WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISTAL ZAMORA, ***Applicant***

vs.

GHIRARDELLI CHOCOLATE COMPANY; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ14803757
Oakland 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/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 8, 2022

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

CRISTAL ZAMORA
LAW OFFICES OF NAKEEM MAKADA
LAURA G. CHAPMAN & ASSOCIATES

AI/*pc*

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

1.	Applicant's Occupation:	Machine operator
	Applicant's Age at date of injury	28
	Date of Injury	April 27, 2021
	Parts of Body Injured	back, upper extremities
	Manner in which injuries alleged to have occurred:	Specific incident
2.	Identity of Petitioner:	**Defendant** filed the Petition.
	Timeliness:	The petition was timely filed.
	Verification:	A verification is attached to the petition.
3.	Date of issuance of Order Denying Petition to Set aside Award Approving Stipulations:	8/17/2022

4. **Petitioners contentions**: The defendant requests reconsideration of the award of temporary disability from March 7, 2022 to present and ongoing.

II
FACTS

Applicant, Cristal Zamora, born [ ], while employed as a machine operator, sustained admitted industrial injuries to her back and upper extremities on April 27, 2021 while employed by defendant Ghirardelli Chocolate Company.

The parties initially set this for an expedited hearing on February 28, 2022; however, no exhibits were filed so the matter was taken off calendar. Applicant replaced her counsel and new counsel filed for an expedited hearing. The matter was continued due to the unavailability of parties and was ultimately continued to a trial date due to the potential length of testimony and for parties to file wage information.

At trial, applicant and an employee witness, Marco Bijuk, testified. Applicant worked as a machine operator at Ghirardelli Chocolate. According to the bargaining contract, an employee is terminated when they have accrued 12 points within 365 days (Exhibit D at 1). At ten points, is a final written warning is issued. *Id* at 2. Points are given for various reasons including calling out or refusing overtime. *Id*. The attendance policy states "Employees may receive multiple disciplinary actions at once if one or more absence caused them to cross into more than one disciplinary threshold." *Id*.

The contract also allows for paid bereavement leave of immediate family members. (Exhibit I. at 25) On April 15, 2021, Applicant accrued 10 points. The system generated a final warning; however, a warning was not given to Ms. Zamora (MOH/SOE page 5 lines 27). On April 26th, Applicant was given a point for refusing to work overtime. On April 27th, Applicant was given a point for refusing to work overtime. On April 27th, Applicant injured her back and upper extremities. On April 29th, an incident attendance tab was printed showing the April 27th point (Exhibit L). On June 4th, Applicant called out because her cousin passed away. An incident attendance tab was printed showing Applicant had 12 points as of April 27th, 2021 (Exhibit H). Applicant worked on June 7th. After her shift, she was given a final written warning and terminated on June 7th (Exhibits F and G). The termination letter references an April 28th conversation about attendance at the same time that Applicant filed her incident report regarding her injury (Exhibit G). On June 8th, Applicant filed a grievance and a new incident attendance tab was printed that shows the April 27th point rescinded because she was excused from work (Exhibits O and E). The grievance was later withdrawn. (Exhibit P)

On July 19, 2021, Dr. Sheppard released applicant to full duty. (Exhibit A).

On August 17, 2022, this court awarded temporary disability from March 7, 2022 to present and continuing. It is from this order awarding temporary disability that the defendant seeks reconsideration. At the time of the filing, Applicant has not issued a response to the petition for reconsideration.

III
DISCUSSION

1. **The totality of the evidence does not support a finding of good faith termination**

The attendance policy makes it clear that the purpose of the step system is progressive discipline and to correct behavior. Having both a final warning and a termination on the same day defeats the purpose of progressive discipline unless there were multiple violations on the same day. It is not good faith to delay a progressive discipline step until the employee has enough points to terminate and then claim it is possible to do both at the same time. Both the contract and Ms. Zamora's discipline record makes it clear that different types of infractions may happen in a singular day which may cause the discipline to go into a different discipline threshold. However, that did not occur in this situation and the significant delay by the employer in enforcing progressive discipline is not in good faith.

Ultimately, Applicant was terminated after missing a day from work because her cousin passed away. Both the testimony and contract are clear that bereavement leave is for immediate family members and employees get paid days off during that period of time. However, both were silent as to whether missing work for an extended family member's death could be considered an excused absence. All three versions of the attendance forms show excused absences; however, it is unclear on what makes an absence excused and why a death in the family would not be.

During the testimony, Mr. Bijuk, employer representative, conceded following the April 15, 2021 notation in the system that there was no final written warning issued prior to the termination and despite the system notification, he processes the termination. (MOH SOE pg 5 line 27).

In the petition for reconsideration, defendant claims that the system generated a final warning on April 15, 2021 and that she was verbally counselled. On April 15th, Applicant accrued 10 points which would mean the final written warning step. However, Mr. Bijuk testified Applicant was not given a warning on April 15th. (MOH/SOE page 5 lines 27).[1]

Based on unrebutted testimony from Ms. Zamora, she did report to work for overtime on April 26th; however, was released from duty (MOH SOE pg 6 lines 27-28). There is no evidence conflicting the testimony; therefore, a point should not have been assessed on that day. Ms. Zamora was given 11 points based on April 26th. According to the attendance incident tab dated April 28th, applicant accrued a 12th point on April 27th. The April 27th point was later rescinded. Ms. Zamora was injured on April 27th, 2022.

The termination letter, references an April 28th discussion about attendance at the same time that Ms. Zamora reported her injury. (Exhibit G). Ms. Zamora accrued 10 points on April 15th. There is no other evidence of this conversation and a conversation is not consistent with the attendance policy for the level of points Ms. Zamora had at that time.

The delay in taking a progressive step until the same day the injury is reported raises significant concerns about the timing of the progressive action and eventual termination. Defendant contends 12 points means 12 points and therefore there was a good faith termination. The system that calculates the 12 points subject to human error as seen by the various versions of the attendance incident tab. Mr. Bijuk testified the termination

[1] Defendant's petition for reconsideration asserts that there was a verbal counseling on April 15th. There is no evidence or statement to back up that assertion. Defendant cites the lines that indicate there was no warning given.

in the system is just a recommendation and it is up to him to terminate which infers 12 points does not always necessarily mean termination (MOH/SOE page 5 lines 44-45).

Based on the totality of the evidence, the inconsistent records from Ghirardelli, and Ms. Zamora's unrebutted testimony, this court found applicant did not have the requisite points for termination on June 7th. The April 27th point was rescinded so Applicant had 11 points as of June 4, 2021. Without the point from April 26th, she would have had 10 points when she called out on June 4, 2021. Therefore putting her at 11 points on June 7th.

This court took particular attention to the timing of the progressive discipline and the delay until after Applicant's injury. Additionally, the termination letter was supported the inaccurate incident attendance tab and a corrected version of the incident reporting tab was not issued until June 8, the day after Ms. Zamora's termination and the same day the grievance was filed (Exhibits G, H, O).

Based on the totality of the circumstances, this court found defendant did not meet their burden to show that the termination was in good faith.

2. **Claim of improper termination is not barred**

Defendant referenced *Taxi Systems, Inc. v. WCAB* (1997) 62 CC 120 to argue applicant should be barred from raising the point; however, it is distinguishable from this case.

In *Taxi Systems Inc*, the applicant filed a civil suit against his employer and several other third party defendants. The workers' compensation carrier was not a part of the civil suit. The civil matter proceeded to arbitration regarding employment with applicant arguing he was an independent contractor. The arbitrator found applicant was an employee and the civil suit was barred. A workers compensation case was filed and the parties raised the issue whether defendant as barred from raising employment as an issue due to the arbitration decision. The appeals board found that the defendant was barred from raising the employment issue and that the employer was deemed notice or knowledge on the part of Golden Eagle under Insurance Code section 11652.

The doctrine of collateral estoppel is applicable only if: (1) the decision in the former proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the former proceeding; and (3) the parties in both the former and present proceedings are the same. *Busick v. WCAB* (1972) 7 Cal.3d 967, 973–974.

In the instant case, there has been no litigation or finding against either party, no formal proceeding, and no decision issued on the merits. The second prong also fails. Whether an Applicant is barred from temporary disability benefits because of a good faith termination with the employer showing but for the termination they would have offered modified duties is not the same issue as whether the termination or point was supported.

Therefore, Applicant is not barred from raising the termination.

3. **No evidence was produced to show Applicant was released to full duty at time of termination or that modified duties would remain available.**

To avoid paying temporary disability defendant has the burden to show that the termination was a good-faith termination and but for the termination, they would have offered modified work. Based on this twofold test, it is unclear why defendant thinks evidence regarding the availability of modified duties is irrelevant and has no impact on whether applicant is barred from temporary disability.

Defendant states Applicant was released to full duty on May 31, 2021; however, there is no medical evidence in the record that supports that contention. Defendant then relies on the primary treating report of July 19, 2021 (Exhibit A)[2] to support that Ms. Zamora was released full duty. Dr. Sheppard's report indicates that the work status is "Return to full work/activity today" and that the MMI date is 7/19/21 (Exhibit A). Dr. Sheppard's work status report is after the termination and does not reflect on the restrictions at the time of the termination. Applicant's credible testimony indicated she was working modified duties but that they wanted her back on the machine. Defendant failed to show a medical report prior to termination showing full duty or provided any testimonial or documentary evidence of what tasks would be performed during modified duty or how long it would be offered. There was not testimony regarding whether the current restrictions could be accommodated.

Without evidence to support that modified duties would be available but for the termination, defendant cannot meet its burden and applicant is entitled to temporary disability benefits.

[2] In defendant's petition for reconsideration they identify this report as Exhibit B. During the organization of exhibits it was re-identified as Exhibit A and is reflected as such in the Minutes of Hearing of July 6, 2022. In its petition for reconsideration, defendant also identifies the author of the report as Dr. Sunita Jayakar; however, the doctor on the work status report is Dr. John Sheppard.

III
RECOMMENDATION

Therefore, it is recommended that defendant's Petition for Reconsideration be Denied.

DATE: September 19, 2022
Erin Finnegan
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE