

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

OSCAR MARTINEZ, *Applicant*

vs.

**SECURITA AMERICA, INC.; GALLAGHER BASSETT, tpa EVEREST NATIONAL
INSURANCE, *Defendants***

**Adjudication Number: ADJ10887310
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Oscar Martinez. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the March 13, 2020 Finding and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to a Supplemental Job Displacement Benefit (SJDB) voucher.

Applicant contends that he is eligible for a SJDB voucher because he sustained 3% permanent disability and even though he returned to his regular job after being off for approximately 5 weeks, applicant worked his regular job less than twelve months before being laid off.

We received and reviewed defendant Securita America Inc.'s answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend the March 13, 2020 Finding and Order to find that applicant is entitled to a SJDB voucher.

FACTS

As the WCJ stated in his Report:

¹ Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

The applicant was injured on 05/03/17, and after treatment was released to return to work by Dr. Abdo on 06/02/17 and 6/12/17 full duties. (See Joint Exhibit II at page 3, EAMS Doc ID 72342584). He returned to work for employer Security America doing the same duties as before the date of injury. (See MOH dated 2/26/20 at page 4 lines 6-9, EAMS Doc ID 72342920). Thereafter, the applicant was evaluated by Panel Qualified Medical Examiner Dr. Khosrow Tabaddor who issued a report dated 10/01/18. The PQME Dr. Tabaddor opined that the applicant is capable of performing his job duties without any restrictions. (See Joint Exhibit FF at page 6, EAMS Doc ID 72342487). In PQME Dr. Tabaddor's 12/18/17 report he indicated that "he is currently working in his job duties within his ability. He may continue to do so without any restrictions". (See Joint Exhibit II at page 6, EAMS Doc ID 72342584). Additionally, In [sic] PQME Dr. Tabaddor's Physician's Return-To-Work & Voucher Report dated 12/22/17 he opined that the applicant can return to regular work and no restrictions noted. (See Joint Exhibit HH EAMS Doc ID 72342559.).

There is no dispute that the applicant continued to work for defendant Security America, Inc. until that employer's contract for providing security for the MTA through Friday November 10, 2017 ended. Before the end date of the contract, the security company who took over the contract, North America Security Company's supervisor went to the location that the applicant was working and informed him of the change in contract with the MTA and that he would be staying on at the same location doing the same job at the same pay starting on 11/13/17. (See MOH dated 02/26/20 at page 5 lines 13-15 EAMS Doc ID 72342920). Thereafter he started working for the new security company North America Security Company starting on his next scheduled work day Monday November 13, 2017. (See MOH dated 02/26/20 at page 5 lines 10-12 EAMS Doc ID 72342920). The applicant worked at the same location, doing the same job as he did for Security America, Inc. and still works at that location for North America Security. (See MOH dated 02/26/20 at page 5 lines 18-19, EAMS Doc ID 72342920). Although the applicant's uniform is different and that some of the company policies are different, he is essentially doing the same job then and now as he did for defendant Security America, Inc. (See MOH dated 02/26/20 at page 5 lines 20 – 22, EAMS Doc ID 72342920). (Report, p. 2.)

DISCUSSION

I. The Grant For Study Was Timely

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California.

(Lab. Code², §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10940(a), 10615(b).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).³ In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.⁴

Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020. As applicant's Petition for Reconsideration was filed on April 10, 2020, it was thus considered filed on April 13, 2020.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (§ 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (§ 5315.) On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.⁵ Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, the decision to grant this case for study on May 28, 2020 was filed within 120 days of April 13, 2020, and is therefore timely.

II. Applicant Is Entitled To A SJDB Voucher.

Section 4658.7(b) provides that an injured worker is entitled to a SJDB voucher if the industrial injury causes permanent partial disability and the employer fails to make an offer of

² All statutory references are to the Labor Code unless otherwise indicated.

³ The March 16, 2020 DWC Newslines may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

⁴ The April 3, 2020 DWC Newslines regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

⁵ Governor Newsom's Executive Order N-68-20 may be accessed here: <https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf>. (See Evid. Code, § 452(c).)

regular, modified, or alternative work. (§ 4658.7(b).) Section 4658.7(b)(1) and (2) and Rule 10133.31(b) provide that the offer of regular, modified, or alternative work must be made no later than 60 days after receipt of the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) and must last for at least 12 months. (§ 4658.7(b)(1) and (b)(2); Cal. Code of Regs. tit. 8, § 10133.31(b).) However, an "employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658.7(b)." (Cal. Code of Regs., tit. 8, § 10133.31(c).)

According to Khosrow Tabaddor, M.D., panel qualified medical evaluator (PQME), applicant sustained a 2% whole person impairment to the lower extremity. (Joint Exhibit FF, Dr. Tabaddor report dated October 1, 2018.) This apparently results in a 3% permanent disability to the lower extremity. (See Joint Exhibit DD, Notice Regarding Permanent Disability Benefits.) Defendant contends that Dr. Tabaddor's report is not substantial evidence because of applicant's ankle inversion and eversion measurements. (Answer, p. 5:9-22.) Defendant notes that the discrepancy between eversion and inversion findings were noted in the Disability Evaluation Unit's consultative rating. (*Ibid.*)

The Disability Evaluation Unit's consultative rating has not been filed and is not in evidence. On p. 4 of Dr. Tabaddor's report, he states that "[m]uscle strength and eversion was 4/5." (Joint Exhibit FF, Dr. Tabaddor report dated October 1, 2018, p. 4.) On p. 5 of his report, he states "[t]he weakness of the inversion of the ankle was 4/5, when compared to the opposite side." (*Id.* at p. 5.) Further down on p. 5, he states that applicant suffers from "[w]eakness of the eversion of the right ankle" under the heading "Objective Findings." (*Ibid.*) It is unclear whether these statements are contradictory or whether one of the statements contains a typographical error. Defendant bears the burden of proof in showing how Dr. Tabaddor's report is not substantial evidence and based on defendant's contention above, we are not convinced that Dr. Tabaddor's report lacks substantial evidence. (§ 5705.)

A 3% permanent disability rating to the lower extremity entitles applicant to a SJDB voucher under section 4658.7(b), unless defendant made an offer of regular, modified, or alternative work lasting at least 12 months. (§ 4658.7(b).) The employer holds the burden of proof to show that it offered applicant regular, modified, or alternative work. (§ 5705.) We conclude that defendant did not meet its burden of proof here.

Defendant does not contend that it made an actual offer of regular, modified, or alternative work to applicant. Rather, defendant relies on Rule 10133.31(c) for its position that it should be deemed to have offered regular work. (Answer, pp. 6:7-8:12.) Rule 10133.31(c) deems an employer to have offered *regular* work when the employee lost no time from work or has returned to the same job for the same employer. Here, applicant lost approximately one month of work following the injury. Although applicant returned to his regular job with the same employer, without restrictions, he worked for approximately five months before he was laid off, thus failing to meet the requirement that the offer of regular work last at least 12 months. While he performed essentially the same job in his subsequent employment, it was with a different employer. Rule 10133.31(c) specifically states that an employee must return to the same job *for the same employer* in order for the employer to be deemed to have offered regular work. The burden of proof remains with defendant to show that it offered regular, modified or alternative work. (*Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied).) We conclude that defendant has not met its burden of proof to show that it offered regular, modified, or alternative work to applicant for at least 12 months. The subsequent employment cannot be added to meet the 12 months requirement because the subsequent employment was with a different employer. Accordingly, we amend the March 13, 2020 Finding and Order to find that applicant is entitled to a SJDB voucher.

The parties here participated in the dispute resolution found in Rule 10133.54. We note that in *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389 (Appeals Board En Banc) we invalidated Rule 10133.54. We are aware that the parties participated in Rule 10133.54 dispute resolution before *Dennis* was issued. We wanted to inform the parties that Rule 10133.54 is no longer valid.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 13, 2020 Finding and Order is **AMENDED** as follows:

...

FINDING

Applicant is entitled to a Supplemental Job Displacement Benefit voucher.

ORDER

Applicant is entitled to a Supplemental Job Displacement Benefit voucher.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 30, 2023

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

**OSCAR MARTINEZ
LAW OFFICES OF FRED L. FONG
QUINTAIROS, PRIETO, WOOD & BOYER**

LSM/pc

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