

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

**ERNESTO MORA, *Applicant***

**vs.**

**BENIHANA NATIONAL CORPORATION; ZURICH AMERICAN INSURANCE  
COMPANY; administered by BROADSPIRE, a CRAWFORD COMPANY, *Defendants***

**Adjudication Number: ADJ12841551  
Marina del Rey District Office**

**OPINION AND ORDER GRANTING  
PETITION FOR RECONSIDERATION AND  
DECISION AFTER RECONSIDERATION**

Defendant Benihana National Corporation, insured by Zurich American Insurance Company, administered by Broadspire, a Crawford Company, seeks reconsideration of the November 2, 2021 Findings of Fact & Award, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is entitled to temporary total disability benefits for the period January 15, 2020 and continuing, at the rate of \$518.19 per week, less credit for sums previously paid, including prior payments from Employment Development Department (EDD), and less reasonable attorney fees, and subject to the statutory limitation pursuant to Labor Code<sup>1</sup> section 4656(c)(2).

Defendant contends that (1) applicant is not entitled to temporary total disability because he was terminated for cause and did not suffer any wage loss, (2) the medical reporting of primary treating physician Susana Arroyo, D.C., is not substantial medical evidence because her medical reporting does not state whether applicant's disability was related to his bilateral wrists, left knee, or both, and only the issue of applicant's bilateral wrists disability was at issue at trial, (3) the medical reporting of Dr. Arroyo is not substantial evidence because she violates the provisions of Labor Code section 4061.5 by failing to incorporate the reporting of the physical therapist and acupuncturist who provided treatment to the applicant, and (4) applicant is not entitled to

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<sup>1</sup> All subsequent statutory references are to the Labor Code unless otherwise indicated.

temporary total disability beyond what was paid by EDD.

We received and reviewed an answer from applicant Ernesto Mora. We received and reviewed applicant's supplemental brief in the form of a reply pleading. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review applicant's supplemental brief.

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, the reply, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration and amend the Findings of Fact and Award to reflect a finding of temporary total disability from January 15, 2020, the date of the first report discussing applicant's temporary total disability, to September 14, 2021, which is seven weeks from Dr. Arroyo's last report in the record, with jurisdiction reserved at the trial level for any future temporary disability benefits.

## **FACTS**

As the WCJ states:

Applicant, Ernesto Mora, while employed by defendant Benihana, Inc. as a cook/chef during the period of 4/1/2012 through 12/5/2019, sustained an admitted industrial injury to his bilateral wrists in the form of ganglion cysts, and claims industrial injury to his left knee.

This matter was originally set for trial on May 11, 2021 with the herein WCJ on several issues, including injury AOE/COE, at which time the parties discussed the matter with the Court and it was determined that the injury was now admitted for the bilateral wrists. The Pretrial Conference Statement (PTCS) was reviewed with the litigants, and the parties were advised to submit a 1st Amended PTCS along with a proposed Joinder Order to clean up the party record.

After a few continuances and clarifications re: the issues, the parties submitted a 3rd Amended Pre-Trial conference statement and on October 5 and October 14, 2021, the case was tried with testimony taken, evidence offered and admitted, and the matter was to stand submitted pending post-trial briefs due by October 29, 2021.

On November 2, 2021, a Findings of Fact and Award issued in which the Court found that based upon the un rebutted and credible testimony of the applicant, along with the medical reporting of both treating physician Susana Arroyo, D.C., and PQME Alexis Dixon, M.D. the applicant is entitled to TTD benefits as a result of his bilateral wrist injuries commencing on 1/15/2021 and continuing.

It is from this Finding and Award that Defendant seeks reconsideration. (Report, p. 2.)

At the October 14, 2021 trial, applicant testified that he stopped working for Benihana on December 18, 2019 because he was terminated for being late and for making more food than the food tickets he received. (Minutes of Hearing/Summary of Evidence (MOHSOE) dated October 14, 2021, p. 2:21-25.) Prior to his termination, he worked without any modifications. (*Id.* at p. 3:1-3.) He did not look for work after his termination and has not worked since. (*Id.* at p. 2:13, 3:1-3.)

## DISCUSSION

As a preliminary matter, we agree with applicant that defendant improperly served its petition. WCAB Rule 10625 provides that a document may be served by (1) personal service, (2) First Class mail, (3) overnight or priority mail or a bona fide commercial or attorney delivery service promising delivery within two business days, (4) a party's preferred method of service, or (5) any method of service agreed upon between the parties. (Cal. Code Regs., tit. 8, § 10625.)<sup>2</sup> Defendant admits that it served its petition on applicant by facsimile transmission. (Reply, p. 2:5-15.) That is not proper service unless it is a preferred or agreed upon method of service, which it does not appear to be since applicant objected to the facsimile service. (Answer, pp. 6:11-7:6.) Nevertheless, since applicant ultimately received defendant's petition and we have accepted and reviewed applicant's answer to the petition, we conclude that there was no prejudice and move forward to the merits of the petition. Defendant, however, is hereby cautioned to take heed of WCAB Rule 10625 in the future.

With respect to whether applicant is entitled to temporary total disability, we conclude that he is. Temporary disability is defined as incapacity to work that is reasonably expected to be improved with medical treatment. (*Chavira v. Workers' Comp. Appeals Bd. (Johns-Manville Sales*

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<sup>2</sup> Effective January 1, 2022, WCAB Rule 10625 also includes electronic service as a proper service method. (Cal. Code Regs., tit. 8, § 10625.)

*Corp.*) (1991) 235 Cal.App.3d 463, 473 citing *W. M. Lyles Co. v. Workmen's Comp. App. Bd. (Butz)* (1969) 3 Cal.App.3d 132, 136.) "Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income." (*Chavira, supra* at p. 473 (citation and internal quotations omitted).) Temporary total disability occurs when an employee is unable to earn any income during the period of recovery. (*Herrera v. Workers' Comp. Appeals Bd. (Goleta Lemon Association)* (1969) 71 Cal.2d 254, 257.) Temporary partial disability occurs when an employee is able to earn some income during her recovery period but not her full wage. (*Ibid.*)

"If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. ([Lab. Code,] § 4657.) If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability." (*Huston v. Workers' Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806].) "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." (*Ibid.* citing *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417 [24 Cal.Comp.Cases 144, 340 P.2d 622] and *Transport Indem. Co. v. Ind. Acc. Com.* (1958) 157 Cal.App.2d 542 [23 Cal.Comp.Cases 30, 321 P.2d 21].)

Temporary disability ends when (1) the employee returns to work, (2) the employee is deemed medically able to return to work, or (3) the employee's medical condition becomes permanent and stationary. (*Huston, supra*, 95 Cal.App.3d at 868; *Bethlehem Steel Company v. Industrial Accident Commission and Harvey Lemons* (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250, 252]; *Industrial Indemnity Exchange v. Industrial Accident Commission and Riccardi* (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25, 26-27].)

Defendant contends that applicant is not entitled to temporary disability because he was terminated for cause. (Petition, pp. 3-4.) Defendant is only liable for the wage loss incurred as a result of the industrial injury. (*Hardware Mut. Casualty Co. v. Workers' Comp. Appeals Bd.* (1967) 253 Cal.App.2d 62, 66-67 [32 Cal.Comp.Cases 291].) An employee is not entitled to temporary disability when he suffers wage loss for other reasons than the industrial disability. (*Ibid.*) While a termination for cause is "tantamount to a refusal to perform modified work . . .

[because] it is the applicant's conduct, rather than the work injury, which is disqualifying the applicant from employment," in situations where there is no modified work either because it is not available or because the worker is not qualified for one, it cannot be said that the wage loss was the result of the termination for cause. (*Romero v. Sunbelt USA, Inc.* (December 19, 2014, ADJ9408761) 2014 Cal. Wrk. Comp. P.D. LEXIS 728; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417, 421.)

Here, the parties do not dispute that applicant was temporarily totally disabled, albeit defendant takes issue with the period of temporary total disability. By definition, a temporarily totally disabled employee is unable to earn any income during the period of recovery. (*Herrera v. Workers' Comp. Appeals Bd. (Goleta Lemon Association)* (1969) 71 Cal.2d 254, 257.) It is applicant's temporary total disability that took him out of the labor market and caused his wage loss. The parties' dispute whether applicant was terminated for cause, which applicant seems to admit he was in his testimony at trial, misses the point. (Minutes of Hearing/Summary of Evidence (MOHSOE) dated October 14, 2021, p. 2:21-25.) As such, we conclude that applicant is entitled to temporary total disability benefits and that his termination does not divest him from this benefit.

However, the last medical report in the record that discusses applicant's temporary total disability is dated July 27, 2021 and states that applicant is temporarily total disabled for seven weeks. (Exhibit 3, July 27, 2021 report of Susana Arroyo, D.C., p. 2.) Therefore, we amend the Findings of Fact and Award to reflect a finding of temporary total disability from January 15, 2020, the date of the first report discussing applicant's temporary total disability, to September 14, 2021, which is seven weeks from Dr. Arroyo's last report in the record, with jurisdiction reserved at the trial level for any future temporary disability benefits. (Exhibits 1-3, Dr. Arroyo's reports dated January 15, 2020 to July 27, 2021; Petition, p. 5.)

For the foregoing reasons,

**IT IS ORDERED** that defendant Benihana National Corporation's Petition for Reconsideration of the November 2, 2021 Findings of Fact & Award is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 2, 2021 is **AFFIRMED EXCEPT** that is it **AMENDED** as follows:

FINDINGS OF FACT

Applicant, Ernesto Mora, is entitled to temporary total disability benefits for the period January 15, 2021 to September 14, 2021, at the rate of \$518.19 per week, less credit for sums previously paid, including EDD, and less reasonable attorney fees, and subject to the statutory limitation on said benefits per Labor Code section 4656(c)(2). Jurisdiction is reserved at the trial level for any future temporary disability benefits.

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AWARD

Temporary total disability indemnity benefits for the period January 15, 2020 to September 14, 2021, at the rate of \$518.19 per week, less credit for sums previously paid, including EDD, and less reasonable attorney fees, and subject to the statutory limitation on said benefits per Labor Code section 4656(c)(2). Jurisdiction is reserved at the trial level for any future temporary disability benefits.

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**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



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

**January 18, 2022**

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

**ERNESTO MORA  
HINDEN & BRESLAVSKY  
FLOYD SKEREN PASADENA**

**LSM/pc**

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