

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

MARIA HERNANDEZ, *Applicant*

vs.

**CARDENAS MARKETS, LLC and SAFETY NATIONAL CASUALTY CORPORATION,
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ13905695
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on October 4, 2021, wherein the WCJ found in pertinent part that applicant was not entitled to temporary disability indemnity for the period from September 25, 2020, through April 27, 2021, and that the issue of applicant's entitlement to temporary disability indemnity for the period from April 28, 2021, through the present and continuing was deferred.

Applicant contends that defendant did not make a valid offer of modified work, and that applicant was entitled to temporary disability indemnity benefits after her employment with defendant was terminated, so she was entitled to temporary disability indemnity for the period from September 25, 2020, through April 27, 2021.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to find that the issue of applicant's entitlement to temporary disability indemnity for the period from September 25, 2020, through April 27, 2021, is deferred (Finding of Fact 1); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her neck, mid-back, lumbar spine, left elbow, left forearm, left hand/small finger, psyche, and internal organs, and in the form of headaches and sleep disorder, while employed by defendant as a clerk on September 25, 2020.

Applicant received treatment for her injury by Keith Wresch, M.D. In the Doctor's First Report of Occupational Injury or Illness, Dr. Wresch stated that applicant could, "Return to modified work/activity today." (App. Exh. 9-J, Keith Wresch, M.D., September 26, 2020, pp. 5 and 7.) He assigned the following work restrictions:

May lift up to 10 lbs. occasionally
May push/pull up to 10 lbs. occasionally
May bend occasionally
May engage in activities requiring trunk rotation occasionally
Wear splint/brace on left upper extremity constantly
No use of left upper extremity
(App. Exh. 9 - J, pp. 7 and 16.)

By a document titled Acknowledgement of Return to Temporary Work, defendant offered applicant modified work on September 28, 2020. The first paragraph of the document states:

Temporary work is being offered during the recovery effective 9-27-2020, and will be re-evaluated and updated on the date of your next doctor visit on 9-30-2020. Upon signing this, you accept that you are going back to work with temporary restrictions as indicated by the doctor.
(Def. Exh. H, Offer of Modified Work, September 28, 2020; translated into English by Spanish interpreter Edgar Beltran [Transcript of Proceedings pp. 13 – 15].)

In his September 30, 2020 Progress Report (PR-2) Dr. Wresch stated that applicant could:

Return to *modified* work on 09/30/2020 with the following limitations or restrictions. ... May lift up to 10 lbs. constantly. May push/pull up to 10 lbs. constantly. May engage in activities requiring trunk rotation occasionally. Wear splint/brace on left upper extremity frequently. No use of left upper extremity.
(App. Exh. 9 - I, Dr. Wresch, September 30, 2020, p. 3, italics in original; [see also EAMS pp. 5, 7, and 10].)

The November 19, 2020 PR-2 from Thomas Mogensen, M.D., (signature page includes Dr. Wresch) stated that applicant could:

Return to modified work on 11/19/2020 with the following limitations or restrictions. ... May lift up to 15 lbs. constantly. May push/pull up to 15 lbs.

constantly. Unable to use power/impact/vibratory tool with left upper extremity.
May not grip/squeeze/pinch with left upper extremity
(App. Exh. 9 - A, Thomas Mogensen, M.D., November 19, 2020, p. 6.)

Applicant changed treating physicians and was seen by Michael J. Chuang, M.D., on April 27, 2021. Dr. Chuang indicated that applicant could return to work but could only do sedentary work. (App. Exh. 8 – D, Michael J. Chuang, M.D., p. 1 [EAMS p. 4].) In his July 6, 2021 PR-2, Dr. Chuang again stated that applicant could return to work but was limited to sedentary work. (App. Exh. 8 – A, Dr. Chuang, July 6, 2021, p. 1.)

The parties proceeded to trial on August 4, 2021. The issues submitted for decision included applicant's claim that she was entitled to temporary disability indemnity benefits for the period from September 25, 2020 to the date of the trial and continuing, except for the period from January 3, 2021, through April 26, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 4, 2021, p. 2.)

DISCUSSION

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

As noted above, each of the treatment reports from applicant's treating physicians indicate that applicant could return to work but with various restrictions. (See App. Exhs. 8 and 9.) Under the 'odd lot' doctrine, a worker who is only partially disabled may receive temporary total disability payments if the partial disability results in a total loss of wages. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) The doctrine places the burden of proof on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. (*General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375]; *Hardware Mutual Casualty Co. v. Workers' Comp. Appeals Bd.* (1967) 253 Cal. App. 2d 62 [32 Cal.Comp.Cases 291].) However, an injured worker may be estopped from claiming temporary disability indemnity corresponding to periods that he or she has refused suitable modified work without good cause. (*Vittone v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 [writ

den.]) The same rule applies when an injured worker leaves the job after suitable modified work is provided. (*Haile v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 832, 835 [written.]) If an injured worker contends that his or her pain results in the inability to perform modified duties, the injured worker must timely object to any primary treating physician report that indicates he or she may return to modified work consistent with the restrictions. (Lab. Code, § 4062; *J.C. Penney Co. v. Workers' Comp. Appeals Bd. (Edwards)* (2009) 175 Cal.App.4th 818, 826 [74 Cal.Comp.Cases 826])

Here, our review of the record indicates that defendant offered applicant modified work on September 28, 2020. (Def. Exh. H, Transcript of Proceedings pp. 13 – 15.) However, the offer of modified work is not clear as to the actual nature of the work being offered or the physical demands of that work. Also, the document stated that the modified work was being offered effective September 27, 2020, and that the offer would be re-evaluated and updated on September 30, 2020, the date of applicant's next doctor's appointment. (MOH/SOE, p. 7; Transcript of Proceedings p. 13.) The record contains no evidence that there was a subsequent "updated" offer of modified work.

Further, at the trial applicant testified that she could not perform modified work "because she had a lot of pain." (MOH/SOE, p. 6.) But the trial record contains no evidence that applicant disagreed with her treating physicians' repeated statements that she could perform modified work.

As discussed herein, the trial record does not contain substantial evidence as to the modified work applicant was offered by defendant, the physical demands of the work, or whether the offer was updated based on the various treating physician reports. Nor does the record contain evidence as to whether applicant objected to the work restrictions assigned by her treating physicians or whether she discussed with the physicians, her level of pain and/or her ability to do the modified work described in the PR-2 reports. Thus, the record does not contain substantial evidence upon which a determination regarding applicant's entitlement to temporary disability indemnity benefits may be made. The Appeals Board has the discretionary authority to further develop the record where there is insufficient evidence to determine an issue submitted for decision. (Lab. Code, §5701, 5906; *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].)

In the F&O the WCJ deferred the issue of applicant's entitlement to temporary disability indemnity for the period from April 28, 2021, through the present and continuing, pending further development of the record. (F&O p. 1, Finding of Fact 2.) Under the circumstances of this matter it is appropriate that the issue of applicant's entitlement to temporary disability indemnity for the period from September 25, 2020, through April 27, 2021, is also deferred pending further development of the record.

Accordingly, we affirm the F&O except that we amend the F&O to find that the issue of applicant's entitlement to temporary disability indemnity for the period from September 25, 2020, through April 27, 2021, is deferred; and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order issued by the WCJ on October 4, 2021, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. The issue of applicant's entitlement to Temporary Disability Indemnity benefits for the period from September 25, 2020, through April 27, 2021, is deferred.

* * *

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2022

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

**MARIA HERNANDEZ
LAW OFFICES OF MOISES VAZQUEZ
TOBIN LUCKS**

TLH/pc

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

CS