

Filed 5/23/05 Borges v. WCAB (Quality Terminal Services) CA5

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

MARK BORGES,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS  
BOARD, QUALITY TERMINAL SERVICES  
et al.,

Respondents.

F046996

(WCAB No. STK 0190495)

**OPINION**

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for writ of review. Ronnie G. Caplane, Merle C. Rabine, and James C. Cuneo, Workers' Compensation Appeals Board Commissioners. Alvin R. Webber, Administrative Law Judge.

Frailing, Rockwell & Kelly and Sharon E. Kelly, for Petitioner.

No appearance by Respondent Workers' Compensation Appeals Board.

Hanna, Brophy, MacLean, McAleer & Jensen and Sherry L. Newton for Respondents Quality Terminal Services, Ace American Insurance Company, and Specialty Risk Services.

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\*Before Dibiaso, Acting P.J., Buckley, J., and Gomes, J.

We granted Mark Borges's (Borges) petition for writ of review to determine the lawfulness of the decision of the Workers' Compensation Appeals Board (WCAB) denying his request for temporary disability payments between February 13, 2004, and March 21, 2004. (Lab. Code,<sup>1</sup> § 5950; Cal. Rules of Court, rule 57.) We agree with Borges and conclude the WCAB's decision is unsupported by substantial evidence.

### **BACKGROUND**

On November 16, 2003, Borges caught his sleeve in a vehicle door and injured his right shoulder while loading and unloading cargo train containers for Quality Terminal Services (Quality) in Oakland.<sup>2</sup> Quality admitted the injury was industrially related and began providing Borges with temporary disability benefits. Borges's primary treating physician, Patrick Rhoades, M.D., issued a progress report on December 9, 2003, recommending Borges receive a surgical consultation and instructing Borges to remain off work until February 15, 2004. After a January 6, 2004, evaluation, the consulting orthopedic surgeon, Lenita Williamson, M.D., concluded Borges's shoulder had been dislocated and that he required aggressive physical therapy without mentioning a need for surgery.

Dr. Rhoades reexamined Borges on January 26, 2004; his primary treating physician's progress report from that date states: "This patient has been instructed to ... Remain off work until 4/1/04." The doctor also reported: "Will attempt to get the patient to work before the six weeks, as soon as the shoulder can tolerate it."

Quality sent Borges to Paul Manchester, M.D., for a Qualified Medical Examination (QME) on February 11, 2004. In a QME report dated February 11, 2004,

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<sup>1</sup> Further statutory references are to the Labor Code unless otherwise indicated.

<sup>2</sup> Further references to Quality include its workers' compensation insurer, respondent Ace American Insurance Company, and its third party administrator, respondent Specialty Risk Services.

but not signed until March 2, 2004, Dr. Manchester found Borges was not yet permanent and stationary and that “He should be able to return to all of his usual and customary work duties as of the date of this examination.” According to correspondence between counsel, Quality first received a faxed copy of Dr. Manchester’s QME report on May 3, 2004, and forwarded it to Borges the next day. A facsimile machine heading along the top of the WCAB’s copy of the QME report further confirms it was faxed from Dr. Manchester’s office on May 3, 2004.

Quality deposed Borges on February 12, 2004. Borges admitted Dr. Manchester “asked me if I felt I could go back to work, and I said yes.” Dr. Manchester, however, did not give Borges any indication that he *should* return to work. Borges explained that he had not yet informed Dr. Rhoades of his improvement because he was “letting the [physical] therapy take its course.” Borges noted he no longer suffered pain when he performed certain movements such as reaching, but he remained unable to sleep on his right side, perform upper-body workouts, or throw a ball with any velocity. Although Borges felt he was “mostly healed” and that he could perform his regular work duties, he emphasized that he was not an expert. When asked if he intended to call Dr. Rhoades about returning to work, Borges responded, “That would be my physical therapist’s determination and Dr. Rhoades’ determination.” Borges explained he planned to tell Dr. Rhoades during his next appointment on March 1, 2004, that his physical therapy was going well and that he believed he had healed as much as he was going to heal. A discussion off the record immediately ensued after defense counsel asked: “Why would we wait two and a half weeks to tell [Dr. Rhoades] that?”

Quality thereafter stopped providing Borges with temporary disability payments as of February 13, 2004.

As scheduled, Borges returned for treatment with Dr. Rhoades on March 1, 2004. Dr. Rhoades noted that Borges pain had improved but that he suffered from a “chronic

subluxating shoulder.”<sup>3</sup> Dr. Rhoades instructed Borges to remain off work until May 1, 2004, and requested Dr. Williamson reevaluate Borges, explaining:

“If patient sees Dr. Williamson one more time, and she feels that he is not a surgical candidate, will probably send him back to work. If she feels, he needs surgery right away, will undergo that. Given chronic subluxation, I want to be sure from [a] surgical standpoint that nothing needs to be done right away.”

On March 16, 2004, Dr. Williamson concurred with her former diagnosis and expressly directed Borges to comply with Dr. Rhoades’s work restrictions. On March 19, 2004, Dr. Rhoades released Borges to work as of March 21, 2004.

On May 28, 2004, Borges filed a Declaration of Readiness to Proceed for an expedited workers’ compensation hearing, claiming in part that Quality “fails and continues to fail to provide adequate temporary disability benefits ....” At a July 29, 2004, hearing, Borges again testified that Dr. Manchester did not advise him to return to work but indicated he would be able to do so after he completed his aggressive physical therapy. Borges recalled Quality’s counsel asking him at the February 12, 2004, deposition to move up his next appointment with Dr. Rhoades, but explained he was unable to reschedule the appointment. According to Borges, Quality never contacted him about returning to work.

The WCJ issued a decision on August 13, 2004, finding undisputed Borges’s personal belief that he was capable of working as of the date of his deposition. The WCJ found irrelevant whether Quality asked Borges to return to work and when Borges received a copy of Dr. Manchester’s QME report. Accordingly, the WCJ concluded Quality appropriately terminated Borges’s temporary indemnity payments after February 12, 2004.

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<sup>3</sup> Subluxation is “Incomplete or partial dislocation, as of a bone in a joint.” (The American Heritage Stedman’s Medical Dict. (2001) p. 797.)

Borges petitioned the WCAB for reconsideration. After first discussing the timeliness of the petition, the WCAB concluded Borges's testimony, coupled with Dr. Manchester's medical opinion, supported the WCJ's finding that Borges was not entitled to temporary disability indemnity between February 13, 2004, and March 21, 2004. In its opinion denying reconsideration, the WCAB did not address Borges's argument that it was improper to deny him temporary disability benefits based on Dr. Manchester's medical opinion received after the disputed temporary disability period.

### DISCUSSION

The existence and duration of temporary disability present a question of fact for the WCAB to determine by a preponderance of the evidence. (§ 3202.5; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233; 1 Hanna, Cal. Law of Employee Injuries & Workers' Compensation (2d rev. ed.1996) § 7.01[2], p. 7-6.) Factual determinations of the WCAB must be upheld if, based on review of the entire record, the findings are supported by substantial evidence. (§§ 5952, subd. (d); 5953; *LeVasque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) This court is not bound, however, to accept the WCAB's factual findings if determined to be unreasonable, illogical, improbable, or inequitable when viewed in light of the overall statutory scheme. (*Western Growers Ins. Co, supra*, at p. 233.)

There is no statutory definition of "temporary disability," but it has been defined as an "incapacity to work that is reasonably expected to be cured or materially improved with proper medical treatment." (*Chavira v Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473.) Unlike permanent disability which compensates an injured employee for impaired 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. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753.) "In general, temporary disability indemnity is payable during the worker's healing period, until the worker has recovered sufficiently to return to work or until the

worker's condition reaches a permanent and stationary status.” (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1980) 104 Cal.App.3d 933, 938.) A disability caused by a work injury is no longer temporary “when the employee's condition has reached maximum improvement or the condition has become stationary for a reasonable period of time.” (*Western Growers Ins. Co, supra*, 16 Cal.App.4th at p. 235.)

Borges takes issue with the WCAB finding he was no longer temporarily disabled as of February 12, 2004. We agree the WCAB's determination is not supported by substantial evidence -- at least not by substantial evidence in existence during the disputed temporary disability period.

We find instructive *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 (*Huston*). The employee in *Huston* suffered a work-related injury to his back on December 11, 1974, and the employer provided the employee with temporary disability payments through November 30, 1977.<sup>4</sup> (*Id.* at pp. 860-861.) The employer petitioned the WCAB to terminate temporary disability benefits in December 1977. Relying on both a physician's April 7, 1977, report and the employee's February 3, 1978, testimony that his back condition was stable, the WCJ determined the employer was entitled to an overpayment of temporary disability payments as of April 7, 1977. (*Id.* at p. 863.) In a split decision, the WCAB denied reconsideration. (*Id.* at p. 864.) The appellate court disagreed, noting the medical report relied on by the WCAB did not constitute substantial evidence because it was based on an incorrect legal theory. (*Id.* at p. 868.) As to the

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<sup>4</sup> Although the parties in *Huston* entered into a stipulation, approved by the WCJ, that the employer would continue to provide temporary disability benefits until the employer filed a petition to terminate, that distinction does not affect the present case regarding the substantiality of evidence required to terminate temporary disability. “It is generally true that in voluntarily paying compensation, the employer and/or his carrier do not thereby admit that he is under any legal obligation to pay or continue to pay benefits.” (*Huston, supra*, 95 Cal.App.3d at p. 866.)

employee's personal belief regarding his physical condition, the court found that testimony alone did not constitute substantial evidence:

“The statement by Huston that his condition has been unchanged since April 7, 1977, *by itself*, is not determinative of temporary disability as it is not a medical opinion of his status. While he felt no change, he still might have been in his ‘healing period.’ [Citation.] Medical evidence must support a finding of permanent and stationary status.” (*Huston, supra*, 95 Cal.App.3d at pp. 867-868.)

We agree with Borges that the WCAB here improperly bolstered Borges's lay opinion with Dr. Manchester's medical evidence not yet in existence. Like the WCAB's opinion denying Borges's petition for reconsideration, Quality ignores the undisputed fact that Borges had no knowledge that any medical professional believed he was able to return to work to perform his regular job duties until he received a copy of Dr. Manchester's QME report in early May 2004.<sup>5</sup>

On February 12, 2004, the available medical evidence in the record indicates Drs. Rhoades and Williamson were treating Borges with aggressive physical therapy and that he had not been cleared to return to work. Borges appropriately followed the work restrictions established by his treating physician, physical therapist, and consulting orthopedic surgeon. Despite Borges's personal belief that he may have been feeling better, the medical evidence indicates he was in his healing period and therefore temporarily disabled. As Borges testified at his deposition, he was not a medical expert and the determination whether to return to work was best made by his treating physician and physical therapist. Borges's reluctance to return to work before terminating his physical therapy and without medical clearance is especially warranted here because he continued to suffer difficulties with his shoulder. Moreover, Dr. Rhoades's subsequent

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<sup>5</sup> Although not raised as an issue by the parties and therefore not addressed by this court, we also question whether Quality could have legally accepted Borges to return to work before any physician had provided a medical release.

examination of Borges on March 1, 2004, confirms the physician continued to believe Borges should not return to work for several weeks.

While Dr. Manchester may have concluded Borges was medically capable of returning to work earlier, his opinion was never conveyed to Borges, Dr. Rhoades, or Quality before Dr. Rhoades released Borges to return to work as of March 21, 2004, and therefore should not have been considered in depriving him of temporary disability benefits. Given that temporary disability indemnity is intended as a substitute for lost wages during a period of transitory incapacity to work, we find the termination of such benefits based on the retroactive consideration of a medical opinion not yet received by the parties unreasonable, illogical, and inequitable. By relying on Borges's lay testimony and Dr. Manchester's not yet created QME report, the WCAB's determination that Borges was capable of returning to work as of February 12, 2004, was not supported by substantial evidence.

#### **DISPOSITION**

The WCAB's November 8, 2004, Opinion and Order Denying Reconsideration is annulled as to its finding that substantial medical and testimonial evidence supported the WCJ's determination that Borges was not entitled to temporary disability between February 13, 2004, and March 21, 2004. In all other respects, the WCAB's Opinion and Order is affirmed. The matter is remanded to the WCAB for further proceedings consistent with this opinion.