

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

JULIE ACOSTA, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION – CALIFORNIA MEN'S COLONY, administered by STATE
COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ17245720
San Luis Obispo District Office**

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

State Compensation Insurance Fund (SCIF) seeks reconsideration of the September 15, 2023 Findings of Fact, Award and Orders, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant's service retirement as a result of the industrial injury did not relieve the employer from offering modified duty to the applicant (Finding no. 8) and that applicant is entitled to temporary disability benefits resuming July 5, 2023 and continuing as long as there is medical substantiation and statutory entitlement (Finding no. 9).

SCIF contends that applicant is not entitled to temporary disability benefits because she retired from the labor force and suffers no loss of income. SCIF further contends that applicant is not eligible for temporary disability benefits retroactively from July 5, 2023 to the present and continuing because there was no medical evidence substantiating it.

We have not received an answer from applicant. We received and reviewed SCIF's supplemental brief. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review SCIF's supplemental brief.

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 supplemental brief, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, amend the Findings of Fact, Award and Orders, and return this matter to the trial level for further proceedings.

FACTS

As the WCJ stated in his Report:

The parties stipulated at the time of the Expedited Hearing on the issue of Temporary Disability to the following facts and agreed that these three (3) questions were at issue:

1. Julie Acosta [] while employed on September 2, 2021, as a material and store supervisor, at San Luis Obispo, California, by California Department of Corrections and Rehabilitation's Men's Colony, legally uninsured, sustained injury arising out of and in the course of employment.
2. At the time of the injury, the employer was legally uninsured with State Compensation Insurance Fund administering.
3. Parties have stipulated that the applicant received Industrial Disability Leave (IDL) during several periods, but specifically December 29th, December 30th, and December 31st of 2022.
4. The applicant was placed on Temporary Total Disability on January 1, 2023, and remained on the same through July 4, 2023.
5. The applicant also took a service-connected retirement on January 1, 2023.

Question 1: Did the Applicant become eligible for modified duty on June 20, 2023?

Question 2: Did the employer make a bona fide offer of modified duty at that time (circa June 20, 2023)?

Question 3: Was the employer relieved from liability to offer modified duty based on the applicant service retirement of January 1, 2023?

Following the decision that issued on September 15, 2023, the Defendants filed the instant Petition for Reconsideration and synthesized their issues into two (2) specific arguments:

1. The evidence shows that applicant retired from the labor force and not merely from her employment at CMC; since she presently suffers no loss of income due to the industrial injury, she is not entitled to TD benefits.

2. Applicant is not eligible for TD benefits retroactively from 7/5/2023 to the present and continuing because there was no evidence that applicant is now or has been since 7/5/2023 medically eligible for TD benefits. (Report, pp. 1-2; emphasis in original.)

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, applicant testified at trial that she took a service connected retirement because she was experiencing too much pain as a result of her industrial injury and could not continue to work. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated September 14, 2023, p. 4:20-33.) There is nothing in evidence to refute this testimony. As such, per *Gonzales*, applicant's retirement does not preclude her entitlement to temporary disability. She must still, however, prove by a preponderance of the evidence an intent to pursue other work following her convalescence from her industrial injury.

With respect to Finding no. 9, the issue of whether applicant is entitled to temporary disability benefits following Michael J. Behrman, M.D.'s medical report dated June 19, 2023, where he found applicant eligible for modified duty, we conclude that this finding is premature. Finding no. 9 states that "Applicant is entitled to Temporary Disability benefits resuming July 5, 2023 and continuing as long as there is medical substantiation and statutory entitlement." A decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (Labor Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Here, while the record reflects that Dr. Behrman released applicant to modified duty and her employer testified it did not offer her modified duty because of her retirement, there is no evidence to substantiate a perpetual temporary disability award subject to "medical substantiation and statutory entitlement." Applicant must prove her present entitlement to temporary disability. (Lab. Code, § 3202.5.)

Accordingly, we grant reconsideration, amend the Findings of Fact, Award and Orders to defer the issue of applicant's entitlement to temporary disability, and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that State Compensation Insurance Fund's Petition for Reconsideration of the September 15, 2023 Findings of Fact, Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 15, 2023 Findings of Fact, Award and Orders is **AFFIRMED EXCEPT** that it is **AMENDED** as follows and that the matter is **RETURNED** to the trial level for further proceedings.

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FINDINGS OF FACT BASED ON EVIDENCE

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9. The issue of applicant's entitlement to temporary disability is deferred.

AWARD

There are no awards at this time.

ORDERS

There are no orders at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 4, 2023

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

**JULIE ACOSTA
SPATAFORE & GRANT
STATE COMPENSATION INSURANCE FUND**

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*