

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

SAMPSON PARKER, *Applicant*

vs.

**AC TRANSIT, permissibly self-insured, adjusted by
ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ10741808
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 10, 2021

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

**SAMPSON PARKER
LAW OFFICES OF WALTERS & ZINN
TESTAN LAW**

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

**I.
INTRODUCTION**

1. Applicant’s Occupation: Bus Driver, 250
Applicant’s Age: 69
Date of Injury: December 9, 2016
Parts of Body Injured: Left Leg, Left Ankle, Left Foot, and Right Wrist
2. Identity of Petitioner: Defendant
Timeliness: Yes
Verification: Yes
3. Date of Findings and Award: May 24, 2021
4. Defendants’ Contentions: The shortening of applicant’s left leg does not qualify applicant for the amputation exception to the 104 week cap on temporary total indemnity. Defendant further contends that if applicant qualifies for the amputation exception, his entitlement to temporary disability indemnity should not run continuously, but rather it should end after a period of 104 weeks and resume on the date of the last surgery.

**II.
STATEMENT OF THE CASE AND FACTS**

On December 19, 2016, while employed by defendant as a bus driver, applicant sustained injury arising out of and in the course of employment to his left leg, left ankle, left foot, and right wrist. As a result of this injury, applicant underwent multiple surgeries as follows: debridement, irrigation, and placement of an external fixator; a debridement and irrigation of the left tibial wound and open reduction and internal fixation of the right distal radius fracture; removal of the external fixator of the left tibial followed by placement of an intramedullary tibial rod; a left foot medial sesamoidectomy; an open excision of the lateral sesamoid; and removal of the intramedullary tibial rod. (Joint Exhibit 104, pp. 2-3; Joint Exhibit 103, p. 2.) On October 15, 2019, applicant underwent his last surgery, which is discussed below.

On October 27, 2020, Steven Isono, M.D., the agreed medical evaluator (AME), issued a report stating that on October 15, 2019, applicant underwent the placement of a revision intramedullary tibial nail placed in a locking fashion along with an open reduction, internal fixation (ORIF) utilizing two plates and screws for fixation along with the implantation of bone morphogenic protein and that the surgery caused a shortening of applicant’s left lower leg. (Exhibit 101, p. 3.) Dr. Isono also stated that he required further information before he could discuss applicant’s disability status. (*Id.* at p. 11.)

On February 8, 2021, applicant's primary treating physician, Scott Petersen, M.D., issued a report stating that applicant was maximally medically improved. (Exhibit A¹, p. 1.) Dr. Peterson also stated that applicant "underwent surgery on 10/15/2019 due to hypertrophic nonunion left proximal tibial shaft fracture with necrotic bone at the fracture site and gross mobility. This surgery resulted in shortening of the left tibia and fibula." (*Id.* at p. 2.) Dr. Peterson's physical examination revealed that applicant's left leg was six centimeters shorter than the right. (*Id.* at p. 3.) Dr. Petersen described the last surgical procedure as a "limb shortening surgery." (*Id.* at p. 4.)

On May 13, 2021, Dr. Isono issued a supplemental report after reviewing radiology reports and Dr. Peterson's permanent and stationary report. (Joint Exhibit 105.) As relevant herein, he stated that, "if the parties wish to move forward with this case ... I would be in agreement with the impairment assessment of Dr. Petersen." (*Ibid.*)

On May 18, 2021, the matter proceeded to trial on the issues of whether applicant qualified for the amputation exception to the 104 week cap on temporary total disability indemnity and if so, whether applicant's entitlement to receive temporary disability indemnity would run continuously or whether it would stop after 104 weeks had been paid and resume on the date of the last surgery. The matter was submitted without testimony. (Minutes of Hearing (MOH), May 18, 2021.)

On May 24, 2021, the Findings and Award issued. As relevant herein, I determined that the surgical removal of bone from applicant's left lower extremity combined with a shortening of the limb constituted an amputation pursuant to Labor Code section 4565(c)(3)(C)², and that applicant was entitled to receive temporary disability indemnity for the period beginning on December 17, 2018 and continuing through February 7, 2021.

On June 11, 2021, defendant filed its Petition for Reconsideration.

III. **DISCUSSION**

In relevant part, Labor Code section 4565(c) provides that,

- (1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.
- (2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

¹ The Minutes of Hearing provide an incorrect date of February 8, 2020 for this report.

² Unless otherwise specified all future statutory references are to the Labor Code.

(3) Notwithstanding paragraphs (1) and (2), for 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:

...

(C) Amputations

(Lab. Code, § 4656(c).)

In *Cruz v. Mercedes-Benz of San Francisco*, (2007) 72 Cal. Comp. Cases 1281, 1283 (Appeals Board en banc), the Appeals Board defined “amputation” as “the severance or removal of a limb, part of a limb, or other body appendage.” (*Id.* at p. 1286.) Subsequent cases have relied on that definition when considering the issue of amputation and section 4565. For example, in *Julie Ramirez v. Workers’ Comp. Appeals Bd.* (2008) Cal.Comp.Cases 1120, 1122 (writ den.), the Board stated that amputation required removal, by surgery or traumatic loss, of external projecting body parts and determined that a total knee replacement was not an amputation. Similarly, in *Murray v. Workers’ Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 379 (writ den.), it was determined that the partial removal of a medial malleolus was not an amputation. Further, in *Ortega v. Workers’ Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 969 (writ den.), it was determined that the amputation exception did not apply to an applicant who had 16 surgeries, including a radial head excision, and surgical removal of bone and bone tissue in the left upper limb.

However, in *Burrtech Waste Industries v. Workers’ Comp. Appeals Bd. (Collinwood)* (2010) 75 Cal.Comp.Cases 1175 (writ den.), the amputation exception was found to apply. In that matter, the removal of breast implants left applicant with a “chest that was essentially devoid of breasts, and whatever breasts were left were seriously diminished in size... and were grossly disfigured.” (*Id.* at p. 1177.) As relevant herein, the Judge in that matter stated that, “[t]here is nothing in labor code section 4656 or in *Cruz* that requires the amputation to be the severance of the entire body part.” (*Ibid.*) Additionally, in *Parco Inc. v. Workers’ Comp. Appeals Bd. (Martinez)* 83 Cal.Comp.Cases 1288 (writ den.), the amputation exception applied because the removal of bone³ from a thumb combined with a shortening of the thumb by 7 millimeters was found to constitute a severance or removal of part of a limb or appendage.

In *Cruz*, *Ramirez*, *Murray*, and *Ortega* there was no evidence reflecting that the surgeries in those matters caused a shortening of a limb or extruding body part. However, in this matter, it is undisputed that as a result of a “limb shortening surgery,” applicant lost approximately two inches from his left lower extremity, an protruding external body part. (Exhibit A at pp. 3-4.) As stated in *Burrtech*, *supra*, 75 Cal.Comp.Cases 1177, the amputation exception does not require the severance of an entire body part. Further, in *Martinez*, the amputation exception applied when a surgery resulted in a shortened thumb despite a lack of discussion regarding whether the bone was removed from the medial portion of the thumb or its outermost periphery. Accordingly, applicant’s last surgery was sufficient to constitute the removal *part of a limb*, and applicant falls under the amputation exception the 104 week cap on temporary disability indemnity.

³ This Opinion does not describe from which part of the thumb the bone was removed.

I also recommend rejecting defendant's argument that applicant would not be entitled to receive temporary total disability during the period between the exhaustion of the 104 weeks of temporary disability indemnity and the date of the last surgery. My recommendation is based on the evidentiary record and the plain language of section 4556(c)(3). (*Renee J. v. Superior Court* (2001) 26 Cal. 4th 735, 743 [When the language of a statute is clear, it is enforced according to its terms].) Here, Dr. Isono stated that applicant was maximally medically improved on July 9, 2019, but he retracted that finding upon review of CT scan, and thus, there is no evidence that applicant was maximally medically improved during that time. (Joint Exhibit 101 at pp. 2-3.) Further, section 4656(c)(3)(C) only provides that an amputation entitled an injured employee to receive up to 240 weeks of temporary disability without consideration for when the amputation occurred. Therefore, applicant's temporary disability should run continuously from December 19, 2016 until Dr. Petersen determined that applicant became maximally medically improved on February 8, 2021.

Based upon the above, I recommend denial of defendant's Petition for Reconsideration.

Date: June 22, 2021

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE