

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

ANA ESCOBAR, *Applicant*

vs.

WOOD RANCH BBQ & GRILL, INC.; SENTRY INSURANCE, *Defendants*

**Adjudication Number: ADJ12893727
Santa Ana 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.

We have given the WCJ's credibility determination 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.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 24, 2021

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

**ANA ESCOBAR
MEHR & ASSOCIATES
GOLDMAN MAGDALIN & KRIKES**

PAG/oo

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

- | | | | |
|----|--|---|------------------------------|
| 1. | Applicant's occupation | : | Prep Cook |
| | Applicant's Age | : | 37 |
| | Date of Injury | : | September 16, 2018 |
| | Parts of Body Injured | : | left shoulder |
| | Manner in which it occurred | : | Specific Incident |
| 2. | Identity of Petitioner | : | Wood Ranch BBQ & Grill, Inc. |
| | Timeliness | : | Petition is timely |
| | Verification | : | Petition is verified |
| 3. | Date of Order | : | June 11, 2021 |
| 4. | Petitioner contends that the WCJ erred in: | | |
| | a) Finding that the applicant was entitled to temporary total disability benefits for the period of May 22, 2020, through the present: and | | |
| | b) Finding that the applicant was entitled to continuing temporary total disability benefits. | | |

**II
FACTS**

The applicant Ana Escobar, while employed on September 16, 2018, as a prep cook, in Corona, California, by Wood Ranch BBQ & Grill, Inc., sustained an injury arising out of and in the course of employment to her left shoulder.¹

After her injury, the applicant continued to work for the defendant with modified duties. The applicant continued to work for the defendant until December 30, 2019.² The applicant stopped working at Wood Ranch because her shoulder pain became unbearable due to the number of hours she was working.³

¹ March 22, 2021 MOH/SOH EAMS Doc ID 74009649 Page 2 Line 5

² March 22, 2021 MOH/SOH EAMS Doc ID 74009649 Page 5 Line 18

³ March 22, 2021 MOH/SOH EAMS Doc ID 74009649 Page 6 Line 1

The applicant started working at the Lazy Dog Cafe in October of 2019 and was laid off by the Lazy Dog Cafe in March 2020 due to the COVID-19 pandemic.⁴

The applicant underwent arthroscopy surgery on her left shoulder on May 22, 2020, and was stated to be temporarily totally disabled by her surgeon and primary treating physician, Dr. James Fait.⁵

The applicant was placed on modified duty on July 10, 2020, with a work restriction of no overhead work with the left shoulder.⁶

The applicant was found temporarily totally disabled by her primary treating physician on August 28, 2020.⁷

She remained temporarily totally disabled through February 19, 2021, and as of the date of the trial, had not been declared permanent and stationary.⁸

III DISCUSSION

The applicant was entitled to temporary total disability benefits for the period of May 22, 2020, through the present.

The defendant asserts two basis for claiming that the applicant had no lost wages and would not be entitled to temporary total disability benefits.

The defendant's first contention is that the applicant had no wage loss because the applicant voluntarily quit her job with Wood Ranch BBQ in December of 2019. Therefore, Wood Ranch BBQ was under no obligation to offer modified work.

Contrary to the defendant's assertion, "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 is not offered".⁹

Furthermore, when an injured worker's resignation is a result of an injury, the worker cannot be said to be unwilling to work.

⁴ March 22, 2021 MOH/SOH EAMS Doc ID 74009649 Page 5 Line 19

⁵ Applicant's Exhibit 15, Medical report of Dr. Fait dated June 2, 2020

⁶ Applicant's Exhibit 17, Medical report of Dr. James Fait dated July 10, 2020

⁷ Applicant's Exhibit 18, Medical report of Dr. James Fait dated August 28, 2020

⁸ Applicant's Exhibit 21, Medical report of Dr. James Fait dated January 8, 2021

⁹ City of Seaside v. Workers' Comp. Appeals Bd. (Sanchez) (1991) 56 Cal.Comp.Cases 598; Szczeszinski v. Butler Chems., 2020 Cal. Wrk. Comp. P.D. LEXIS 398

The undersigned judge found the applicant credible. The applicant testified that she stopped working at Wood Ranch because her shoulder pain became unbearable due to the number of hours she was working.¹⁰

As noted by the defendant, the applicant was evaluated by Dr. Ronny G Ghazal, MD, as the Panel Qualified Medical Examiner in April 2020.

At the time of the evaluation, the applicant complained of frequent sharp, aching pain in front of her left shoulder and over her left collar bone.

Dr. Ghazal acknowledged that the applicant had been working regular duty and stated that she could continue doing so. However, Dr. Ghazal stated that the applicant's condition had not reached maximum medical improvement and recommended left shoulder arthroscopy decompression and distal clavicle resection.¹¹

The undersigned judge finds nothing in the reporting of Dr. Ghazal inconsistent with the applicant's testimony. As such, the applicant had not removed herself from the labor market.

The applicant underwent arthroscopy surgery on her left shoulder on May 22, 2020, and was placed on temporary total disability by Dr. James Fait.

Dr. James Fait did state the applicant could return to work with modified duty on July 10, 2020, and provided the applicant with a work restriction of no overhead work with the left shoulder. The applicant remained released to modified duty until August 28, 2020, when Dr. Fait declared the applicant again temporarily totally disabled.

As the applicant had not removed herself from the labor market, the defendant was obligated to offer modified work to the applicant when she was released to modified duties on July 10, 2020. Having failed to do so defendant is liable for temporary total disability benefits for this period.

After being declared temporarily totally disabled on August 28, 2020, the applicant remained temporarily totally disabled through February 19, 2021, and as of March 22, 2021, the applicant had not been declared permanent and stationary.

The defendant further suggests that the applicant's failure to apply for unemployment is evidence that she removed herself from the workforce as she declined to take advantage of the State's assistance in transitioning into gainful employment.

¹⁰ March 22, 2021 MOH/SOH EAMS Doc ID 74009649 Page 6 Line 1

¹¹ Joint Exhibit W, Medical report of Dr. Ronny Ghazal dated April 14, 2020

However, it is well established that the Workers' Compensation Laws are intended to award compensation for disability incurred in employment. Though not intended to make an employee whole, it is intended to prevent an employee and their dependents from becoming public charges during the period of an employee's disability.

Based on the above, the undersigned Judge's finding that the applicant was entitled to temporary total disability benefits between May 22, 2020, to the present and continuing is supported by the evidence.

The defendant's second contention is that the applicant had no wage loss because the applicant was laid off during the COVID-19 pandemic.

The appeals board has provided that the fact that it is impossible for a defendant to offer modified duties to an applicant because of the COVID-19 orders is inconsequential.¹²

The appeals board further stated that an employer's inability to accommodate a temporarily disabled employee's work restrictions does not release it from its obligation to pay temporary disability benefits.¹³

No evidence was submitted that showed misconduct on the part of the applicant, and no evidence was presented that showed that the defendant offered work within the applicant's work restrictions to the applicant.

Based on the above, the undersigned Judge's finding that the applicant was entitled to temporary total disability benefits between May 22, 2020, to the present and continuing is supported by the evidence.

Applicant's entitlement to continuing temporary total disability benefits.

The defendant takes issue with the undersigned Judge's Award of continuing temporary total disability benefits.

The defendant states that there were no medical reports subsequent to Dr. Fait's February of 2021 report upon which to make this finding. The defendant also says that after trial, Dr. Ghazal, the PQME, issued a report indicating that the applicant has reached permanent and stationary status.

¹² Corona v. California Walls, Inc dba Crown Industrial Operators (2020) 85 Cal. Comp. Cases 1043

¹³ Dennis v. State of California (2020) 85 Cal. Comp. Cases 389

This matter proceeded on the records on March 22, 2021, less than 30 days from the last medical reporting of Dr. Fait and 15 days prior to the alleged report of Dr. Ghazal.

At the time of trial, the undersigned Judge was provided with the current reporting, which demonstrated that the applicant's industrial injury had not become permanent and stationary and that the applicant remained temporarily totally disabled.

The defendant argues that the award for continuing temporary total disability benefits should be vacated based on the defendant's representation that there is medical evidence issued subsequent to trial and for which the applicant has not had the opportunity to offer rebuttal evidence that indicates the applicant is permanent and stationary.

At the time of trial and at this time, there is no medical reporting submitted to the court that finds the applicant permanent and stationary.

The defendant has not filed the medical report of Dr. Ghazal, filed a petition requesting that evidence unavailable at the time of trial but relevant to a determination on the matter be taken as evidence by the undersigned Judge, and/or filed a petition to terminate temporary total disability benefits. As such, there is no evidentiary support for the defendant's claim that the applicant is not entitled to continuing temporary total disability benefits.

Based on the above, the undersigned Judge's finding that the applicant was entitled to temporary total disability benefits between May 22, 2020, to the present and continuing is supported by the evidence.

**VI
RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that the defendant's petition for reconsideration be denied.

DATE: July 13, 2021

Oliver Cathey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE