

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

MARTHA CASTRO, *Applicant*

vs.

**WALMART; ACE AMERICAN INSURANCE COMPANY, adjusted by SEDGWICK,
*Defendants***

**Adjudication Number: ADJ12525278
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Amended Findings of Fact, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on August 31, 2022. By the FA&O, the WCJ found that applicant's termination from employment was not "in good faith." Several issues including temporary disability were deferred as additional development of the record was deemed necessary.

Defendant contends that there was good cause to terminate applicant and that it was premature for the WCJ to determine whether there was good cause for her termination before applicant established entitlement to temporary disability.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny the Petition.

FACTUAL BACKGROUND

Applicant claims injury to her back and left knee on July 7, 2018 while employed by Walmart. This claim has been accepted as compensable by defendant. (Minutes of Hearing and Summary of Evidence, May 5, 2022, p. 2.)

The matter proceeded to trial on the issues of temporary disability, permanent and stationary date, liens and whether applicant was terminated “in good faith.” (Minutes of Hearing and Summary of Evidence, May 5, 2022, p. 2.) Dawn Miller, a Walmart employee, testified on the first day of trial and applicant testified on the second day. (*Id.* at pp. 4-6; Minutes of Hearing and Summary of Evidence, June 16, 2022, pp. 2-9.) We adopt and incorporate the following from the WCJ’s Report regarding their testimony:

Applicant asserts she was not terminated from employment in good faith. Applicant testified credibly about the events surrounding her termination from employment.

On June 26, 2019, while applicant worked at the door, there was an incident with a customer. (MOH 06/16/2022 at p. 4:22-23.) Manager, Alana, came to the door and allowed the customer to leave. (*Id.* at p. 4:17-18.)

Then, applicant spoke to her supervisor, Pedro Cavazos, about the incident. (*Id.* at p. 4:19.) She described the situation with the customer to Mr. Cavazos who made some sort of incident report and had applicant sign it. (*Id.* at p. 4:21-22.) Employees do not sign exit interviews. (MOH 03/07/2022 at p. 6:20-21.) Mr. Cavazos indicated the incident report was precautionary because he expected the angry customer would file a formal complaint. (MOH 06/16/2022 at p. 4:21-22.)

After June 26, 2019, there was no further conversation about the incident with the customer between the applicant and Mr. Cavazos or anybody else. (*Id.* at p. 5:1-2.)

On July 2, 2019, applicant was on vacation and traveling internationally. (*Id.* at p. 4:5; Exhibit 6.)

Applicant returned to work on August 3, 2019. (*Id.* at p. 4:5-6.) This was a Saturday. Applicant worked for two more days, including Wednesday which was August 7, 2019. (*Id.* at p. 6:11-12.) Then, on Sunday, August 11, 2019, when she tried to clock in for work early in the morning, applicant was informed she had been fired. (*Id.* at p. 4:6-8.)

On August 11, 2019, applicant attempted to find out more about her termination from employment. Applicant returned to the store later in the day and tried to speak to her manager, Mr. Cavazos, the store manager and/or human resources. (*Id.* at p. 7:15-18.) Applicant spoke to a female manager. (*Id.* at p. 7:18.) Then, applicant returned to the store with her daughter on August 16, 2019, to try and speak to human resources. (*Id.* at p. 8:5-6.) Lastly, applicant followed-up telephonically with 1-800-Walmart. (*Id.* at p. 7:21-23; 8:6.)

The employer witness, Dawn Miller, did not work with the applicant. (MOH 03/07/2022 at p. 4:10.) The employer witness has no first-hand knowledge about this applicant's termination from employment. (*Id.* at p. 6:13.) The sole source of employer witness' knowledge about applicant's termination from employment is the digital exit interview completed by Mr. Cavazos from which she read before trial. (*Id.* at p. 4:10-11.)

The employer witness testified credibly about defendant employer's in general, workplace policies only. However, the employer witness offered no credible evidence to rebut applicant's version of the events surrounding her termination from employment. The only information employer witness offered about applicant's termination from employment was from the digital exit interview which gave an inaccurate incident date, July 2, 2019. (*Id.* at 5:22.)

(Report, October 3, 2022, pp. 3-4.)

DISCUSSION

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' Comp. Appeals Board* (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].) 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;¹ *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (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].)

In *Huston*, the Court of Appeal stated more specifically that:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] 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. [] If the partially disabled worker can perform some type of work but chooses not to, his "probable

¹ All further statutory references are to the Labor Code unless otherwise stated.

earning ability” will be used to compute wage-loss compensation for partial disability. [] 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, supra*, 95 Cal.App.3d at p. 868, emphasis in original.)

Thus, the language used by the *Huston* Court reflects that an employer’s showing that modified work is available and offered affects an injured employee’s entitlement to temporary disability.

The Appeals Board has accordingly previously found that 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.)) Defendant must show that an injured employee’s termination while performing modified duty was for good cause. (See *Manpower Temporary Services v. Workers’ Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 (writ den.)) Pursuant to established case law, defendant holds the burden of proof to show that an employee was terminated for good cause. (See *Huston, supra*; *Esquivel, supra*; see also Lab. Code, § 5705 [the party with the affirmative of the issue holds the burden of proof].)

In its Petition, defendant contends that applicant was terminated for stopping a customer from leaving the store, which violated company policy. Defendant further argued that applicant “had at least two previous incidents of misconduct and the third was what led to the termination.” (Defendant’s Petition for Reconsideration, September 23, 2022, p. 6.)

There is no specific evidence regarding applicant’s alleged two prior incidents of misconduct since the employer witness, Ms. Miller, testified that there was no information in the database about these incidents. The company policy was also not entered into evidence and therefore, the record is insufficient to show that applicant engaged in conduct prohibited by that policy.

Moreover, the WCJ found applicant’s testimony regarding her termination to be credible. While Ms. Miller was also considered credible, Ms. Miller was not a witness to the incident that led to applicant’s termination. She also did not give the prior write-ups to applicant or terminate her. No witness other than applicant testified regarding the June 26, 2019 incident with the customer. 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.*) In the absence of substantial evidence regarding applicant's termination, defendant has not met its burden of proving that applicant was terminated for good cause. (See *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record].)

It is acknowledged that generally the issue of whether a termination was for good cause does not arise until the employee has shown entitlement to temporary disability. However, a WCJ has broad authority to issue orders to ensure proper adjudication of each claim, including "any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case." (Cal. Code Regs., tit. 8, § 10330.) This includes the authority to defer issues that the trier of fact determines are not ripe for adjudication. (See e.g., Cal. Code Regs., tit. 8, § 10787(a) [the WCJ may bifurcate the issues for trial and try them separately upon a showing of good cause].) Although it may make practical sense to defer whether a termination was for good cause until there has first been a showing of entitlement to temporary disability since the issue could be rendered moot, it was not an abuse of discretion for the WCJ to determine this issue and order further development of the record on the other issues in dispute.

In conclusion, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Amended Findings of Fact, Award and Order issued by the WCJ on August 31, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 21, 2022

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

**LAW OFFICE OF SANDRA GOMES
MARTHA CASTRO
MULLEN & FILIPPI**

AI/pc

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