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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

STEPHEN HART,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and
CHIEF AUTO PARTS AUTO ZONE,

Respondents.

C069347

(WCAB No. ADJ4234206)

Applicant Stephen Hart injured his right shoulder in the course of employment, which later led to an overcompensation injury to his left shoulder. The workers' compensation judge (WCJ) denied applicant's claim for temporary total disability benefits from February 11, 2011, and continuing. Applicant does not directly challenge the WCJ's finding that his shoulder injuries were permanent and stationary by that time, which would preclude further temporary disability if there were no other consequential injuries. He claims the WCJ erred by failing to

consider whether applicant was temporarily disabled based on cervical (neck) problems resulting from the previously identified injuries.

The Workers' Compensation Appeals Board (WCAB) denied applicant's petition for reconsideration of the WCJ's decision. Upon timely petition to this court, we issued a writ of review. As we shall explain, we agree with applicant that the WCJ erred by concluding that an earlier decision precluded him from considering applicant's cervical problems. We shall remand the matter to the WCAB to reconsider applicant's temporary total disability claim.

BACKGROUND

Applicant sustained the original shoulder injury in the course of employment in 1999. His claim was initially resolved and an award was entered; however, he later filed a timely petition to reopen in 2004. Applicant broadly alleged that his condition had worsened in terms of both functionality and pain level.

In August 2009, the parties entered a stipulation concerning applicant's entitlement to temporary total disability from 2004 forward. It was noted that temporary total disability was "ongoing." The stipulation did not refer to the specific parts of applicant's body that were affected.

1. 2009 Decision

Of importance to the WCJ's decision in the current matter was an earlier decision in December 2009 (the 2009 decision). By the time of the 2009 decision, applicant had undergone three

operations on his right shoulder and had favored his left side, resulting in a further consequential or overcompensation injury to the left shoulder. Authorization for surgery on his left shoulder had been denied by the employer and its insurer (the employer). In the 2009 decision, the WCJ concluded, based on evidence of the overcompensation injury, that the surgery had been erroneously denied. The 2009 award specified that applicant was entitled to "[a]ll further medical treatment reasonably required to cure or relieve from the effects of injury herein, including, but not limited to, surgery on his left shoulder."

Applicant's entitlement to temporary disability was not at issue at the time of the 2009 decision. The parties stipulated that applicant's injuries had resulted in ongoing temporary total disability from at least August 2009, to the present and continuing.

2. Current Decision

The controlling issue at the time of the current decision (which was rendered in 2011) was applicant's continued entitlement to temporary total disability. The parties stipulated to applicant's receipt of temporary total disability through February 10, 2011, but the employer objected to further benefits. Applicant asked the WCJ to award further temporary disability from February 11, 2011, through the present and continuing. The following summary provides a brief overview of pertinent evidence submitted in the current matter. A more comprehensive summary is unnecessary, considering our conclusion

that the WCJ and WCAB did not weigh the evidence relating to applicant's cervical problems.

Applicant's qualified medical evaluator (QME), Dr. Patrick Walborn, had prepared reports that support a finding of a cervical (neck) problem connected with the earlier injury. Dr. Walborn referred to applicant's cervical problems in multiple reports, including reports from 2008, 2009, and 2011. In a report dated May 23, 2011, Dr. Walborn recommended a fluoroscopic examination and an MRI of the cervical spine, as well as additional treatment. He opined that applicant should continue to receive temporary total disability benefits while he underwent additional diagnostic tests.

The employer's QME, Dr. Howard Sturtz, had previously concluded that applicant's shoulder injuries were permanent and stationary. Dr. Sturtz did note at one point that he observed a "discrepancy in range of motion of the cervical spine" But Dr. Sturtz concluded that applicant did not require additional medical treatment for his shoulders or his "other complaints." Dr. Sturtz based his conclusions on "the discrepancy between [applicant's] complaints, objective physical findings and his actual performance" as Dr. Sturtz observed in surveillance films that he reviewed.

The case was heard by the WCJ at a hearing on June 1, 2011, and his written decision followed shortly thereafter. The WCJ denied applicant's request for further temporary disability benefits, concluding that "applicant has never alleged any injury to his neck in this case." The WCJ explained that the

2009 decision was final and applicant could not "presently add new parts of the body as it is more than five years since his original injury."¹

The remainder of the WCJ's decision addressed the findings that applicant's shoulder injuries were permanent and stationary. The WCJ observed: "There is no substantial medical evidence of any need for temporary disability due to [applicant's] shoulders at this time." The WCJ commented that it reasonably could be inferred from the fact that applicant stopped seeing the doctor who was treating him for his shoulder injuries that he "was not in need of further follow up for his shoulder injuries"

3. Petition for Reconsideration and Writ Proceedings

Applicant filed a petition for reconsideration. In the WCJ's Report and Recommendation responding to the petition, the WCJ noted that applicant's neck was not injured as of 1999 "nor was it brought up as a consequence of the injury when new and further disability was previously tried and decided [in 2009]." The WCJ emphasized: "Once new and further disability was litigated and determined on December 21, 2009, the basis for that disability (injured shoulders) was a final determination."

¹ The WCJ also initially referred to a separate claim involving the neck that was settled in 2003, which the WCJ believed may have been the cause of applicant's current problems. But the WCJ later conceded in the Report and Recommendation: "Applicant settled an earlier neck claim via compromise and release, but that claim wasn't necessarily the source of the present neck symptoms."

The WCAB denied reconsideration of the WCJ's decision based on the reasons stated in the WCJ's Report and Recommendation, which the WCAB incorporated by reference with some minor, non-substantive corrections. Consequently, we refer to the WCJ's own explanation for the underlying decision throughout this opinion.

Applicant filed this timely petition for writ of review on October 3, 2011. This court subsequently entered an order directing issuance of the writ of review.

DISCUSSION

Substantial evidence applies to review of the WCAB's factual findings, but its legal conclusions are reviewed de novo. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1298; Lab. Code, § 5952.)

Applicant complains the WCJ and WCAB erred by declining to consider whether he was entitled to ongoing temporary disability based on cervical or neck area problems that were compensable consequences of the original injury. Applicant characterizes the WCJ's decision as holding that the 2009 decision precluded consideration of these issues. Consequently, applicant's argument is that the WCJ made an erroneous legal conclusion that prevented consideration of the merits of applicant's claim. Applicant's contention that the WCJ committed a legal error calls for our de novo review.

The employer responds by emphasizing the portion of the WCJ's decision indicating that applicant had not adequately, and in a timely manner, identified the issues concerning his

cervical problems.² On this point, the employer notes there was some medical evidence in 2009 of the neck problems but they were not raised as an issue until the hearing on the 2011 decision. The employer also notes that applicant's declaration of readiness to proceed on the current matter simply asked the WCJ to award temporary disability benefits that had been denied. The declaration noted applicant was awaiting treatment and did not specifically refer to the neck/cervical issues.

Preliminarily, we conclude that there was nothing in the 2009 decision itself that precluded applicant from pursuing the current claim for continued temporary disability benefits based on his cervical problems. In 2009, there was no dispute concerning temporary disability benefits, as the parties agreed at that time that they should be continued. The issue was applicant's entitlement to medical care, including surgery, for his left shoulder. Consequently, it was unnecessary for applicant to raise his cervical problems at that time.

Nor do we discern any other deficiency or procedural problem that precluded the WCJ from considering whether applicant's cervical problems supported an award of continued

² As stated in the fact section, the WCJ referred to a five-year period for filing new claims. The WCJ was referring to the period for filing a petition to reopen. (See Lab. Code, §§ 5410, 5803, 5804.) But here, both the WCJ and employer acknowledge that applicant filed a timely petition to reopen. Applicant's timely petition afforded the Board continuing jurisdiction after the five-year limitations period had expired, until the matter was resolved. (See *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926.)

temporary total disability benefits. Temporary disability benefits are designed to provide a substitute for lost wages during a temporary period of incapacity. (See, e.g., *Brooks v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1522, 1530; *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 790, 795-796.) The obligation to pay temporary disability ceases when an applicant's condition becomes permanent and stationary, which occurs when the applicant's condition has stabilized. (See *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 443; *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689, 694, fn. 4; Cal. Code Regs., tit. 8, §§ 9785(a)(8), 10152.) Accordingly, the only issue before the WCJ was whether applicant's condition was sufficiently stable to warrant discontinuing temporary disability benefits. Applicant's condition was not stable if it was still causing collateral problems that warranted further diagnosis and potential treatment.

The employer does not point to any authority to support the WCJ's conclusion that consideration of applicant's temporary disability claim was limited to those parts of the body that had *previously* been identified as having been injured. Temporary disability is provided during a period in which a person's medical condition is in flux. Furthermore, applicant's current medical issues (including his cervical problems) were clearly identified both in the medical reports and by applicant at the hearing in this matter, at which time the employer did not claim surprise or object.

The employer also suggests that "the question of a compensable consequence injury to the neck" was in fact *decided* by the WCJ in the current decision. The employer argues that there is no indication the WCJ failed to consider Dr. Walborn's reports and suggests the WCJ simply elected not to follow Dr. Walborn's opinions. The employer contends that although the WCAB adopted the WCJ's Report and Recommendation, "that does not equate to failing to consider the underlying record and thus ignoring or barring Petitioner's medical evidence."

We reject the employer's characterization of the underlying decision. In the WCJ's Report and Recommendation (adopted by the WCAB), applicant's failure to assert his cervical problems prior to or at the time of the 2009 proceedings was expressly identified as the basis for rejecting his current claim. Nothing in the Report and Recommendation implies that the WCJ actually considered applicant's claim on the merits. To the contrary, consideration of this claim would have been unnecessary based on the WCJ's conclusion that he was precluded from doing so.

In sum, we conclude the WCJ (and WCAB) erred by failing to consider whether applicant was entitled to continued temporary total disability benefits based not only on his shoulder injuries, but also on his cervical problems. In so holding, we express no opinion as to what the ultimate ruling should be.

The matter must be remanded to the WCAB for reconsideration and resolution of the underlying factual issues.³

DISPOSITION

The order of the Workers' Compensation Appeals Board denying State Compensation Insurance Fund's petition for reconsideration is annulled and the matter is remanded to the Board with directions to grant reconsideration consistent with this opinion. Petitioner is awarded the costs of this writ proceeding.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.

³ The employer also points out that after the WCJ made the decision at issue here, applicant filed a request to amend his application to include problems affecting the neck, upper back and left upper extremity as compensable consequences of the earlier injury. The current status of any further claim is unclear, but the WCJ's reasoning in the current matter would appear to preclude the amended claim.