

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

BREEZI TIEDEMANN, *Applicant*

vs.

**SUKUT CONSTRUCTION; AMERICAN COMPENSATION INSURANCE GROUP
adjusted by TRISTAR, *Defendants***

**Adjudication Number: ADJ17191297
Redding District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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 grant reconsideration, amend the WCJ's decision as recommended in the report regarding the start date for temporary disability, amend Finding of Facts numbers six and seven, and otherwise affirm the decision of December 12, 2023.

First, Finding of Fact number seven and the Award are amended to reflect the correct start date of applicant's temporary disability from November 29, 2022, to November 30, 2022. Applicant appeared for work on November 29, 2022, but work was shut down that day due to rain. (11/14/23 Minutes of Hearing/ Summary of Evidence (MOH/SOE), p. 6.) However, she was paid four hours of "show up time" on that day. (MOH/SOE, p. 6.) Therefore, as she received pay that day, her temporary disability started the following day on November 30, 2022.

Further, Finding of Fact number six is amended as follows: The defendant did not offer the applicant modified or alternative work within her restrictions. Applicant's work restrictions following her injury included a restriction that she could not drive more than one to two hours per day. (MOH/SOE, p. 5.) After applicant was off work, defendant offered her a job in an area near

Fairfield, California. (MOH/SOE, p. 6.) However, in order to get to that worksite, the offer required her to drive a distance that exceeded her driving restrictions. (MOH/SOE, p. 6; Ex. BB, Offer of Modified Work, pp. 1-3.) Applicant was also offered work at Angels Camp but driving there also required her to exceed her driving restrictions. (MOH/SOE, p. 6.)

“If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.” (*Huston v. Workers’ Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868.) Further, the offer of regular, modified, or alternative work must be bona fide. (*Dennis v. State of California* (2020) 85 Cal.Comp.Cases 28, 43 (Appeals Bd. en banc).) Therefore, Finding of Fact number six is amended to reflect that applicant was not offered modified or alternative work within her restrictions.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 12, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the decision of December 12, 2023, is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

6. The defendant did not offer the applicant modified or alternative work within her restrictions.
7. The applicant was temporarily totally disabled from November 30, 2022, to June 4, 2023.

AWARD

AWARD IS MADE in favor of BREEZI TIEDEMANN against AMERICAN COMPENSATION INSURANCE GROUP, of:

1. Temporary disability at the rate of 401.47 per week from November 30, 2022, to and including June 4, 2023.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2024

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

**BREEZI TIEDEMANN
NOVEY LAW GROUP
LAW OFFICE OF C. STEPHEN MOORE**

JMR/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. **INTRODUCTION**

1. Applicant's Occupation: Traffic Flagger
2. Applicant's Age at Injury: 39
3. Date of Injury: 11/15/2022
4. Part of Body Injured: Right hip, low back, right thigh, left ankle
5. Identity of Petitioner: The defendant is the petitioner
6. Timeliness: The petition for reconsideration was timely filed.
7. Verification: The petition was properly verified.
8. Date of Findings and Order: 12/11/23
9. Petitioner's Contentions: Petitioner contends that, first, the temporary disability award should begin on 11/30/2022, not 11/29/22. Second, petitioner contends that they did in fact offer modified/alternative work that was within the applicant's physical restrictions via a formal written offer on 1/24/23, and that therefore their liability for temporary disability should end at that point.

II. **FACTS**

There is no dispute that the applicant has met her legal burden of showing entitlement to temporary disability benefits from 11/30/22 to the point of the defendant's formal job offer on 1/24/23. There is no dispute that the formal written offer contained language informing the parties that "if the offer is not accepted within 30 days of the offer, the offer is deemed to be rejected by the employee." There is no dispute that the formal job offer required driving that was beyond the restrictions defined by the treating physicians, and for that reason the applicant felt she could not accept it. There is no dispute that the applicant did receive the formal written job offer.

By the written terms of the job offer, since the applicant neither accepted nor rejected it, it was deemed rejected by operation of law 30 days after the offer, or on or about February 23rd, 2023.

No further formal job offer was made by defendant after that of 1/24/23. An oral offer of modified work in Angel's Camp may also have been made (Defendant's Exhibit D, 5/12/23 email), but that location is even further from the applicant's home than the Fairfield job, and therefore, if it was offered, would also have been outside the applicant's work restrictions.

Becoming financially desperate, the applicant self-procured a physically appropriate job on June 5th, 2023, at which point her wage loss ceased and Petitioner's liability for temporary disability came to an end.

Applicant's counsel demanded temporary disability to be paid from 11/16/22 to and including 6/4/23. Petitioner refused, and, the parties, finding themselves unable to resolve this dispute informally, took the matter to trial on November 14th, 2023. A decision issued thereafter finding liability for temporary total disability from 11/29/23 to and including 6/4/23.

Defendant then filed their timely Petition for Reconsideration alleging that temporary total disability should start on 11/30/23, as applicant did not suffer wage loss on 11/29/23. More importantly, defendant also argued that their liability for this benefit should end on 1/24/23, when they offered the applicant modified work in Fairfield.

III. **DISCUSSION**

The formal job offer of 1/24/23 required the applicant to drive from home to the jobsite in Fairfield, which no one disputes is about two hours one way. This would therefore require driving of about four hours a day. The restrictions on the applicant's activities defined by the treating doctors limit her to, among other things, driving no more than one to two hours a day.

Per the Petitioner's Vista Notes, in evidence as Defendant's Exhibit F, these driving restrictions were clearly listed and understood by defendant on 11/18/22, 12/3/22, 1/13/23, 5/22/23 and 6/8/23.

Therefore, the formal job offer of 1/24/23 required driving that was beyond the applicant's physical restrictions, as defined by the treating physicians. As shown by the Vista Notes cited above, the Petitioner was well aware of this driving restriction.

It is well settled law that the modified work offered by the employer must be within the employee's restrictions. If an employer offers work that is beyond the limitations caused by the industrial injury, the employee's refusal to accept a physically inappropriate position will not result in a denial of temporary disability. **Aluminum Co. of America v. WCAB (West) (1971) 36 CCC 514 (writ denied); Tiscareno-Cruz v Barrett Business Services Inc., 3015 Cal. Wrk. Comp. P.D. Lexis 60.**

Here, it is clear that the job offered in Fairfield required driving significantly beyond the applicant's restrictions, and therefore she was correct to not accept it.

Although the applicant did not formally reject the offer, by the written terms of the offer, it was deemed rejected by operation of law thirty days after the offer, and the Petitioner thereafter did not formally offer any other job. In fact, the evidence shows that at that point Petitioner simply waited for the applicant to contact them about modified work, believing that they had work within the applicant's restrictions available, although they did not define it or communicate what that work might be to the applicant.

This is confirmed by the Vista Note dated 5/23/23 in which the applicant asked her supervisor, Clint Evans, about any other offer of modified work that might be forthcoming from Petitioner, to which Mr. Evans responded by telling the applicant that "...this is for the attorneys to work out

now.” Soon thereafter, the applicant self procured a physically appropriate job with another employer and in so doing terminated the Petitioner’s exposure to temporary disability.

Although Petitioner seems to believe that it was up to the applicant to contact them about any other modified work available, the fact is that they have the burden to identify and offer physically appropriate modified or alternative work if they want to be relieved of their liability to pay temporary disability. **SME Steel Contractors, Inc. v. WCAB (2019) 84 CCC 856 (writ denied); Mevers v. Industrial Accident Com. (1940) 39 Cal. App. 2d 665.**

Here, their offer did not meet that standard, due to the driving restrictions. No other formal offer of modified or alternative work was made. An informal offer of a job in Angel’s Camp, if made, would suffer from the same problem.

Therefore, although petitioner believed they had appropriate modified work available, such work was not defined, nor was it offered in any formal way to the applicant. Since it is the Petitioner’s burden to offer physically appropriate work in order to terminate their liability for temporary disability, and they did not, their exposure for this benefit continued until the applicant herself found work within her restrictions with another employer.

However, Petitioner is correct that the applicant was paid on 11/29/22, and therefore the award of temporary total disability should begin on 11/30/22. Reconsideration should be granted to correct that clerical error.

In summary, Petitioner never offered the applicant modified work within her physical restrictions, either formally via their job offer of 1/24/23, or informally at the Angel’s Camp worksite. Since it is undisputed that the applicant has established entitlement to temporary disability benefits, the burden then falls on the petitioner to offer physically appropriate modified or alternative work to the applicant. The evidence establishes that this did not happen here.

IV. RECOMMENDATION

It is respectfully recommended that reconsideration be granted to correct the start of temporary total disability from 11/29/22 to [11/30/22]. On all other issues, it is respectfully recommended, for the reasons discussed above, that reconsideration be denied.

DATE: 1/12/24

Curt Swanson
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE