, the decedent, sustained injury AOE/COE sustained injury AOE/COE to his neck, head, headaches, and back (MOH/SOE at line 18-19.)

The trial judge, WCJ Crymes, vacated the submission and provided the parties with proposed Findings of Facts. WCJ Crymes became unavailable and the matter was reassigned to WCJ John Durr.

A Notice of Intention, dated September 3, 2021, specifically gave the parties an additional 15 days to object to the handling by WCJ Durr of the proposed Findings and Award issued by Judge Crymes. The matter was then submitted for final decision based on the lack of objection to the proposed Findings of Facts made on May 20, 2021. The proposed findings of facts from Judge Crymes included but are not limited to:

PROPOSED FINDINGS OF FACT ADJ9485691
9. Applicant, Jesus (Chuy) Esparza, Jr., (deceased) born 3/9/69, while employed during the cumulative trauma period ending on 4/10/14, as a correctional lieutenant by the State of California, Department of Corrections & Rehabilitation, sustained injury AOE/COE to hypertensive heart disease (diastolic dysfunction and borderline left atrial enlargement) lungs, (non-oat cell cancer of the lungs with metastases to the spine and brain), bones, CNS, weakness of lower extremities, neck and headaches.
10. At the time of the injury, the employer was legally uninsured, adjusted by State Compensation Insurance Fund.
11. At the time of the injury, the employee's earnings were sufficient to warrant maximum for temporary disability and permanent disability.
12. The injury caused temporary disability from 1/16/15 through 8/22/19, a total of 1,680 days.
13. Defendant paid temporary disability from 1/16/15 through 1/14/16 (a total of 364 days).
14. Applicant's attorney has provided reasonable services in the amount of $38,247.94.
Note: The only change to the findings of fact in the final decision was an inclusion of #12a: "The applicant became entitled to permanent disability advances following the last payment of temporary disability on 8/23/19.

PROPOSED FINDINGS OF FACT ADJ8625546
15. Applicant, Jesus (Chuy) Esparza, Jr., (deceased) born 3/9/69, while employed on 3/25/12, as a correctional lieutenant by the State of California, Department of Corrections & Rehabilitation, sustained injury AOE/COE to neck, back, head and headaches.
16. Defendant has paid IDL from 3/26/12 through 3/25/13 and temporary disability from 3/26/13 through 3/24/14.
17. The injury caused permanent disability of 4%.
18. Applicant's attorney has performed reasonable services in the amount of $522.00.
19. Applicant is in need of medical treatment to cure or relieve from the effects of the injury herein.
Note: There were no changes to the Findings of Fact in the final decision.

These two proposed Findings of Fact are reproduced as they are relative to the potential arguments raised in the Petition for Reconsideration. These are the same Findings of Fact in the final decision of November 3, 2021.

. . .
There was no objection to the proposed findings of facts circulated by Judge Crymes on May 20, 2021; therefore, it is asserted that the defendant waived their argument that the evidence does not justify the findings of fact.

The first specific argument is that there is no substantial evidence to find injury AOE/COE in ADJ8625546. This argument flies in the face of the stipulations made between the parties at the time of trial on March 24, 2021.

. . .

There is no evidence in the record that the stipulation was based upon mutual mistake or fraud. In essence, the petitioner is requesting that the stipulations be set aside. The circumstances giving rise to potentially setting aside the stipulation are: Where stipulations are entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation, a court may exercise sound discretion and set aside the stipulation, but when there has been no mistake but merely a lack of full knowledge of the facts, which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief. (*Huston v. WCAB*, 95 Cal. App. 3d 856, 865–866 (1979.))

The petitioner identifies Dr. Larry H. Woodcox DPM, DC as an AME in this case, whereas all of the medical reporting and exhibits identify him as a panel QME. Despite the misrepresentation, it appears clear that Dr. Woodcox was a panel QME replacing the deceased AME, Dr. Robert Steiner.

. . .

Regarding the claimed credit for overpayment of temporary disability in ADJ8625546, that was untimely requested. Pursuant to Title 8 CCR §1055, a request for an overpayment of benefits must be requested via petition. There is not a petition for overpayment of benefits in the board file in this case. However, the matter was raised at time of trial and delineated as a specific issue for determination but no evidence of prior objection to the payments of temporary disability were provided.

. . .

It was stipulated by the parties that the applicant received IDL from March 26, 2012 through March 25, 2013 and temporary disability from March 26, 2013 through March 24, 2014. The AME, Dr. Steiner, found the applicant to still be totally temporarily disabled on October 2, 2013. In the panel QME report of Dr. Woodcock dated August 21, 2015 (Joint 19), he reviews the PR-2 of Dr. Shaw of December 21, 2013, on Page 24. The contemporaneous medical report indicates that the applicant was temporary disabled. This summary includes the Dr. Shaw's statement that the applicant will be considered for a trial of regular duty early next year [2014].

. . .

There is a stipulated industrial injury with medical reporting up through December 21, 2013, finding total temporary disability and indicating that a trial of modified duty would be appropriate early in 2014. Payments for temporary disability ceased on March 24, 2014 . . .

Regarding the 4% permanent disability, as established above, between the parties there was a stipulated and accepted injury. The reporting of panel QME of Dr. Woodcox and his deposition appear to have been relied upon by WCJ Crymes, as

to the assignment of permanent disability to "previous industrial injuries." This was appropriately divided between the accepted/stipulated prior injuries by WCJ Crymes. The argument is that ADJ8625546 was a flare-up is inconsistent with the discussion to this point. Therefore, an equitable split was made between the multiple dates of prior injuries.

. . .

The second main issue raised by the petitioner in ADJ9485691 is that lung cancer is not a chronic lung disease as intended by the legislature in Labor Code §4656 (a)-(c) to allow for the extension of temporary disability benefits to 240 weeks. The case law that they pointed to was a panel decision in *Velez v. Electronic Source Co*., 2018 Cal. Wrk. Comp. P.D. LEXIS 368, where the Workers Compensation Appeals Board found that "chronic lung disease" may include "asthma, bronchitis, and pulmonary edema." That is absolutely correct but it is specifically non-limiting.

The United States Centers for Disease Control and Prevention broadly defines a chronic disease as a condition that lasts one year or more and requires ongoing medical attention or limits activities of daily living, or both.

The AME Dr. Jonathan Ng in his February 28, 2021 report (Joint Exhibit 1) on page 15 was specifically asked whether he considered the cancer in this case to been a "chronic lung disease?"

2. *Do you consider Ms.[sp] Esparza's cancer to have been "chronic lung disease*?"

Yes. Lung cancer could be chronic as in this case and is definitely a lung disease.

In that regard, is it true or false that lung cancer is a chronic lung disease because that lung cancer had the potential to become and/or did become a new disease of its own as continued to grow and change?

True. Lung cancer could be chronic as in this case and is definitely a lung disease. The lung cancer did not become a new disease but he did continue to grow and led to his death on 1/8/21.

Speaking to the applicant's actual periods of temporary disability related to the lung cancer Dr. Ng opined on page 14:

1. *For the cancer, was Mr. Esparza temporarily (partially or totally) disabled from May 2013 through his date of death on 1/8/21*?

Yes.

> These two opinions by the AME, Dr. Jonathan Ng support the finding that the applicant suffered from a chronic lung disease and suffered disability, either partial or total from May 2013 until his date of death on January 8, 2021, thereby justifying finding . . . that the injury caused temporary disability from 1/16/15 through 8/22/19, a total of 1,680 days.
>
> (Report, pp. 1-9.)

DISCUSSION

Before turning to the merits of the Petition, we note the WCJ's recommendation that that the Petition be dismissed on the grounds that it was filed only in ADJ4297137 and challenges findings only in ADJ9485691 and ADJ8625546.

We observe that principles of "liberal pleading" are well-established in California law. For example, Code of Civil Procedure section 452 requires that, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Cal. Code Civ. Proc. § 452.) Code of Civil Procedure section 473 provides, "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Cal. Code Civ. Proc. § 473(b).) The Court of Appeal has made it clear that the protections afforded under Code of Civil Procedure section 473(b) are applicable in workers' compensation proceedings. (*Fox v. Workers' Comp. Appeals Bd*., (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149].)

The workers' compensation system "was intended to afford a simple and nontechnical path to relief" and "the informality of pleadings in workers' compensation proceedings before the Board has been recognized." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624]; *Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 328–334 [35 Cal.Comp.Cases 513].) "[I]t is an often-stated principle that the [Workers' Compensation] Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits." (*Martino v. Workers' Comp. Appeals Bd*., (2002) 103 Cal.App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Consequently, courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd*. (1985) 165 Cal.App.3d 196, 200–01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd*. (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866].)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox, supra,* at p. 1205.) This is particularly true in workers' compensation cases, where there is a constitutional mandate "to accomplish substantial justice in all cases." (Cal. Const., art. XIV, § 4.)

It is thus settled law in workers' compensation proceedings that (1) pleadings may be informal; (2) claims should be adjudicated based on substance rather than form; (3) pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim; and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the WCAB of jurisdiction. (*Zurich Ins. Co*., *supra*, at p. 852; *Bland*, *supra*, at pp. 328–334; *Martino*, *supra*, at pp. 490-491; *Rivera v. Workers' Comp. Appeals Bd*. (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 141]; *Liberty Mutual Ins. Co v. Workers' Comp. Appeals Bd.* (*Aprahamian*) (1980) 109 Cal.App.3d 148, 152–153 [45 Cal.Comp.Cases 866]; *Beaida v. Workmen's Comp. Appeals Bd*. (1968) 263 Cal.App 2d 204, 207–210 [33 Cal.Comp.Cases 345]); *Sarabi v. Workers' Comp. Appeals Bd*. (2007) 151 Cal.App.4th at pp. 925–926 [72 Cal.Comp.Cases 778].)

These principles are reflected in procedural rules applicable to workers' compensation proceedings. For example, WCAB Rule 10617 provides:

> (a) An Application for Adjudication of Claim, a petition for reconsideration, a petition to reopen or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that
>
> (1) The document is not filed in the proper office of the Workers' Compensation Appeals Board;
>
> (2) The document has been submitted without the proper form, or it has been submitted with a form that is either incomplete or contains inaccurate information; or
>
> (3) The document has not been submitted with the required document cover sheet and/or document separator sheet(s), or it has been submitted with a document cover sheet and/or document separator sheet(s) not containing all of the required information.
>
> (Cal. Code Regs., tit. 8, § 10617.)

This rule provides considerable latitude for the WCAB to accept nonstandard pleadings, so long as the pleadings contain "a combination of information sufficient to establish the case or

cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file." (Cal. Code Regs., tit. 8, §10617(b).)

Here, although the Petition was filed only in ADJ4297137 and challenges findings only in the related cases of ADJ9485691 and ADJ8625546, it provides information sufficient to establish the cases to which it relates and enable us to adjudicate its merits.

Accordingly, we decline to dismiss the Petition.

We now address the contention in ADJ9485691 that applicant is not entitled to more than 104 weeks of temporary disability benefits on the grounds that he did not have a chronic lung disease within the meaning of section 4656(c)(3)(I).

Section 4656(c)(3)(I) states:

> [F]or an employee who suffers from the following injuries or conditions, aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury:
>
> (A) Acute and chronic hepatitis B.
> (B) Acute and chronic hepatitis C.
> (C) Amputations.
> (D) Severe bums.
> (E) Human immunodeficiency virus (HIV).
> (F) High-velocity eye injuries.
> (G) Chemical bums to the eyes.
> (H) Pulmonary fibrosis.
> (I) Chronic lung disease.
>
> (§ 4656(c)(3)(I).)

In *Velez v. Elec. Source Co*. (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 368, the Board panel stated that section 4656(c)(3)(I) "refers to various 'injuries or conditions' that are not specific diagnoses which must be made by the reporting physician . . . [c]hronic lung disease is a general term for a wide variety of persistent lung disorders or long-term respiratory problems including asthma, bronchitis, and pulmonary edema."

As the WCJ states in the Report, these conditions may include lung cancer and the medical record establishes that applicant's lung cancer was a chronic lung disease. (Report, pp. 8-9.)

Accordingly, we discern no merit to the contention that applicant is not entitled to more than 104 weeks of temporary disability benefits.

We turn to defendant's contentions in ADJ8625546 that (1) the record fails to show that applicant sustained injury AOE/COE; (2) it is entitled to a credit for temporary benefits paid on the injury in the amount of $52,546.00; and (3) the WCJ erroneously found that defendant sustained permanent disability of 4%.

As to the issue of whether applicant sustained injury AOE/COE, the WCJ states in the Report that the parties stipulated that applicant sustained injury AOE/COE on March 25, 2012 to his neck, head, headaches, and back. (Report, pp. 3, 7-8.)

Section 5702 provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(§ 5702.)

Stipulations between counsel are a "substitute for proof" and binding on the parties "if within the authority of the attorneys," and on the court if "not contrary to law, court rule or policy." (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54, 58 [44 Cal.Comp.Cases 553].) Stipulations between counsel further "'the public policies of settling disputes and expediting trials...' (citation) 'and their use in workers' compensation cases should be encouraged.'" (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd*. (*Allen*) (2010) 181Cal.App.4th 752, 764 [75 Cal.Comp.Cases 1]; see *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].)

Here, as the WCJ states in the Report, the parties are bound by their stipulation as to injury AOE/COE in ADJ8625546 and there are no allegations or evidence to suggest it may be set aside. (Report, pp. 5-6.) Thus, we agree with the WCJ that applicant sustained injury AOE/COE to the neck, back, head, and headaches.

Accordingly, we will leave the finding undisturbed.

As to defendant's contention that it is entitled to a credit for temporary benefits paid on the alleged injury in the amount of $52,546.00, the record shows that the WCJ concluded that defendant could not establish entitlement to the credit because it did not file a petition for credit or object to paying temporary disability benefits in the first instance. (Report, p. 7.)

Waiver is the intentional relinquishment of a known right after knowledge of the facts, and it may be either express or implied. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) (*Supervalu*) 74 Cal.Comp.Cases 720, 728.) "To make a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." (*First Nat'l Bank v. Maxwell* (1899) 123 Cal. 360, 367-368.)

Here, though defendant did not file a petition for a credit or object to paying temporary disability benefits, the record does not show that it abandoned its right to seek a credit for the alleged overpayment of temporary disability benefits. To the contrary, as the WCJ states in the Report, the issue was framed for trial and, therefore, properly subject to determination on the merits. (Report, p. 6.)

The existence of temporary disability and its duration are questions of fact and the burden of proof of a fact rests on the party holding the affirmative of an issue. (§ 5705; *Rubalcava v. Workers' Comp. Appeals Bd*. (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196].) An award of temporary disability requires both a physical impairment and a wage loss resulting from the inability to perform one's employment. (*Allied Compensation Ins. Co. v. Industrial Acc. Com*. (1963) 211 Cal.App.2d 821, 831 [28 Cal.Comp.Cases 11].) Unlike permanent disability, which compensates an injured employee for diminished future earning capacity or decreased ability to compete in the open labor market, temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. (S*ignature Fruit Co. v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].)

Applicant bears the initial burden of proving that he is either temporarily totally disabled, or that he could return to modified duties. (See *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].) If the applicant meets his burden of establishing disability, either total or partial, and the 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." (*Huston*, at p. 868.)

Here, the reporting of applicant's primary treating physician Dr. Shaw establishes that applicant was disabled from work up to December 21, 2013, and that applicant was expected to be considered for regular duty early by early 2014. (Report, pp. 7-8.)

WCAB Rule 9785(f)(8) provides that when continuing medical treatment is provided by a primary treating physician, a progress report shall be made no later than forty-five days from the last report. (Cal. Code Regs., tit. 8, § 9785(f)(8).) Notably, applicant's most recent medical report from his primary treating physician is dated December 21, 2013. (Report, p. 7.) This record shows that applicant is entitled to temporary disability benefits extending 45 days from December 21, 2013, or until February 4, 2014. Consequently, we conclude that the WCJ erroneously found applicant entitled to temporary disability benefits for the period from February 4, 2014 through March 24, 2014.

Accordingly, we will amend the F&A to find that defendant is entitled to a credit for temporary disability benefits paid during the period of February 4, 2014 through March 24, 2014, to be adjusted by the parties, with jurisdiction reserved by the WCAB in the event of a dispute.

As to the defendant's contention that the WCJ erroneously found that defendant sustained permanent disability of 4%, we observe that all decisions by a WCJ must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]; *Bracken v. Workers' Comp. Appeals Bd*. (1989) 214 Cal.App.3d 246 [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 [193 Cal. Rptr. 157, 666 P.2d 14, 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 [36 Cal.Comp.Cases 93, 97].)

Here, although the parties stipulated that applicant sustained injury, Dr. Woodcox opined that there was no separate injury but rather a flare-up of previous injuries. (Report, p. 8; Jt. Ex. 15, Supplemental PQME Report of Larry Woodcox, March 22, 2019, p. 3.) Because Dr. Woodcox did not find a separate injury, he did not opine as to any resulting permanent disability. (*Id*.) It follows that the WCJ assigned the 4% permanent disability rating based not upon medical evidence but "an equitable split . . . between the multiple dates of prior injuries." (See Report, p. 8.))

"Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a commission finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. [Citation.] Expert testimony is necessary 'where the truth is occult and can be found only by resorting to the sciences.'" [Citation.] (*Peter Kiewit Sons v. Ind. Acc. Comm*. (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].

Given that the record lacks medical reporting as to the amount of permanent disability, if any, resulting from applicant's injury, we conclude that the WCJ erroneously determined that applicant sustained permanent disability of 4%.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; 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* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the [Appeals] 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 [Appeals] Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id*.)

Because the record is unclear as to whether and to what extent applicant sustained permanent disability from his injury to the neck, back, head, and headaches, we are persuaded that the record requires further development thereon.

Accordingly, we will amend the F&A to find that the issues of permanent disability and attorney's fees thereon are deferred.

We further note that supplementation of the record on permanent disability should be from Dr. Woodcox per *McDuffie* to the extent that he can address permanent disability resulting from injury to the neck, back, head, and headaches.

Accordingly, as our Decision After Reconsideration, we will affirm the findings in ADJ9485691 and amend the findings in ADJ8625546 to find that (1) defendant is entitled to a credit for temporary disability benefits paid during the period of February 4, 2014 through March 24, 2014, in an amount to be adjusted by the parties, with jurisdiction reserved by the WCAB in the event of a dispute; and (2) the issues of permanent disability and attorney's fees are deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Facts, Awards, Orders and Opinion on Decision issued on November 3, 2021 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

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FINDINGS OF FACT ADJ8625546

15. Applicant, Jesus (Chuy) Esparza, Jr., (deceased) born _____, while employed on March 25, 2012, as a correctional lieutenant by the State of California, Department of Corrections & Rehabilitation, sustained injury AOE/COE to neck, back, head and headaches.

16. Defendant paid IDL from March 26, 2012 through March 25, 2013 and temporary disability benefits from March 26, 2013 through March 24, 2014. Defendant is entitled to a credit for temporary disability benefits paid during the period of February 4, 2014 through March 24, 2014, in an amount to be adjusted by the parties, with jurisdiction reserved by the WCAB in the event of a dispute

17. The issue of permanent disability is deferred.

18. The issue of attorney's fees is deferred.

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JOINT AWARD

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For Case - ADJ8625546

F. Temporary Total Disability (TTD) in the amount of $52,546.00 for the period from March 26, 2013 through March 24, 2014, when applicant became permanent and stationary, less credit for sums paid, and subject to a credit in defendant's favor for temporary disability benefits paid during the

period of February 4, 2014 through March 24, 2014, in an amount to be adjusted by the parties, with jurisdiction reserved by the WCAB in the event of a dispute.

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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 WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 3, 2026

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

DENNISE GUTIERREZ
MICHAEL GEORGARIOU ATTORNEY AT LAW
STATE COMPENSATION INSURANCE FUND

SRO/*kl*

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