WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

OSCAR SCAGLIOTTI, ***Applicant***

vs.

ELMORE TOYOTA, ***Defendant***

Adjudication Number: ADJ9298865
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues presented in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings, Award and Orders (132a Only) (F&O) issued on February 17, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant is entitled to recover his lost wages at the stipulated average weekly wage of $759.62 from June 13, 2014 through October 26, 2015; defendant is not entitled to a credit for unemployment benefits that were not paid by the Employment Development Department (EDD); and applicant is entitled to reinstatement to his service advisor position with defendant at seniority and pay commensurate with what he would have received had he not been terminated from employment in 2013. The WCJ issued an award in favor of applicant in accordance with these findings and ordered that jurisdiction be reserved "should there be a dispute as to applicant's return to the workplace after the state safely reopens from the pandemic."

Defendant contends that applicant failed to mitigate his damages because he did not perform a reasonable job search during the period of June 13, 2014 through October 26, 2015, and did not seek unemployment benefits he could have received from the EDD. Defendant further contends that applicant is not entitled to reinstatement because he has removed himself from the workforce to avoid potential health risks resulting from the Covid-19 pandemic.

We received an Answer from applicant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend finding number 5 to state applicant is entitled to reinstatement when applicable State and County guidelines issued in response to the Covid-19 pandemic indicate that reopening may safely take place.

FACTUAL BACKGROUND

On November 16, 2020, the matter proceeded to trial on issues framed as follows:

> [A]pplicant is seeking the following: The $10,000 statutory amount; penalties; costs; wages; lost wages for the period June 13, 2014, through October 26, 2015; reinstatement; statutory interest; and lost wages from March 2, 2020, and continuing.
> . . . Defendant alleges lack of mitigation and credit for unemployment benefits.
> (Minutes of Hearing (Further) and Summary of Evidence (132a Only), November 16, 2020, p. 2:2-10.)

The WCJ entered the following into the record:

> [T]his matter has been returned to the court by the Appeals Board to determine damages in the 132a claim. It has previously been determined that the information contained at the last trial was not adequate for the court to determine damages.
> (*Id*., p. 2:3-4.)

At trial, applicant testified that he has not received unemployment benefits since he was terminated from his service advisor position by Ford of Irvine on March 20, 2020. (*Id*., p. 2:19-23.) He further testified that he is willing to return to work for defendant. (*Id*., p. 3:7.) He is not comfortable in the workplace because of the risks associated with Covid-19. (*Id*., p. 3:23-24.) He does not believe he has fully removed himself from the labor market, and wants to return to work after the pandemic is over. (*Id*., pp. 3:25-4:2.)

In the Report, the WCJ writes:

> Applicant testified that he began looking for work "as soon as he was released" (11/16/20 SOE, Page 3, 1-5). He was released from medical treatment on June 12, 2014 and was hired on October 27, 2015. Therefore, applicant was available, but not working, for a 16 month period of time. Petitioner contends that the applicant's job

search, viewed in the best light, involved only six job applications over 16 months. However, applicant testified that he put in six job applications, but he also called "other places for work as well, but it has been a long time, and he cannot recall where." (Supra at lines 8-9). The applicant was found credible as a witness and defendant offered no rebuttal evidence to show that the applicant did not call any other places.

This is very similar to the case of *San Diego Unified School District v WCAB* (*Pinto*) (1997, 4th Appellate District) 62 CCC 991 wherein defendant claimed the WCAB erred in disagreeing with their arguments that applicant did not make reasonable efforts to mitigate her damages in looking for work. The court stated, "Although she was unable to remember the names of the potential employers contacted, the WCJ found her testimony that she actively looked for employment credible. At all times applicant was ready, willing and able to perform the duties of the position which had been denied to her as well as other employment. There was substantial evidence to support the Board's determination."

Just as in Ms. Pinto's case, above, Mr. Scagliotti testified credibly that he had contacted other potential employers but could not recall their names. The applicant clearly did more than put in only six applications in the 16 months that it took him to obtain employment after he was taken off temporary disability benefits and was medically cleared to work. . . . Further, the applicant was not limiting his search for work only to jobs that were identical to the one from which he had been fired. In fact, he wound up accepting employment in October 2015 as a fabricator at Aria Group, which has no connection to auto dealerships or car repairs. This is further evidence that the applicant did not limit himself to applying only at six auto dealerships as suggested by petitioner.

. . .

Based on the credible evidence that applicant contacted unrecalled potential employers, as well as identifying six applications with five interviews that did not result in employment, the applicant mitigated damages by attempting to obtain employment.

. . .

Defendant contends that applicant did not properly mitigate his damages because he did not apply for unemployment benefits during the nearly 17 months that he was off work. . . . Defendant believes that applicant was required to apply for those benefits, which allows them $450 a week credit in calculating the lost wages owed to the applicant. Defendant offers no Labor Code section, Regulations or case law to support that argument.

The court relies upon *Eubanks v. WCAB, State of California, Roseville Community Hospital* (3rd App. Dist., 1994) 59 CCC 223 (writ denied). In that case, the WCJ denied the employer's request to reduce its liability by the amount of unemployment insurance and disability payments received by applicant. The WCAB partially overturned the trial judge's decision, finding that applicant was entitled to reimbursement for all lost wages and work benefits caused by the employer's discriminatory act less deductions for taxes, earnings and disability indemnity received by the applicant, as well as periods that the applicant was unavailable to work due to school or traveling. The Opinion and Decision after Reconsideration did not allow defendant to reduce their liability for lost wages by taking credit for unemployment insurance received by the applicant while she was off work.

In following the holding in *Eubanks*, the defendant cannot reduce their liability to pay lost wages by the amount of unemployment benefits paid to applicant. That applicant did not apply for unemployment benefits does not alter the fact that defendant cannot reduce their liability to pay lost wages. Defendant has offered no legal support to the contrary; therefore, applicant is entitled to lost wages without deduction for benefits he never received.

. . .

Petitioner argues that because applicant is currently at home due to the Covid-19 pandemic, he is not entitled to reinstatement at Elmore Toyota.

Labor Code §132a states in part "Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer." (Emphasis added). The word "shall" is not permissive. It is mandatory. . . . The applicant has no work restriction that bars him from performing his former job of service writer. In fact, prior to the pandemic, which caused applicant to lose his present job, applicant was working the same job, a service writer, for a different dealership.

This mandatory remedy of reinstatement is addressed in *Dyer v. WCAB* (3rd App. Dist., 1994) 59 CCC 96 where the court held that in the event an employer discriminates against an employee due to a work injury, the employee is entitled to the undefined remedy of reinstatement. "However, reinstatement is a common remedy in cases of employment discrimination [Citations removed] in such cases courts are vested with broad equitable discretion in fashioning and applying an appropriate remedy.[*Franks v. Bowman*

> *Transportation Co.* (1976) 424 U. S. 747, 763] . . . That the legislature intended the WCAB to exercise its equitable powers with respect to matters of reinstatement is made clear in Labor Code section132a."
>
> At the damages trial on November 16, 2020, the applicant testified that he was uncomfortable returning to work immediately due to the pandemic and his advanced age. Defendant's argument that applicant's testimony was irrational has no basis in our current reality. In a normal world, defendant's argument might be valid, but right now, we are living in unprecedented times, which require the court to be creative in fashioning and applying an appropriate remedy for the situation.
>
> At the time of trial, no vaccines had been approved for use and the CDC continued to recommend the people at high risk of contracting the disease, such as the older population, stay home. In fact, only a matter of days after the trial took place, the Governor of California issued a more restrictive order. That order was still in effect when the judge's decision was written and the F&A issued. Therefore, the applicant's testimony that he was not currently looking for work due to the pandemic is reasonable considering the circumstances. . . . Defendant is ordered to return applicant to the workplace from which he was wrongfully terminated, but not until the State of California and County guidelines indicate it is safe to do so.
> (Report, pp. 3-7.)

DISCUSSION

We turn first to defendant's contention that applicant failed to mitigate his damages because he did not perform a reasonable job search during the period of June 13, 2014 through October 26, 2015. The record in this regard shows that applicant testified not only that he filed six applications with potential employers during this period, but also contacted other potential employers whose identities he could not recall five and a half years later. (Report, p. 4.) The record further shows that the WCJ determined that this testimony was credible. (Report, pp. 3-5.) We accord the WCJ's credibility determination great weight because she had the opportunity to observe applicant's testimony at trial. (*Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Accordingly, we are unable to discern error in the WCJ's finding that applicant is entitled to recover his lost wages at the rate of his average weekly wage for the entire period of June 13, 2014 through October 26, 2015.

We next address defendant's contention that applicant failed to mitigate his damages because he did not seek unemployment benefits he could have obtained from the EDD. In this regard, defendant cites no authority, and we are aware of none, for the proposition that applicant's duty to mitigate damages includes a duty to seek unemployment benefits for which defendant may subsequently claim a liability credit. To the contrary, the authorities of which we are aware suggest otherwise.

In *Monroe v. Oakland Unified School District*, (1981) 114 Cal.App.3d 804, the court held that in "computing the damages awarded to a wrongfully discharged employee in an action for breach of contract, unemployment insurance benefits 'are not deductible as compensation received from other employment in mitigation of damages . . . Benefits of this character are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee.'" (*Id.* at 810-11 (citing *Billetter v. Posell* (1949) 94 Cal.App.2d 858).) The court reasoned that "the law . . . does not require the mitigation of damages by everything of value received during a period of wrongful unemployment. Rather, the rule of mitigation requires only the duty to seek other employment." (*Id.* at 811 (citing *Parker v. Twentieth-Century Fox Film Corp*., (1970) 3 Cal.3d 176 and *Gonzales v. Int'l Assn. of Machinists*, (1963) 213 Cal.App.2d 817.)

Based upon these authorities, we concur with the WCJ's reasoning that there is no legal basis to conclude that applicant failed to mitigate his damages because he did not seek unemployment benefits. (Report, p. 5.) Accordingly, we are unable to discern error in the WCJ's finding that defendant is not entitled to a credit for unpaid unemployment benefits.

Lastly, we address defendant's contention that applicant is not entitled to reinstatement because he removed himself from the labor market to avoid potential health risks resulting from the Covid-19 pandemic. Here, applicant specifically testified that he is willing to return to work for defendant. (Minutes of Hearing (Further) and Summary of Evidence (132a Only), November 16, 2020, p. 3:7.) In addition, we concur with the WCJ's reasoning that the fact that applicant did not search for work after his March 2020 termination from a service advisor position with Ford of Irvine does not suggest that he removed himself from the labor market given the circumstances of the pandemic. (Report, p. 6.) We are therefore unable to discern grounds to support defendant's contention that applicant is not entitled to reinstatement.

Although the WCJ ordered defendant to return applicant to the workplace when "the State of California and County guidelines indicate it is safe to do," the WCJ's finding that applicant is entitled to reinstatement does not similarly provide when he is to be reinstated. (Report, p. 7; F&O, p. 2.) Accordingly, we will amend finding number 5 to state that applicant is entitled to reinstatement when applicable guidelines indicate that reopening may safely take place. In doing so, we note that any failure or refusal on applicant's part to return to his position after governmental guidelines permit reopening may be deemed as a waiver of his right to reinstatement.

Accordingly, we will affirm the F&O, except that we will amend finding number 5 to state that applicant is entitled to reinstatement when applicable State and County guidelines issued in response to the Covid-19 pandemic indicate that reopening may safely take place.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration, that the Findings, Award and Orders (132a Only) issued on February 17, 2021 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. When applicable State and County guidelines issued in response to the Covid-19 pandemic indicate that reopening may safely take place, applicant is entitled to reinstatement to his service advisor position at Elmore Toyota at seniority and pay commensurate with what he would have received had he not been terminated from employment in 2013.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 22, 2021

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

OSCAR SCAGLIOTTI
LAW OFFICES OF J. FELIX MCNULTY
LAW OFFICE OF GEORGE E. CORSON IV

SRO/ara

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