WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ISABEL SALLAGO, *Applicant*

vs.

CINTAS;
TRAVELERS INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ9427922
Bakersfield District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Isabel Sallago. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the May 13, 2021 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a bulk folder on October 25, 2013, sustained industrial injury to her right shoulder. The WCJ found that Rule 10133.31 applied, applicant returned to the same job for the same employer after the October 25, 2013 injury, and applicant is not entitled to the Supplemental Job Displacement Benefit (SJDB) voucher.

Applicant contends that she is entitled to the SJDB voucher because she is permanently disabled, defendant has not met its burden of proof that it made a regular, modified, or alternative work offer within the required time, and Rule 10133.31, subdivision (c),[2] is not applicable.

We have reviewed defendant Travelers Insurance Company's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the

[1] Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

[2] All subsequent references to a subdivision are noted by a parenthesis.

Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend findings nos. 5, 6, 7 and 8 to find that applicant is entitled to a SJDB voucher, we amend finding no. 9 to defer the issue of attorneys' fees, and we return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

It is undisputed that applicant suffered an industrial injury to her right shoulder on October 25, 2013, from which she was awarded 20% permanent disability. (Findings, Orders and Awards dated December 1, 2017.) It appears that applicant then took a few days off after the injury but returned to full time work thereafter. (Applicant Exhibit 2, Todd A. Shapiro, M.D.'s report dated April 22, 2019, p. 1; Defendant Exhibit H3, David L. Wood, M.D.'s report dated December 8, 2015, p. 5; but see Minutes of Hearing and Summary of Evidence (MOH/SOE) dated February 2, 2021, p. 3:37.) Sometime after returning to work, applicant was placed on modified duties, which her employer ignored for a while but then appears to have accommodated later. (Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5.)

It is undisputed that applicant was off work from March 2015 to August 2015 following surgery on her right shoulder. (Applicant Exhibit 2, Dr. Shapiro's report dated April 22, 2019, pp. 1-2; Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5; MOH/SOE dated February 2, 2021, p. 3:39-41.) She returned to work with modified duties until May 2019, when she stopped working because of right shoulder pain. (Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5; MOH/SOE dated February 2, 2021, p. 3:39, 44-45.) It is unclear whether applicant returned to her same job following her surgery. (MOH/SOE dated February 2, 2021, p. 3:45-47.) Nancy Solis, HR Manager at applicant's place of employment, testified that applicant's position was that of bulk folder and that when she returned to work following her surgery, she worked in the shirts and pants department. (*Ibid*.) Furthermore, Dr. Shapiro described applicant's job as a "clothes hanger," Dr. Wood described applicant's job as a "towel folder," and indicated that applicant was allowed to switch duties every two hours, which consisted of sweeping and separating hangers. (Applicant Exhibit 2, Dr. Shapiro's report dated April 22, 2019, p. 3;

Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5; Defendant Exhibit H1, Dr. Wood's report dated September 11, 2019, p. 2.)

On February 2, 2021, trial was held on the issue of applicant's entitlement to the SJDB voucher. (MOH/SOE dated February 2, 2021.) On May 13, 2021, a Findings of Fact was issued. (Findings of Fact dated May 13, 2021.)

On June 7, 2021, applicant filed her Petition for Reconsideration. (Petition for Reconsideration.) On June 18, 2021, defendant filed an Answer to the Petition. (Answer.) On June 15, 2021, the WCJ issued his Report. (Report.)

DISCUSSION

We first address the timeliness of this Opinion. Labor Code[3] section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (§ 5909.) Applicant filed her Petition for Reconsideration on June 7, 2021. The Appeals Board had until August 6, 2021 to act on the Petition. However, the Appeals Board did not receive notice of it until August 16, 2021.

It "is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Id.* at p. 1108.) Therefore, considering that applicant filed a timely petition for reconsideration on June 7, 2021 and that our failure to act was due to a procedural error, we find that our time to act on applicant's petition for reconsideration was tolled until August 16, 2021, the date we received the Petition. Accordingly, per section 5909, the deadline to act on this Petition is extended to October 15, 2021. On October 8, 2021, we granted reconsideration in order to allow sufficient opportunity to further study the

[3] Subsequent statutory references are to the Labor Code unless otherwise indicated.

factual and legal issues in this case. Therefore, this Opinion and Decision After Reconsideration is timely.

Turning to the issues raised in the Petition, we disagree that Rule 10133.31(c) applies in this matter and that its elements were met, and conclude that applicant is entitled to a SJDB voucher. Section 4658.7(b) provides that an injured worker is entitled to a SJDB voucher if the industrial injury causes permanent partial disability and the employer fails to make an offer of regular, modified, or alternative work. (§ 4658.7(b).) Section 4658.7(b)(1) and (2) and Rule 10133.31(b) provide that the offer of regular, modified, or alternative work must be made no later than 60 days after receipt of the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) that last for at least 12 months. (§ 4658.7(b)(1) and (b)(2); Cal. Code of Regs. tit. 8, § 10133.31(b).) However, an "employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658.7(b)." (Cal. Code of Regs., tit. 8, § 10133.31(c).)

The Findings of Fact found that Rule 10133.31(c) applied and were met and therefore applicant was not entitled to a SJDB voucher. (Findings of Fact dated May 13, 2021, Findings nos. 6, 7, and 8; Opinion on Decision, pp. 1-2.) We disagree. It is undisputed here that applicant sustained 20% permanent disability from her October 25, 2013 industrial injury and is thus entitled to a SJDB voucher under section 4658.7(b), unless her employer made an offer of regular, modified, or alternative work. (§ 4658.7(b); Findings, Orders and Awards dated December 1, 2017.) The employer holds the burden of proof to show that it offered applicant regular, modified, or alternative work. (§ 5705.) We conclude that defendant did not meet its burden of proof here.

Defendant does not contend that it made an actual offer of regular, modified, or alternative work to applicant. Rather, defendant relies on Rule 10133.31(c) for its position that it should be deemed to have offered regular, modified, or alternative work. (Answer, pp. 2:26-5:15.) Rule 10133.31(c) deems an employer to have offered *regular* work when the employee lost no time from work or has returned to the same job for the same employer. However, contrary to defendant's contention, it appears that applicant lost time from work for a few days following the date of the injury and also from March 2015 to August 2015 due to surgery on her right shoulder. (Applicant Exhibit 2, Dr. Shapiro's report dated April 22, 2019, pp. 1-2; Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5; MOH/SOE dated February 2, 2021, p. 3:39-41.)

Furthermore, it is not clear that applicant returned to the same job following her injury. Dr. Shapiro described applicant's job as a "clothes hanger," Dr. Wood described applicant's job as a "towel folder," and defendant's only witness at trial testified that applicant's position was a "bulk folder" and worked in the "shirts and pants department" when she returned to work in 2015. (Applicant Exhibit 2, Dr. Shapiro's report dated April 22, 2019, p. 3; Defendant Exhibit H3, Dr. Wood's report dated December 8, 2015, p. 5; MOH/SOE dated February 2, 2021, p. 3:44-47.) Moreover, Dr. Wood indicated that applicant was allowed to switch duties every two hours, which consisted of sweeping and separating hangers. (Defendant Exhibit H1, Dr. Wood's report dated September 11, 2019, p. 2.) Thus, the evidence is not clear to support defendant's contention that applicant returned to her regular work following her industrial injury. We note that Rule 10133.31(c) makes no mention of modified or alternative work.

Although the record does not contain a Physician's Return to Work & Voucher Report, we conclude that the law is clear that applicant is entitled to a SJDB voucher upon showing that she sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work. (§§ 4658.7(b), 5705.) There is no dispute that defendant knew of applicant's permanent partial disability and, therefore, of its potential liability for a SJDB voucher. (Findings, Orders and Awards dated December 1, 2017.) In *Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied), a different Appeals Board panel concluded that:

> We are persuaded by applicant's contention here that, in this instance, defendant had the burden to obtain a Physician's RTW form when defendant was apprised of applicant's permanent disability status and work preclusions in the QME report. The purpose of a Physician's RTW form is to inform defendant that applicant has become permanent and stationary, the industrial injury caused permanent partial disability, and of applicant's work capacities and restrictions. (Lab. Code, § 4658.7(b)(1), (h)(2); Cal. Code of Regs., tit. 8, § 10133.31(b).) The QME report here provided this information. To conclude otherwise would place form over substance. (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal. App. 4th 301, 321, 200 Cal. Rptr. 3d 714 ["A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect a public interest. (citations omitted.) It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit.' (citations omitted)."]; *Pulaski v.*

> *American Trucking Associations, Inc.* (1999) 75 Cal. App. 4th 1315, 1328 [64 Cal. Comp. Cases 1231, 1236] ["Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute . . . . Where there is compliance as to all matters of substance technical deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations omitted.)" (internal quotations omitted [by WCAB]; emphasis in original.)].) [Citations to record omitted]

We agree. The burden of proof remains with defendant to show that it offered regular, modified or alternative work, irrespective of whether defendant received a Physician's Return to Work & Voucher Report. Therefore, we conclude that defendant has not met its burden of proof to show that it offered regular, modified, or alternative work to applicant. Accordingly, we amend findings nos. 6, 7 and 8 to find that applicant is entitled to a SJDB voucher.

Lastly, we admonish both parties for their sloppiness in creating the evidentiary record. The issues listed under the Pretrial Conference Statement as well as in trial includes whether the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) was issued by Dr. Wood or Dr. Sanchez and served on defendant. (Pre-Trial Conference Statement, p. 3; MOH/SOE dated February 2, 2021, p. 2:30-35.) However, the Physician's Return to Work & Voucher Report was not listed as an exhibit in the Pretrial Conference Statement nor admitted into evidence. (Pre-Trial Conference Statement, pp. 5-6; MOH/SOE dated February 2, 2021, p. 2:39-3:17.)

Accordingly, we amend findings nos. 5, 6, 7 and 8 to find that applicant is entitled to a SJDB voucher, we amend finding no. 9 to defer the issue of attorneys' fees, and we return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 13, 2021 Findings of Fact is **AFFIRMED EXCEPT** that it is **AMENDED** as follows, and that the matter is **RETURNED** to the trial level for further proceedings.

Findings of Fact

. . .

5. There is no Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) in the record.

6. Defendant failed to show that it offered applicant regular, modified, or alternative work following her industrial injury.

7. Applicant is entitled to a Supplemental Job Displacement Benefit voucher.

8. The issue of attorney's fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 18, 2022

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

ISABEL SALLAGO
LEVITON, DIAZ & GINOCCHIO, INC.
MULLEN & FILIPPI, LLP

LSM/*pc*

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