

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

FRANK BORRELLI, *Applicant*

vs.

**DOLLAR GENERAL, permissibly self-insured,
administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ16808800
Stockton 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. Pursuant to our authority, we reject defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.) Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and the reasons stated below, we will deny reconsideration.

Temporary disability indemnity is a workers' compensation benefit, which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

In *Huston*, the Court of Appeal stated more specifically that:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled ***or there is no showing by the employer that work is available and offered***, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments. (*Huston, supra*, at p. 806 (emphasis added).)

Thus, the language used by the *Huston* Court reflects that an employer's failure to show that modified work was available and offered, affects an injured worker's entitlement to temporary disability. A resignation cannot be interpreted as a refusal of modified work and cannot be used as a basis for denying temporary disability if modified work was not offered. (*City of Seaside v. Workers' Comp. Appeals Bd. (Sanchez)* (1991) 56 Cal.Comp.Cases 598 (writ den.)) Moreover, where an injured worker's resignation is a result of the injury, the worker cannot be said to be unwilling to work. (See *Gonzales, supra*, at p. 1479.) Thus, we agree with the WCJ that defendant was obligated to either make an offer of modified work to applicant or be liable for temporary disability indemnity payments.

Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

Finally, we note that Labor Code section 5903(d) provides that reconsideration from a final decision may be sought on the basis of newly discovered evidence on the grounds "[t]hat the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing." (Lab. Code, § 5903(d).) WCAB Rule 10974 further provides:

Where reconsideration is sought on the ground of newly discovered evidence that could not with *reasonable diligence* have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing: [¶]... (e) As to newly discovered evidence, a *full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.* [¶] A petition for reconsideration sought upon these grounds may be denied if it fails to meet the requirements of this rule, or if it is based upon cumulative evidence.

(Cal. Code Regs., tit. 8, § 10974.)

We are not persuaded by defendant's assertion that applicant's testimony was a "surprise." Applicant's claim of temporary disability through the present and continuing was listed as the principle issue at trial. It was defendant's burden of proof to show that it offered applicant modified work and it has not established that it could not with reasonable diligence have been produced the evidence offered in its proposed supplemental pleading prior to the mandatory settlement conference and submission of the case.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 11, 2024

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

**FRANK BORRELLI
LAW OFFICE OF TIMOTHY CAMACHO
DIETZ, GILMOR & CHAZEN**

PAG/abs

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

Manner of Injury:	Squatting knee injury
Date of Injury:	9/3/2022
Body Parts Injured:	Bilateral knees
Occupation:	Retail manager
Date of Findings and award:	11/9/2023
Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification of Petition:	Verified

INTRODUCTION

Petitioner/Defendant, filed a Petition for Reconsideration of A Findings and Award.

PETITIONER'S CONTENTION(S)

Petitioner contends

1. By the Order, Decision, or Award made or filed by the Workers' Compensation Judge, the workers' compensation Judge acted without or in excess of its powers.
2. That the evidence does not justify the findings of fact.
3. That the Findings of Fact do not support the Award;

RESPONSE TO PETITIONER'S CONTENTION

Petitioner is incorrect in their assessment of the temporary disability issue and reconsideration should be denied.

SUMMARY OF FACTS

The applicant has an accepted bilateral knee injury which occurred on 9-3-2022 while squatting and hearing a pop in both knees. He squatted down as he was holding a case of store product at the Dollar General Store in Ceres California.

The PQME is Dr. Gwalini who indicates that the applicant is temporarily disabled and has been throughout the time claimed. Dr. Gwalini's report also mentions the early note from Concentra containing work restrictions. The applicant continues to be temporarily disabled at this time.

Defendant is aggrieved as they indicate that the applicant self-terminated on 1-6-2023 and due to that fact, the applicant is not entitled to any temporary disability. The court found that the situation at work was untenable as the applicant was being harassed for his complaints regarding his knees and lack of any modified work and he quit his job.

The applicant worked at the Dollar General store for six years and was a manager. He testified very credibly at trial regarding his work note limitations, his knee problems, his discussions with the employer, and his treatment by the employer. He also indicated the type of work that was imposed upon him and that the work became beyond his restrictions and comfort levels despite his best efforts to inform his employer to no avail.

Defendants did not present witnesses or testimony at trial to oppose the trial testimony offered by the applicant. They are now claiming foul despite their lack of evidence or testimony knowing it was their burden of proof to demonstrate that alternative work would have been offered. Up to and including the day of trial, they still have not put forth any evidence regarding alternative or modified positions at the workplace. The applicant also testified that as a manager, of six years, he had not seen anyone at a modified job position at the workplace and he does not think that there are any positions for a modified duties job.

The main issue at trial was that of “whether or not the applicant was entitled to temporary disability from 2-6-2023 to present and continuing”.

DISCUSSION

The applicant was injured on 9-3-2022. He was seen at Concentra 9-13-2022. The applicant credibly testified that he received a note with work restrictions from Concentra stating no stooping, bending, climbing or walking on uneven ground, and no stairs. He faxed the work restrictions note to his employer and also faxed it to the risk manager. This note is also referenced as reviewed materials in the PQME report of Dr. Gwalani. The applicant testified that there was no response to his work restriction note from his employer. Defendants failed to review the PQME report findings. It is clear, that the early reporting described bilateral torn meniscus injuries, pain and altered gait findings.

The applicant indicated that he was unable to follow the given restrictions as a working retail manager in his position as his job did not lend itself to many of the designated restrictions. He also was unable to sit as needed. At trial, the applicant testified to the details of his job duties in depth. He was required to stock many shelves of product weighing anywhere from three to 100 pounds per carton. He was to lift, walk with stock, and bend to stock the lower shelving, up to 250 cases per day. There was stacking with frequent bending, stooping and squatting.

There are two other medical reports prior to his last day of work, dated on the same day of 10-21-2022 from both nurse practitioner Ms. Paul and Dr. Tenison. The reporting indicates that the applicant, while bending down, felt pops in both knees and he received MRIs at the facility. The MRIs demonstrated bilateral meniscus tears. The applicant was found to have internal

derangement of both knees, he was referred to an orthopedic surgeon for evaluation and he was given medication for pain and swelling.

His work did not give the applicant any modified job duties, and he was never formally offered any modified jobs despite his knee complaints to his manager or the faxed note to HR. The applicant testified that he never heard back from the employer regarding modified duties and he continued to alert his manager Liz about the pain he was experiencing in his knees. This evidence was not disputed by the employer.

Prior to his last day at work, and after his complaints were given to his manager, the applicant testified that his manager began to berate him in front of the other workers at the store and he felt he was being treated inappropriately. This had never happened before. Due to the lack of any offers regarding modified duties, his complaints to management, and no help at the store, the applicant felt compelled to quit his position in January of 2023.

After he left work, the applicant was seen again on 2-6-2023 by Dr. Hammer. The evidence indicates that the applicant again had numerous work restrictions that were undisputed by the petitioner/defendant. The medical examination, done at that time, demonstrated diffuse tenderness over the lateral aspects of both knees and a limp towards the left side. Dr. Hammer thoroughly described his job duties fully. The applicant was also placed on restrictions of no kneeling, squatting, or climbing ladders.

There is a report by Dr. Giang dated 1-11-2023 which indicates that the applicant was very frustrated with the workers compensation system, unclear as to why he was seeing the doctor that day, and during that appointment Dr. Giang did not give any recommendations regarding work restrictions. He wanted the applicant to try physical therapy or injections and again the applicant seemed somewhat frustrated with the way that his treatment had gone. He also relayed to the doctor that he had quit work a few days before (which may account for the doctor not placing any work restrictions on the report at that time).

CONCLUSION

The applicant clearly was on work restrictions and was not accommodated by his employer. He was then forced to quit his job as he was being harassed and it was making his work related condition worse. Based on the fact that the petitioner/defendant did not present any evidence at trial to oppose applicant's claims, injury, or work relation strains, the court found that the applicant was entitled to temporary disability as of the requested date of 2-6-2023.

The situation at work was untenable for this applicant despite his multiple requests for help with his job duties. His supervisor began belittling him, treating him differently and making his work conditions very difficult. The applicant had obvious meniscal tears and many physical findings. He could not have continued with the job duties as is. No change was in sight for him and he quit.

RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the Petition for Reconsideration be denied.

Dated: 11/28/23

Maribeth Arendt
WORKERS' COMPENSATION JUDGE