

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

**GARY GARNER, *Applicant***

**vs.**

**SACRAMENTO REGIONAL TRANSIT, permissibly self-insured, adjusted by  
INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ17059111  
Sacramento District Office**

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

Applicant Gary Garner seeks reconsideration of the June 7, 2023 Findings of Fact, Award, Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to total temporary disability for the period of February 9, 2023 to present, which is when applicant retired from employment.

Applicant contends that he met his burden of proof to show that his decision to retire was, in part, due to his industrial injury.

We received an answer from defendant Sacramento Regional Transit District. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the 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 grant reconsideration and amend the June 7, 2023 Findings of Fact, Award, Order to find that applicant's retirement does not preclude him from being entitled to total temporary disability benefits.

**FACTS**

As the WCJ stated in his Report,

Applicant was employed as a bus operator for the employer since November 2002. As a bus driver, Mr. Garner [had] to bid for routes every few months as the routes are re-assigned. In April 2022, Applicant made

an initial inquiry about a service retirement. (See MOH/SOE Page 2, Lines 4-1). In September 2022, Applicant was advised that he would receive a pay raise in January 2023 as the result of a new contract. (See MOH/SOE Page 2, Lines 6-7).

On or about October 4, 2022, Mr. Garner bid for and was assigned a bus route which was to begin on January 1, 2023. On or about October 10, 2022, Mr. Garner scheduled an appointment to reassess the value of his retirement after January 2023. On October 28, 2022, Mr. Garner was involved in an industrial bus accident suffering an injury to his low back and neck. This injury is accepted. Applicant began receiving temporary disability benefits as of October 29, 2022.

On December 27, 2022, at the meeting with the employer, Applicant decided to take a service retirement. The assigned date for retirement was February 9, 2023. Temporary disability payments stopped as of February 8, 2023. (Report, pp. 1-2.)

## DISCUSSION

In *Gonzales v. Workers' Compensation Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477], the court set out the framework in analyzing whether a worker is entitled to temporary disability after retirement. It stated that the purpose of temporary disability benefits is to “primarily [] substitute for the worker’s lost wages, in order to maintain a steady stream of income.” (*Id.* at p. 847.) Earning capacity is the touchstone in determining the amount of temporary disability benefits. (*Id.* at p. 846.) The elements of earning capacity include the ability to work, willingness to work, and opportunity to work. (*Id.* at p. 847.)

That a worker retires after sustaining a job-related injury should not cause any radical departure from these general principles. Our touchstone is still earning capacity.

In our view, the decision to retire implicates the element of “willingness to work” in the earning capacity calculus, and the primary factual component of the analysis must be whether the worker is retiring for all purposes, or only from the particular employment. (See *Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal. App. 3d 81, 90 [112 Cal. Rptr. 208] [“matter of common knowledge” people often work at other jobs after retirement].) If the former, then the worker cannot be said to be willing to work, and earnings capacity would be zero. If the latter, then it would be necessary to determine an earning capacity from all the evidence available. A subsidiary question is whether the decision to retire is a function of the job-related injury. If the injury causes the

worker to retire for all purposes or interferes with plans to continue working elsewhere, then the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish by preponderance of the evidence an intent to pursue other work interrupted by the job-related injury. (§ 3202.5, 5705; cf. *West v. Industrial Acc. Com.*, *supra*, 79 Cal. App. 2d at p. 726 [burden on worker to explain reason for periods of unemployment].) (*Id.* at pp. 847-848.)

Here, the undisputed facts are as follows: (1) in April 2022, applicant made an inquiry about service retirement, (2) in September 2022, applicant learned he would receive a pay raise in January 2023, (3) on or about October 4, 2022, applicant bid and received a new bus route that began January 2023, (4) on or about October 10, 2022, applicant scheduled another meeting to reassess the value of his retirement, (5) on October 28, 2022, applicant sustained an industrial injury, (6) on December 7, 2022, applicant had his retirement meeting and decided to take a service retirement, effective February 9, 2023. (Report, pp. 1-2.)

Applicant testified at trial that he decided to retire because of his industrial injury. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated June 6, 2023, p. 4:14-15.) There is nothing in evidence to refute this testimony. The only other witness at trial, Jessica Mathew, the retirement service analyst who communicated with applicant about his retirement benefits, did not refute this testimony. (MOH/SOE) dated June 6, 2023, pp. 5:24-6;11.)

The WCJ, nevertheless, found that applicant is not entitled to temporary disability benefits after retirement because he did not find applicant's testimony credible. (Report, pp. 3-4.) The WCJ explained in his Report,

Applicant's testimony that he retired due to his claimed injuries was not credible. The documentation and credible testimony of Ms. Mathew indicates that Applicant planned to retire prior to his injury of October 28, 2022. Specifically, Applicant made an initial inquiry about a service retirement in April 2022. (See MOH/SOE, Page 4, Lines 4-5). In September 2022, a new contract, with a pay raise in January 2023, became effective so Applicant decided to defer retirement so he could take advantage of the increase in pay. (See MOH/SOE Page 4, Lines 7-6.) (Report, p. 4.)

Although a trier of fact's credibility determinations must be afforded great weight, they still must be supported by substantial evidence. (*LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]; *Lamb v. Workmen's Comp. App. Bd.* (1974) 39

Cal.Comp.Cases 310, 314 [1974 Cal. Wrk. Comp. LEXIS 2174]; *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 ["Moreover, although the board is empowered to resolve conflicts in the evidence [citations], to make its own credibility determinations [citations], and upon reconsideration to reject the findings of the referee and enter its own findings on the basis of its review of the record [citations], nevertheless, any award, order or decision of the board must be supported by substantial evidence in the light of the entire record [citations]."])

The WCJ here does not cite to any evidence in support of his credibility determinations. While it is true that applicant has been inquiring about retirement before his industrial injury, it does not necessarily mean that applicant intended to retire in February 2023. In fact, applicant inquired about retirement in April 2022 and decided not to retire at that time. Moreover, applicant bid for a new bus route, showing his intent to work in 2023, at approximately the same time he scheduled an appointment to inquire about retirement. There is nothing in evidence to support the WCJ's determination that applicant was not credible when he testified that he decided to retire because of his industrial injury.

For the foregoing reasons,

**IT IS ORDERED** that applicant Gary Garner's Petition for Reconsideration of the June 7, 2023 Findings of Fact, Award, Order is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 7, 2023 Findings of Fact, Award, Order is **AMENDED** as follows:

**Findings of Fact in ADJ17059111**

...

11. Applicant's retirement, effective February 9, 2023, does not preclude his entitlement to temporary disability.

**Award**

Any award at this time is deferred.

**Order**

Any orders at this time are deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ NATALIE PALUGYAL, COMMISSIONER**

I CONCUR,

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 28, 2023**

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

**GARY GARNER  
BOXER & GERSON, LLP  
ALBERT MACKENZIE ROSEVILLE**

**LSM/oo**

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