WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KIEGAN YOA, ***Applicant***

vs.

VILLAGRANA LOGISTICS, INC.;
OLD REPUBLIC INSURANCE COMPANY, administered by SEDGWICK, ***Defendants***

Adjudication Number: ADJ16845605
Oxnard 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, and for the reasons stated below, we will deny reconsideration.

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured employee is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers Compensation Appeals Board, Hunt-Wesson, Inc., Respondents* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured employee is off work. (*Gonzales, supra*, at p. 847.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd*. (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. Industrial Acc. Com. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

An employer is not liable for temporary disability if the injured employee could have continued to work modified duty but for the employee's termination for cause. (See *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.).) However, the defendant has the burden of proving that the applicant's employment was terminated for cause. (*Id*.; *Peralta v. Party Concepts* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 100 (Appeals Board panel decision).)

For the reasons stated by the WCJ in the Report, we agree that defendant failed to meet its burden of proof. In addition, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

We further note that defendant's Petition for Reconsideration fails to cite to the record with any specificity, which is an additional basis for denial. WCAB Rule 10945(a) provides, in relevant part:

> (a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. ***A failure to fairly state all of the material evidence may be a basis for denying the petition***.
>
> (b) Every petition and answer shall support its evidentiary statements by specific references to the record.
> (1) References to any stipulations, issues or testimony contained in any Minutes of Hearing, Summary of Evidence or hearing transcript shall specify:
> (A) The date and time of the hearing; and
> (B) If available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates (e.g., "Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15").
> (2) References to any documentary evidence shall specify:
> (A) The exhibit number or letter of the document;
> (B) Where applicable, the author(s) of the document;
> (C) Where applicable, the date(s) of the document; and
> (D) The relevant page number(s) (e.g., "Exhibit M, Report of John A. Jones, M.D., 6/16/08 at p. 7.").
> (3) References to any deposition transcript shall specify:
> (A) The exhibit number or letter of the document;

(B) The name of the person deposed;
(C) The date of the deposition; and
(D) The relevant page number(s) and line(s) (e.g., "Exh. 3, 6/20/08 depo of William A. Smith, M.D., at 21:20-22:5]").

(Cal. Code Regs., tit. 8, § 10945(a)-(b), emphasis added.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 19, 2023

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

KIEGAN YOA
LAW OFFICE OF CHRISTINE T. NELSON
HANNA, BROPHY, MacLEAN, McALEER & JENSEN

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

The Workers' Compensation Judge ("WCJ") issued an Opinion on Decision and Findings of Fact and Order, on June 27, 2023. Defendant, hereinafter, “Petitioner,” has filed a timely and verified Petition for Reconsideration on the following grounds pursuant to Labor Code § 5903 / Rule 10843:

1. The appeals board acted without or in excess of its powers;
2. That the evidence does not justify the findings of fact;
3. That the findings do not support the order, decision or award.

Applicant has not filed a response.

I. CONTENTIONS:

That the Award of temporary disability is inconsistent with the “factually overwhelming evidence” that Applicant violated company policy multiple times, that the case should be remanded for further proceedings in order to develop the record, to provide further documentation, and further witnesses, to support defendant’s position that Mr. Yoa’s termination was warranted, and that the WCAB overturn the June 27, 2023 Findings and Award and Opinion.

II. FACTS:

The claim herein involves an admitted specific injury that took place on August 30, 2022, to the applicant’s right knee, while he worked as a delivery associate for defendant, Villagrana Logistics. Minutes of Hearing and Summary of Evidence, May 3, 2023, page 2, lines 6-9. The matter proceeded to trial on whether the applicant was entitled to TTD, after being terminated while working modified duties. Id. at page 2, lines 20-23. The parties stipulated that the applicant was working modified duties at the time of his termination on January 10, 2023. Id. at page 2, lines 17-18. The applicant testified on his own behalf, in court, and Ms. Mabel Vuong testified on behalf of the defendant, via telephone.

The applicant testified that he was placed by defendant to work modified duties at “Lutheran Social Services (hereinafter “LSS”).” Minutes of Hearing and Summary of Evidence, May 3, 2023, page 4, lines 8-9. Mr. Yoa testified that at said location, his supervisor was “Stephanie,” and that his work hours were recorded using two separate applications: “Paycom” and “Real Time.” Id. at page 4, lines 10-12. The applicant explained that he “would first log in to Paycom and then to Real Time through their website, and so there was always a few minutes discrepancy in each. Villagrana told him that he needed to have the timesheets matching and that there could be no discrepancies and,

therefore, needed to match his time and was forced to change his Paycom time to the Real Time." Id. at page 4, lines 13-16.

When asked why he was terminated, the applicant testified that it was due to a "time discrepancy and two days that he didn't show up, but he actually did on January 5th and January 6th, 2023." Minutes of Hearing and Summary of Evidence, May 3, 2023, page 4, lines 17-19. Specifically, for the January 5th date, the applicant testified that he had received a text from the LSS supervisor, Stephanie, that they were "closed and that HR wanted them to work from home. Therefore he didn't go in." Id. at page 4, lines 19-22. For the January 6th date, the applicant testified that he did not go in because he had his deposition for his workers' compensation case, and had texted Stephanie regarding same. Id. at page 4, lines 21-22.

Under re-direct examination, the applicant was asked about the application and whether it "tracked him," to which he responded "I believe so." Minutes of Hearing and Summary of Evidence, page 5, lines 9-10. Further, the applicant explained that when he worked for LSS, he "sometimes had to run errands and would leave the premises." Id. at page 5, lines 10-11.

Defense called as a witness, Ms. Mabel Vuong, an employee of Villagrana, who works as the operations manager. Minutes of Hearing and Summary of Evidence, May 3, 2023, page 5, lines 18-20. Ms. Vuong testified that the applicant had "stolen company time," and that she warned him on December 28. Id. at page 5, lines 23-24. Specifically, the witness testified that the applicant had not clocked in, and that on that day, she reached out to the applicant "asking him why he was not punching in when he arrived inside the building, and he said that he had, and then she had sent him a picture of where his punch had landed." Id. at page 7, lines 15-17.

Ms. Vuong testified that she had a "day one chat" with the applicant on December 28th, after he had clocked in an hour and a half after arrival, and that "they always talked to employees first." Minutes of Hearing and Summary of Evidence, page 7, lines 17-18.

Following the December 28th "day one chat," with the applicant, Ms. Vuong testified that the applicant did not clock in properly on December 30th, and that "violations continued after the holiday following New Year's Day, and again on January 3rd where he didn't clock in while in the building." Minutes of Hearing and Summary of Evidence, May 3, 2023, page 7, lines 18-22. The applicant was then suspended on January 6th "when he didn't show up and was not responsive." Id. at page 7, lines 24-25.

Following the applicant's suspension, the witness testified that an "audit was initiated," and that it was determined "the applicant had violated the company policy 29 times." Minutes of Hearing and Summary of Evidence, page 7, lines 23-24. Under cross-examination, Ms. Vuong testified that at the time the applicant was suspended, which was for the violations following the initial "day one chat" on December 28, 2022, that the applicant had not been given a return date, and it was "pending management review." Id. at page 8, lines 6-7. The witness was asked what the outcome of the review was, and she testified that "they did an audit and that there were multiple infractions, and the company relationship changed on January 10th." Id. at page 8, lines 7-9.

In regards to the audit, when she was asked under direct examination about the 29 times the applicant had violated company policy, Ms. Vuong was heard by the undersigned judge ruffling some paper, and appeared to be referring to a document in order to respond to defense counsel's questions. Minutes of Hearing and Summary of Evidence, page 6, lines 5-8. The testimony was stopped, and the witness confirmed she was referring to a "spreadsheet…indicating it had been prepared…". Id. at page 6, lines 16-17. The undersigned judge advised defense counsel that no spreadsheet had been taken in as an exhibit, and there was a break provided so defense counsel could email the document in question to both applicant's attorney and the undersigned regarding admissibility. Id. at page 6, lines 17-22.

Further, Ms. Vuong's testimony had been stopped because she had provided a "speech-like response and that it needed to be clarified and was confusing to the judge." Minutes of Hearing and Summary of Evidence, page 6, lines 11-14. The speech-like response included the term "geofencing policies," the applicant's initial violation of December 28th, and the proper way to clock in, which was beyond the scope of the question asked by defense counsel. The witness was advised that she needed to respond to the questions being asked, and defense counsel was advised "that he needed to break down the testimony because there had been a lot of information provided in the witness's speech-like response and that it needed to be clarified and was confusing to the judge." Id. at page 6, lines 12-14. The witness' testimony had to be stopped several times thereafter because of this issue, and because she was talking too fast, and the undersigned wanted to make sure the court reporter was getting her testimony.

Following the lunch break, applicant's attorney objected to the admissibility of the spreadsheet, indicating it had not been served, and defense counsel withdrew the document, and that he would

ask his witness about the violations in question. Id. at page 7, lines 4-6. However, there was no specific testimony provided in regards to each of the 29 violations.

Under cross-examination, the witness was asked about the applicant's supervisor at LSS, Stephanie, and testified that "she had never had direct communication from the nonprofit and that when she had asked them a question, they didn't respond." Minutes of Hearing and Summary of Evidence, page 8, lines 24-25. However, when asked if Stephanie had "reached out to her," Ms. Vuong explained that she could not testify that her name was Stephanie unless she had information in front of her." Id. at page 8, line 25, and page 9, lines 1-2. Ms. Vuong further testified that she recalled receiving an email from LSS "indicating that the applicant was a good employee and that the sender of the email had personally witnessed him clocking in and out and that they didn't have issues with him…" and when she asked for information, they did not respond. Id. at page 9, lines 3-6. Thus, there was some communication between Ms. Vuong and LSS.

Ms. Vuong was then asked if "she had been aware that the facility was closed on January 5th and that he [the applicant] had a deposition to attend on January 6th whether she would have suspended him, and she said, 'No, I wouldn't have.'" Minutes of Hearing and Summary of Evidence, at page 10, lines 15-16.

Based on the testimony provided by the applicant and the defense witness, in addition to the exhibits, it was found that the applicant's testimony was more credible. Defense did not establish good cause for the termination. In addition, it appears that there was miscommunication, and lack of communication, between defendant and LSS, the location where the applicant had been placed for modified duties, in regards to him clocking in.

Ms. Vuong did not even know the name of the supervisor, Stephanie, and for some reason had issues obtaining information from them. Given that this miscommunication was part of the reason for the applicant's termination, supports, in part, that there was no good cause for the termination. Further, it does not appear that the applicant was terminated for the dates that he had been suspended for, which Ms. Vuong testified had she known the reasons for his January 6th date, he would not have been suspended. Rather, pursuant to Ms. Vuong, "the relationship changed," following an audit. However, there was no evidence submitted by defendant that they advised the applicant of the audit and the results, nor what the actual specific results were, since defendant did not submit evidence of the 29 violations, nor obtain specific testimony as to the 29 violations.

Accordingly, the undersigned judge issued a Findings of Fact and Award, and Opinion on Decision on June 27, 2023, finding that the applicant was entitled to TTD benefits and that defendant did not establish good cause for the applicant's termination. In addition, an attorney fee was ordered at 15% from the benefits owed, to be adjusted by the parties.

On July 21, 2023, 25 days after the Findings of Fact and Award and Opinion on Decision issued, petitioner filed their "Petition for Reconsideration." Applicant has not filed a response.

III. DISCUSSION:

1. THE EVIDENCE SUBMITTED AT TRIAL BY DEFENDANT DID NOT ESTABLISH GOOD CAUSE FOR APPLICANT'S TERMINATION:

Petitioner refers to the case of Butterball Turkey Co. v. WCAB (Esquivel) (1999) 65 CCC 61, as support that they are not liable for TTD benefits. Specifically, petitioner notes that the court in the case "held that if an employer is accommodating an applicant's work restrictions, but then the applicant is terminated for good cause, wholly unrelated to his workers' compensation injuries, then no temporary disability benefits will be owed by the workers' compensation carrier." Petition for Reconsideration, page 4, lines 4-8, and page 6, lines 20-23. Petitioner argues that the applicant had been "reprimanded numerous times, beginning in December of 2022, that he was stealing company hours and had to comply with company policy in order to not be terminated." Id. at page 5, lines 22-24. Further, that the applicant had "continued to violate company policy multiple times despite warnings from Villagrana Logistics to comply, and Mr. Yoa's absence from work on January 5, 2023 and January 6, 2023 were just two of many, multiple instances of company violation." Id. at page 5, lines 25-28, page 6, lines 1-2.

The case of Butterball Turkey involves a finding for the applicant. Specifically, the WCJ found the applicant was entitled to TTD benefits, after he was terminated while on modified duties, because defendant had not shown the termination was due to misconduct by the applicant.

The WCJ indicated that the "record does not permit a finding that applicant was terminated because of his own misconduct. Defendant simply has not offered substantial evidence supporting such." Id. at 62. The WCJ was upheld by the WCAB, who denied reconsideration, and adopted and incorporated the WCJ's findings. Butterball, 65 CCC 62-63.

While petitioner argues that the applicant violated company policy "multiple times," and that there were "multiple instances" of company violation, like the defendant in Butterball, petitioner did not offer substantial evidence to support same.

First, defendant did not establish what the company policy or policies were that were violated 29 times, or the dates of the 29 violations.

When petitioner initially asked Ms. Vuong about the 29 violations at trial, the undersigned judge had to stop the witness testimony for several reasons. First, the witness had given a "speech like" response that contained a lot of information that went beyond the scope of the question. Secondly, it sounded as though she was rustling paper and referring to a document that had not been submitted into evidence, which the witness indicated was a spreadsheet that had "been prepared." Minutes of Hearing and Summary of Evidence, page 6, lines 12-22. Defense counsel ultimately advised the court that he was not going to submit the spreadsheet into the record, to which applicant's attorney had lodged an objection, indicating that it had not been served. Id. at page 7, lines 4-6. Nonetheless, when testimony resumed, Ms. Vuong was not asked by defense counsel about the 29 violations, including dates, and specific infractions of company policy. Without presenting said information into the record, petitioner did not meet its burden.

Secondly, petitioner misstates the evidence in regards to the applicant's alleged "multiple" violations, when they argue that Ms. Vuong "very conspicuously testified that due to Mr. Yoa's long list of company violations, the employer had a long discussion with him on December 28, 2022." Petition for Reconsideration, page 6, lines 7-9. This is incorrect.

The testimony by both the applicant and Ms. Vuong established that the applicant was given a warning on December 28, 2023, when he clocked in late and was given a verbal "day one" chat. The "long list of company violations," were not discussed with the applicant at that time, since pursuant to Ms. Vuong's testimony, the list was obtained after the applicant had been suspended via audit conducted by defendant.

Further, it is unclear if the applicant was provided with the audit and list of violations, and if the employer discussed all of the alleged 29 violations with him. Petitioner did not submit any evidence to support same.

Additionally, and not addressed by petitioner in the "Petition for Reconsideration," were the terms of the actual offer of modified duty. Specifically, the terms of the modified duty contradict what the employer required of the applicant. Pursuant to the testimony provided by both the applicant and Ms. Vuong, the employer required the applicant to use two different applications to clock in and out. However, the offer of modified duty only references the use of one application, "Real Time," and does not indicate that the applicant must also use "Paycom." Defense Exhibit A.

The applicant testified that using both applications resulted in time discrepancies, and that he was "forced to change his Paycom time to the Real Time." Minutes of Hearing and Summary of Evidence, May 3, 2023, page 4, lines 15-16. Thus, it appears that the employer's requirement that the applicant use two applications to clock in resulted in the applicant having time discrepancies not due to his fault. In addition, the requirement also went beyond the scope of the offer of modified work.

Accordingly, it was found that petitioner did not establish good cause for the applicant's termination.

2. THE RECORD DOES NOT NEED TO BE DEVELOPED OR REHEARD:

Petitioner argues that "the case should be remanded for further proceedings in order to develop the record, to provide further documentation, and further witnesses, to support Defendant's position that Mr. Yoa's termination was warranted." Petition for Reconsideration, page 2, lines 25-28. In support of this argument, petitioner argues that "Ms. Vuong provided very clear and concise testimony that applicant, Kiegan Yoa, violated company policy many times," and that "[i]f this information was confusing to WCJ Rosenfeld, Defendant contends and respectfully asks that it be reheard by a different WCJ in order to properly factor it into making a proper decision…". Id. at page 7, lines 27-28, page 8, lines 1. Further, that "if WCJ Rosenfeld was confused about Ms. Vuong's testimony, Defendant asks that the record be further developed pursuant to Labor Code §§5507 and 5906, so that it would give Defendant the opportunity to clarify any confusion." Id. at page 8, lines 9-11.

First, petitioner requesting that a different judge be assigned to rehear the case, and make "a proper decision," is not being considered as an actual Petition for Disqualification of the undersigned judge. Petitioner did not outline any evidence in support of same.

Secondly, petitioner arguing that the undersigned judge was "confused" does not include the basis for said confusion. As indicated above, when petitioner asked Ms. Vuong about the 29 violations of company policy by the applicant, the undersigned judge had to stop the witness' testimony, because she gave a "speech-like" response, and was advised that she needed to respond to the questions being asked, and defense counsel was advised "that he needed to break down the testimony because there had been a lot of information provided in the witness's speech-like response and that it needed to be clarified and was confusing to the judge." Minutes of Hearing and Summary of Evidence, page 6, lines 12-14.

The undersigned judge advised the parties she was confused, so that defense counsel could have an opportunity to properly obtain testimony from the witness, and establish the company policies and dates of the violations. However, defense counsel did not take the opportunity provided, and instead obtained testimony from the witness that did not establish good cause for the termination. For petitioner to now ask for a second opportunity by having the record developed, so he can "provide further documentation, and further witnesses" is not warranted. Petitioner was given an opportunity at the MSC to list any and all documentation and witnesses needed to establish their burden. If petitioner failed to list all necessary documents and witnesses at the MSC, it is not a reason to reopen the record. Further, as indicated above, petitioner was given an opportunity at trial to establish their burden.

Accordingly, the undersigned judge issued a decision based upon all of the exhibits and testimony provided by both parties at trial.

RECOMMENDATION:

It is recommended that the Petition for Reconsideration be denied in its entirety.

DATE: AUGUST 11, 2023

/S/SANDRA ROSENFELD
Sandra Rosenfeld
WORKERS' COMPENSATION JUDGE