

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

JASON BACON, *Applicant*

vs.

**CDCR – PRISON INDUSTRY AUTHORITY, Legally Uninsured;
STATE COMPENSATION INSURANCE FUND, STATE EMPLOYEES,
ADJUSTING AGENCY, *Defendants***

**Adjudication Numbers: ADJ9221135, ADJ9221136
San Bernardino 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, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2021

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

**JASON BACON
THE LAW OFFICES OF LUCY M. BISHOP
STATE COMPENSATION INSURANCE FUND**

PAG/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

Identity of Petitioner: Applicant
Timeliness: The petition was filed timely.
Verification: The petition was properly
verified. Date of Issuance of Joint Finding of Fact: December 4, 2020

II

CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers;
2. The evidence does not justify the Joint Findings of Fact;
3. The Findings of Fact do not support the Decision.

III

FACTS

The Applicant in this case, Jason Bacon, sustained injury to his left wrist on 8/6/2013 (ADJ9221135-MF) and to his left thumb on 10/29/2013 (ADJ9221136), while employed as an inmate laborer by CDCR. The applicant's claims were settled by way of Stipulation with Request for Award, with both Awards issuing on 7/20/2016 for 9% permanent disability in connection with ADJ9221135, and 9% permanent disability in connection with ADJ9221136.

This case previously proceeded to trial on the issue of whether the applicant was entitled to the Supplemental Job Displacement Benefit (voucher), pursuant to Labor Code 4658.7. The undersigned issued an Award on 1/4/2017 that found the applicant was entitled to two separate SJDB vouchers, one for each date of injury. Defendant filed a Petition for Reconsideration, with the WCAB accepting the case for review on 3/23/2017. On 6/8/2020 the WCAB issued an Opinion and Decision after Reconsideration confirming the applicant's entitlement to a SJDB voucher for each date of injury. On 6/12/2020 defendant issued a SJDB voucher in connection with each of the applicant's cases.

Thereafter, applicant counsel filed a Petition for Penalty, Sanctions and Attorney Fees dated 7/2/2020 in connection with Labor Code 5814, 5814.5 and 5813 asserting unreasonable delay in provision of the SJDB vouchers, as well as bad faith actions or tactics by defendant. Defendant filed a Trial Brief/Points and Authority on 10/5/2020, responding to Applicant's Petition for Penalty, Sanctions and Attorney Fees. This matter proceeded to Trial on 10/13/2020, at which time Applicant counsel requested time to respond to Defendant's Trial Brief. Applicant was provided until 11/2/2020 to file the same, at which time the matter would stand submitted. Applicant did file a Trial Brief on 11/2/2020, and this matter was submitted.

It is noted that pursuant to Applicant's Trial Brief, the claims for penalty and attorney fees pursuant to Labor Code 5814/5814.5 were withdrawn as the parties had previously resolved any and all issues as to potential Labor Code 5814. Therefore the only issue before the court at trial was whether the defendant engaged in bad faith actions or tactics pursuant to Labor Code 5813.

On 12/4/2020 the undersigned issued a Findings and Award whereby it was found that defendant's actions did not constitute bad-faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, therefore no sanctions pursuant to Labor Code 5813 are warranted or awarded.

Applicant counsel filed a Petition for Reconsideration of the Joint Findings of Fact on 12/29/2020.

IV

DISCUSSION

A. APPLICANT CONTENDS THE WCJ'S FINDINGS THAT DEFENDANT'S ACTIONS OF ISSUING THE 7/8/2014, 8/4/2014, AND 1/12/2015 NOTICE OF OFFER OF REGULAR, MODIFIED OR ALTERNATE WORK LETTERS DID NOT CONSTITUTE BAD FAITH ACTIONS OR TACTICS THAT WERE FRIVOLOUS OR SOLELY INTENDED TO CAUSE UNNECESSARY DELAY IS INCONSISTENT WITH THE EVIDENCE AND LAW.

In this case both parties submitted Points and Authority/Trial Briefs wherein they outlined their positions. Applicant's argument in connection with the above contention in its Petition for Reconsideration is the same as was put forth in its Points and Authority/Trial Brief. As I stated in the Joint Opinion on Decision, and as I continue to believe now, while I agree the issuance of offers of Regular, Modified or Alternate Work were not genuine offers of work, I do not find that in issuing such Notices Defendant's actions were bad-faith action/tactic that were either frivolous or intended to cause unnecessary delay. Specifically, these Notices, while not genuine offers of Offer of Regular, Modified or Alternate Work, never purport to be genuine offers. These Notices all indicate under "Duties required of position:" the phrase, "YOU HAVE VOLUNTARILY TERMINATED YOUR EMPLOYMENT DUE TO YOUR RELEASE FROM PRISON AND ARE NO LONGER AVAILABLE FOR EMPLOYMENT." Defendant never argued that they actually had Regular, Modified or Alternate Work available for the applicant (as evidenced by the added language under the "Duties required of position:" section). Thus, while Defendant's use of the Notices to communicate its position that Applicant was not entitled to the SJDB may not have been the correct manner of doing so, said action was not seen by the undersigned as frivolous or intended to cause unnecessary delay.

It appears to the undersigned, as argued at the original Trial and in Defendant's Points and Authorities/Trial Briefs in connection with the issue, that Defendant was trying to establish case law on a novel issue, involving a non-typical employee (inmate worker, now released from custody). The applicant's entitlement, as an inmate worker, to a SJDB was a case of first impression (at the time it was heard). Defendant argued that the employer could not legally offer Regular, Modified or Alternate Work, and that it would be unlawful to make an offer of

Regular, Modified or Alternate Work to a non-inmate. Defendant further argued, by analogy to Labor Code 3370(e) and 4658(d)(2), that the applicant should not be entitled to a SJDB voucher. It is clear to the undersigned that this was an issued defendant sought to have litigated. As such, I disagreed that the flawed offers of Regular, Modified or Alternate Work caused an unnecessary delay in this case, but were rather a means for defendant to deny the SJDB and move this issue towards litigation.

With respect to the allegation that the action was done with improper motive or without merit, just because the undersigned was not ultimately persuaded by defendant's argument against the applicant's entitlement to a SJDB does not mean that Defendant's actions/arguments were not seen as based upon a genuine, good faith dispute regarding applicant's entitlement to the SJDB voucher or that Defendant did not have the right to litigate the argument. On the contrary, without any case law at the time giving guidance on this issue, and where there was precedent in the Labor Code for eliminating entitlement to inmate injured workers to some benefits and/or to significantly reduce entitlement to VR benefits, it was accepted by the undersigned that defendant's position constituted a genuine, good faith dispute regarding applicant's entitlement to the SJDB voucher. Given this case remained at the WCAB for 3 years and 3 months, it would appear the Appeals Board gave due consideration to the arguments made by defendant as well, as it did not reject them out of hand as "frivolous".

Ultimately, while I appreciate and respect Applicant's position and argument, Applicant has offered no additional arguments/points of law in its Petition for Reconsideration to support their position, thus I find no reason to alter, amend or change my Joint Findings of Fact and Joint Opinion on Decision on 12/4/2020.

B. APPLICANT CONTENDS THE WCJ'S OPINION THAT THE NOTICES OF OFFER OF REGULAR, MODIFIED OR ALTERNATE WORK NEVER PURPORTED TO BE GENUINE OFFERS IS INCONSISTENT WITH THE EVIDENCE.

As discussed above, the Notices referenced by Applicant in the Petition for Reconsideration all indicate under "Duties required of position:" the phrase, "YOU HAVE VOLUNTARILY TERMINATED YOUR EMPLOYMENT DUE TO YOUR RELEASE FROM PRISON AND ARE NO LONGER AVAILABLE FOR EMPLOYMENT." It is the undersigned's opinion that this statement (a condition subsequent) negates the offer of Regular, Modified or Alternate work noted above that clause in the Notices. Again, while I appreciate and respect Applicant's position and argument, I simply do not agree with the same. Thus, as Applicant has offered no additional arguments/points of law in its Petition for Reconsideration that would make me question my decision, I find no reason to alter, amend or change my Joint Findings of Fact and Joint Opinion on Decision on 12/4/2020.

C. APPLICANT CONTENDS THE WCJ MISAPPLIED THE MOLDINGS OF MALMUTH V WCAB (2009), 74 CCC 654, CHAVEZ V. WCAB (2004), 69 CCC 503, AND IN RE MARRIGAE OF FLAHERTY (1982), 31 CAL.3D 637 TO THE FACTS OF THIS CASE, WHICH ARE DISTINGUISHABLE.

In no event may the Appeals Board impose a monetary sanction pursuant to Labor Code Section 5813 if the one subject to the sanction acted with reasonable justification or if other

circumstances make the imposition of the sanction unjust. *Hanna*, 2 CA Law of Employee Injuries & Workers' Comp § 23.15 (2020)

In the within case the undersigned found that the actions complained about by Applicant, and taken by Defendant were done so in pursuing a position that was "novel", "complex", and "new", a case of first impression at the time on this issue. Further, the undersigned found the actions by Defendant were taken in good faith to test the validity of Labor Code section 4658.7 as it relates to entitlement of the SJDB to inmate injured workers. Based upon the same I found the actions of Defendant did not constitute bad-faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, and thus should not expose Defendant to penalty pursuant to Labor Code 5813.

I disagree with Applicant that the reference to the cases of *Malmuth v. Workers' Compensation Appeals Bd.*, (2009) 74 Cal. Comp. Cases 654 (writ denied), *Chavez v. Workers' Compensation Appeals Bd.*, (2004) 69 Cal. Comp. Cases 503 (writ denied), and *In re Marriage of Flaherty*, (1982) 31 Cal. 3d 637, in the Joint Opinion on Decision were "misapplied". I referenced those cases to demonstrate that the Court disfavors penalizing a party who seek to challenge or change law, and to point out that the California Supreme Court has warned of a serious chilling effect on the assertion of litigants' rights on appeal by imposition of sanctions, noting "counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win... Counsel should not be deterred from filing such appeals out of a fear of reprisals." *In re Marriage of Flaherty, supra* at 650.

Therefore, while I appreciate and respect Applicant's position and argument, I do not agree with the same. Thus, I find no reason to alter, amend or change my Joint Findings of Fact and Joint Opinion on Decision on 12/4/2020.

V.

RECOMMENDATION

Based upon the above discussion, it is respectfully recommended that Applicant's Petition for Reconsideration be denied in its entirety.

DATE: 1/8/2021

Suzanne M. Banks
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE