

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

DOLORES RIVERA, *Applicant*

vs.

**PACKERS SANITATION SERVICES, INC.; ACE AMERICAN INSURANCE
COMPANY, *Defendant***

**Adjudication Number: ADJ17200471
Van Nuys District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's Findings of Fact, Award and Order of August 28, 2023, wherein it was found that while employed as a food safety sanitor during a cumulative period ending on November 5, 2022, applicant sustained admitted injury to her upper extremities and wrists causing compensable temporary disability from February 12, 2023 to the present and continuing. Applicant also claims injury to the fingers, psyche, "dental," and in the form of headaches, but those claims were not at issue, and deferred.

Defendant contends that the WCJ erred in finding compensable temporary disability, arguing that that applicant is not entitled to temporary disability benefits because she refused an offer of modified work without sufficient reasonable basis. We have not received an answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further proceedings and decision so that the issue of the reasonableness of applicant's refusal of the offer of work can be more fully analyzed on a more complete record.

Applicant worked the night shift at her work starting at 7 pm and ending her shift at 4:30 am. She began complaining of pain in her right hand that gradually extended all the way up her arm. Applicant was first seen regarding her condition on November 28, 2002 by Jennifer Yasharal, PA-C of Concentra. She was given a wrist brace, ibuprofen, hot and cold packs and referred to

occupational therapy. She was returned to modified work with restrictions of no gripping/squeezing/pinching with the right upper extremity, constant wearing of the prescribed wrist brace, and limited repetitive movements of the right arm. (Exhibit 1, Initial Report from Concentra Clinic dated November 28, 2022.)

Applicant continued to work her regular shift with some modified duties, although applicant testified at trial that the employer did not completely accommodate her work restrictions. (Minutes of Hearing and Summary of Evidence of July 17, 2023 trial at p. 5.) Applicant's last day of modified work was February 11, 2023. She stopped working because the company ceased its regular operations at applicant's location. (Minutes of Hearing and Summary of Evidence of July 17, 2023 trial at p. 5.)

On February 20, 2023, applicant was sent an "Offer of Alternative Modified Work" beginning February 27, 2023. The Offer stated that "Using the guidelines provided by your doctor, a temporary alternative modified duty opportunity has been identified for you."

The Offer read, in part:

As part of its return-to-work program, Packers Sanitation Services, Inc. (PSSI) provides employees with temporary opportunities in the local community to perform modified duty work for nonprofit organizations. **Your opportunity through the Transition2Work® program is provided through Carson Christian Outreach (Carson, CA), a local nonprofit agency located at 17705 S. Central Ave., Carson, CA 90746.** You will report to Anita Rhodes.

However, in contrast to applicant's ordinary night shift, the offer of modified work was for work Monday through Friday from 8:30 am to 5 pm. (Ex. D, Offer of Alternative Modified Work dated February 20, 2023.) Similar offers of modified work overseen by the same organization, at the same location and the same schedule were sent on February 27, 2023 and April 4, 2023. (Exs. F and H, Offers of Alternative Modified Work dated February 27, 2023 and April 4, 2023.)

In response to the February 27, 2023 offer of modified work, applicant's counsel wrote:

Applicant's counsel objects to the Transition2work assignment offer dated 02/27/2023. As the applicant's usually and customary hours at Packers Sanitation Services, Inc were from 7:00 pm - 4:30 am. The Transition2work assignment is offering hours from 8:30 am - 5:00 pm. Applicant's counsel objects to the dayshift scheduled. The applicant would gladly accept a Transition2work assignment offer only if her same regularly work schedule[] is offered.

(Ex. 3, Applicant Attorney Objection Letter, dated March 1, 2023.)

According to the Summary of Evidence of the July 17, 2023 trial applicant testified as follows:

She refused the offer because she had always worked at night. She had a babysitter available to watch her children at that time. She did not have a babysitter during the day. The babysitter during the day would have been too expensive for the Applicant. She would have been working just to pay for the babysitter. She agrees that she was offered a daytime modified work position from 8:30 a.m. through 5:00 p.m., Monday through Friday. She had previously worked as she has testified earlier from approximately 6:00 p.m. to 4:00 a.m., Monday through Friday, prior to her work injury.

(Minutes of Hearing and Summary of Evidence of July 17, 2023 trial at p. 5.)

Applicant testified that she has two children, aged 11 and 1½ at the time of trial. Applicant takes her 11-year-old to school. Her brother “Danard” is able to look after the children at night, but not during the day. She also used a babysitter Rafaela at night, who she paid \$170 per week, although applicant did not specify the hours worked by Rafaela. Applicant testified that the children have separate fathers, one of whom lives in El Salvador, and the other one who lived locally. It is unclear which child is related to the local father. Applicant testified that the local father works at night and sleeps during the day and is therefore not able to care for the children during the day. However, applicant testified that she did not look into alternative care options, did not look at “preschool” options for her 1½ year old child, and did not ask the local father to watch the children. (Minutes of Hearing and Summary of Evidence of July 17, 2023 trial at p. 6.)

Temporary disability indemnity is a workers’ compensation benefit which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers’ Comp. Appeals Bd.* (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 worker is off work. (*Gonzales, supra*, at p. 1478.)

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, §§ 4650-46571; *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 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 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*, at p. 806 [citations omitted].)

Accordingly, we have found that an applicant may be estopped from claiming temporary disability indemnity corresponding to periods that she has refused suitable modified work without good cause. (*Vittone v. Workers' Comp. Appeals Bd.* (2001) 66 Cal. Comp. Cases 435 [writ den].)

Thus, the issue is whether applicant's refusal to accept offer to work the Transition2Work shift for Carson Christian Outreach was reasonable given the facts of this case.

In his Opinion on Decision and in his Report, the WCJ purports to find support for his decision in the panel decision *Sandoval v. Residence Inn* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 43 (Appeals Bd. panel). In *Sandoval*, the injured worker had worked from 4 pm to 12:30 am prior to injury. (*Id.* at *3.) The injured worker in *Sandoval* took her children to school and picked them up from school. (*Id.* at *4.) The injured worker's husband then looked after the children when he returned from his work. (*Ibid.*) The injured worker in *Sandoval* was offered modified work during the morning shift. She testified that she could not take this work because it would have required paying \$75 per day in childcare. (*Id.* at *3.) The employer in *Sandoval* testified that they were open to modifying the morning shift to allow applicant to pick up her children from school, but applicant testified that she needed to be able to feed her children before school and transport them to school. (*Id.* at *4-5.) The WCJ in *Sandoval* found that the injured worker was not entitled to temporary disability because she did not accept the offer of modified

work. (*Id.* at *1.) Contrary to the WCJ in the instant case's Report, the Appeals Board panel in *Sandoval* did not find an entitlement to temporary disability. While the panel in *Sandoval* held that the cost of childcare was a factor that could be considered in determining whether an offer of modified work was reasonably refused, the panel granted reconsideration and deferred the issue of entitlement to temporary disability because there was insufficient evidence in the record concerning the extent to which paying for childcare would have diminished the earnings from modified work. (*Id.* at 8.)

Like in *Sandoval*, we believe a more complete evidentiary record is necessary to consider whether applicant reasonably refused the offer of modified work. In establishing reasonableness, the WCJ may require more evidence whether the offer of work overseen by a completely different organization was a valid offer, and more evidence may be required concerning the costs that applicant would incur for childcare if she accepted the offer of modified work, and more evidence regarding applicant's brother availability to provide childcare, Rafaela's availability during the proposed shift, and the local father's availability. This list of factors should not be considered exhaustive. We express no view on the ultimate resolution of this or any other issue.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact, Award and Order of August 28, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award and Order of August 28, 2023 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 13, 2023

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

**DOLORES RIVERA
JHM LAW OFFICE
FAMIGLETTI & VOLPE**

DW/oo

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