

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

ISAIAS VAZQUEZ, *Applicant*

vs.

LEPRINO FOODS, permissibly self-insured, administered by TRISTAR, *Defendants*

**Adjudication Number: ADJ12900094
Fresno 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, and for the reasons stated below, we will deny reconsideration.

Contrary to defendant's assertion, we note that orthopaedic panel qualified medical examiner (PQME) Michael Klassen, M.D., found a period of temporary partial disability from November 27, 2019 to April 5, 2020. (Joint Exhibit Y, Dr. Klassen's 8/11/20 report, at p. 10.) If temporary partial disability is such that it effectively prevents an injured employee from performing any duty for which the worker is skilled or there is no showing by the employer that work was available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments. (Lab. Code, § 4657; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2022

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

**ISAIAS VAZQUEZ
MITCHELL & POWER
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
EMPLOYMENT DEVELOPMENT DEPT.**

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**

INTRODUCTION

1.	Applicant's Occupation	Forklift Driver
2.	Age at Injury	43
3.	Dates of Injury	3/21/2019
4.	Parts of Body	Low Back
5.	Status of Claims	Accepted
6.	Petitioner	Leprino Foods
7.	Timeliness	Timely Filed, 1/4/2022
8.	Verification	Petition was Verified
9.	Award Date	12/13/2021
10.	Answer	Not on file
11.	Recommendation	Denial

PRELIMINARY STATEMENT

Essentially, defendant is disputing the undersigned's award of total temporary disability for the period of November 27, 2019 through April 5, 2020, which encompasses the period when EDD provided benefits, at a rate lower than that of the temporary disability rate, resulting in an award for reimbursement to EDD, as well as an award to applicant for the difference between the EDD rate and the TD rate.

RELEVANT FACTS

Applicant sustained compensable, accepted injury, on 3/21/2019, while employed as a forklift operator by Leprino Foods, permissibly self insured, administered by Tristar. There are no disputes regarding earnings or TD rates. Temporary disability was paid from 10/7/2019 through 11/4/2019 per report of Mr. Jaime Salvatierra, PA-C, App. Exh. 1.

Applicant was found P&S, discharged to full duty without need for further treatment on 11/5/2019 by Mr. Jaime Salvatierra, PA-C, App. Exh. 2.

Neither report was countersigned by a Treating Physician within the meaning of the Labor Code.

Temporary disability benefits were terminated based upon the report dated 11/5/2019. There is no evidence introduced showing that applicant was provided with any notices regarding his right to request a Qualified Medical Evaluation upon termination of TD benefits.

Applicant thereafter sought the services of non-MPN physician, Samuel Leon. See App's Exhs. 4 through 7. Dr. Leon certified "disability" during the disputed period of time. He did not specify whether the disability was partial or total. The applicant testified at trial that Dr. Leon had given him a paper recommending modified employment. That he provided that note to Ryan Rocha, supervisor and "Caroline" of HR and was told that there was no modified work available. This testimony was un rebutted. Sum. Of Ev. Pg. 5, Lns 18-22.

The employer's witness, Carolina Martinez, testified, generally, about the interactive process, but did not have any notes regarding such. On cross examination, she testified that the policy on light duty is on a case by case basis. She could not recall much regarding what had happened that far back.

She acknowledged receiving the reports from Dr. Leon, but did not send those reports to Tristar, their WC administrator, but instead sent them to The Hartford, the third party administrator for personal leave. HR took the position that those reports were not related to the industrial injury [even though a plain reading of Dr. Leon's reports would reveal that they were directly related to the industrial injury].

Eventually, the applicant proceeded to a QME with Dr. Klassen, who retrospectively disagreed with Mr. Salvatierra's full release of 11/5/2019, and noted that applicant would have been temporarily partially disabled during the period of time in question.

DISCUSSION

There are no reports from any physician in the trial record, other than those of Dr. Leon and Dr. Klassen. The release by Mr. Salvatierra is questionable at best, as he was not the treating physician and his reports were not countersigned by *any* physician.

While an applicant may be treated by a PA-C under the supervision of a physician, in this case there is no indication that any doctor actually supervised the treatment and concurred with the opinions of Mr. Salvatierra.

There are workers' compensation medical visits that simply monitor an applicant's progress. In those situations where nothing major is changing on the patient's status or need for treatment, the participation of a PA-C may be appropriate. There are milestones, however, where the alleged supervising physician should be called upon to report, instead of deferring entirely to a PA-C.

It would seem that one of those milestones, turning points on a case, would be where a full release to return to work as Permanent and Stationary, without need for further would require at the very least, countersigning by the actual PTP.

Such never happened in this case. The release by Mr. Salvatierra of 11/5/2019 would not appear to constitute substantial evidence, as it presented a milestone in terms of applicant's medical treatment and status, and the report was not issued countersigned by a physician.

To complicate matters, there is no testimony or documentary evidence indicating that applicant was provided with notice of his rights following Mr. Salvatierra's release. Without being informed as to his options, applicant did what any reasonable person would do, that is, seek treatment as he could. In this case, through Dr. Leon.

The employer was kept abreast of Dr. Leon's involvement, but made the unilateral decision that Dr. Leon's treatment was unrelated to the industrial injury, and as such, deprived the employer's WC administrator, Tristar, the opportunity to communicate with applicant regarding his rights, and/or communicate with Dr. Leon to determine whether there was a possibility of some type of work modification to avoid the period of disability in question.

Lastly, while petitioner maintains that Dr. Klassen did not agree with Dr. Leon's assessment of temporary disability, such is not the case. Dr. Klassen did agree that there was a disability during the period of time in question, contrary to the opinion issued by Mr. Salvatierra. While it is true that Dr. Leon did not specify whether the disability was total or partial, the employer deprived itself of the opportunity to seek such clarification by failing to set forth inquiry to Dr. Leon either directly or through Tristar, and instead presuming that the Leon reports pertained to personal leave, when it was patently clear that the reports were directly related to the industrial injury herein.

RECOMMENDATION

Given the ill reliance on a PA-C's opinion, the lack of notice of options to the applicant, the failure of defendant to properly investigate whether an accommodation would be appropriate, and the findings of the QME disagreeing with the release issued by the purported PTP (a PA-C), it is recommended that the Petition for Reconsideration herein filed by defendant be DENIED.

DATE: 1/21/2022

Javier A. Albart
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE