

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

**KENNETH PURCELL, *Applicant***

**vs.**

**LAGUNITAS BREWING COMPANY, NATIONAL UNION FIRE INSURANCE  
COMPANY, Administered By GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ15904596  
Oakland District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Finding of Fact of August 26, 2022, wherein it was found that, "Applicant is entitled to temporary disability benefits starting May 16, 2022 and continuing." In this matter, while employed on November 18, 2021 as an electrician, applicant sustained industrial injury to his right hip, left elbow and head and claims injury to his lumbar spine and knee. The WCJ found an entitlement to temporary disability indemnity on the basis that, while applicant was temporarily partially disabled, defendant did not sufficiently offer suitable modified work.

Defendant contends that the WCJ erred in finding an entitlement to temporary disability indemnity, arguing that suitable modified work was offered, and that applicant abandoned his job despite a suitable offer of modified work. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny defendant's Petition. As noted by both applicant's testimony and the testimony of applicant's supervisor, applicant's supervisor appears to have been unaware of applicant's work restrictions. The fact that the employer did not make applicant's supervisor aware of applicant's work restrictions, including the need to lay down, buttresses the WCJ's finding that applicant was not offered suitable modified work. As noted by the WCJ, it was defendant's burden

to offer modified work within the doctor's restrictions, not applicant's burden to request modifications while performing his usual work.

We therefore deny reconsideration for the reasons stated by the WCJ, which we quote below:

### **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

Defendant filed a petition for reconsideration from my August 25, 2022 finding that applicant is entitled to temporary disability benefits from May 16, 2022 and continuing. Applicant filed a response.

#### **INTRODUCTION**

Applicant began his employment with Lagunitas Brewing Company as an electrician in 2017.

On November 18, 2021, he sustained an injury to his right hip, left elbow and head along with his lumbar spine and knee. Despite his injury, applicant continued working for the employer full capacity.

On May 9, 2022, (Applicant's Exhibit 3) applicant emailed HR asking how he could have his restrictions from the April 28, 2022 doctor's note (Defense Exhibit B) accommodated. HR never provided a response to applicant's question regarding provision of accommodation. (Minutes of Hearing, Summary of Evidence, 8/17/2022, page 5, lines 12-14). Because his pain was getting worse, and since his work restrictions were not being accommodated, applicant stopped working on May 14, 2022. (Minutes of Hearing, Summary of Evidence, 8/17/2022, page 5, lines 30-32).

Because applicant failed to return to work after May 15, 2022, defendant terminated his employment.

It was my finding that since the employer did not properly address applicant's need for work modifications, proper modified work was not provided hence applicant is entitled to temporary disability benefits.

Defendant has appealed this finding.

#### **DISCUSSION**

At no point in time during the trial did defendant provide any proof that the April 28, 2022 work restrictions (Defense Exhibit B) were accommodated for applicant.

Defendant had applicant's direct supervisor, Mr. Ginelli testify at trial. Most of Mr. Ginelli's testimony focused on his impression that applicant was a bad employee.

When questioned about whether the applicant's work restriction for the need to lay down was accommodated, Mr. Ginelli testified that applicant never requested the to lie down during the work hours. (Minutes of Hearing, Summary of Evidence, 8/17/2022, page 6, lines 45-47).

Applicant provided the employer with his work restrictions. The work restrictions specify applicant's need to lie down during the work hours. There was no need for applicant to do anything other than submit his doctor's note to the employer. Once the employer receives the doctor's note, the employer needs to take appropriate steps to determine whether modifications can be made to applicant's job.

Since applicant's supervisor testified that he did not take any steps to accommodate applicant's need to lay down during the work hours, applicant's modifications were not met.

Applicant was receiving treatment from Concentra which is an employer designated medical service for people with work related injuries. Concentra produces medical reports which reports are served upon the insurance carrier by the provider.

Once the medical report is served upon the provider, the provider communicates with the employer about whether accommodations can be met.

Since the employer did not properly address applicant's need for work modifications, proper modified work was not provided hence applicant is entitled to temporary disability benefits.

Defendant argues that my decision needs to be over turned because I failed to make a credibility determination.

Both of the witnesses testified honestly. There was no reason for me to doubt the credibility of either witness. The issue in this case did not turn on credibility. Rather it was a lack of communication. I do not believe the supervisor understood what the work restrictions were while the applicant did not know where he needed to go and what he needed to do to ask for his accommodations to be met.

The supervisor should have been told by HR that one of the work restrictions required that the applicant be provided with an opportunity to lay down. Either HR or the supervisor should have communicated with the applicant as to how this restriction could be met. Unfortunately the supervisor was under the

impression that applicant needed to request the opportunity to lay down, personally, instead of just accepting the doctor's note as the request on behalf of applicant to be able to lay down.

As for defendant's pitch that the record needs further development so that proof can be produced to show there are places where applicant could lay down if he needs to, the issue is not whether there is a place to lay down. Rather the issue is did the employer communicate with the applicant that he could lay down during the work hours.

Since the supervisor testified that he did not offer applicant the ability to lay down during the work hours, applicant's work modifications were not met by the employer.

### **RECOMMENDATION**

I recommend the Petition for Reconsideration filed by defendant be **DENIED**.

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of the Finding of Fact of August 26, 2022 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 15, 2022**

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

**KENNETH PURCELL  
FRANCO MUÑOZ, P.C.  
LAUGHLIN, FALBO, LEVY & MORESI**

**DW/ara**

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