

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

JAMIE BODINE, *Applicant*

vs.

**EMPLOYER SOLUTIONS STAFFING GROUP II;
OLD REPUBLIC INSURANCE COMPANY,
adjusted by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ11008178
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 2, 2021. By the F&A, the WCJ found that applicant is entitled to continuing temporary disability benefits. An award was made for temporary disability and a 15% attorney's fee from retroactive temporary disability benefits.

Defendant contends that applicant is not entitled to temporary disability because she could have continued working but for her termination. Defendant also contends that applicant could not have returned to work for it because she relocated approximately 150 miles away from the employer.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny reconsideration.

FACTUAL BACKGROUND

Applicant claims injury to the left eye, psyche, face and nose on June 30, 2017 while employed as a merchandiser by Employer Solutions Staffing Group II. Injury to the left eye has been accepted as compensable by defendant.

Temporary disability was paid to applicant from July 1, 2017 through August 15, 2017.

Applicant last worked for defendant on October 23, 2017. (Joint Exhibit No. 103, Applicant's deposition transcript, December 5, 2017, p. 14.) Applicant testified in her deposition that she was fired from her job via text and no reason for her termination was given to her by defendant. (*Id.*)

Applicant was receiving treatment from Linda Agwada, M.D. Dr. Agwada released applicant to full duty on August 15, 2017. (Defendant's Exhibit A, Report of Dr. Agwada, August 15, 2017, p. 3.) In her subsequent September 7, 2017 report, Dr. Agwada provided applicant with work restrictions of no climbing ladders or driving after 7 p.m. (Defendant's Exhibit B, Report from Dr. Agwada, September 7, 2017, p. 3.)

David Sami, M.D. evaluated applicant as the ophthalmological qualified medical evaluator (QME). In his December 11, 2017 report, Dr. Sami found that applicant's eye condition had not yet reached maximum medical improvement. (Joint Exhibit No. 101, Report of Panel QME Dr. Sami, December 11, 2017, p. 9.) He also opined as follows regarding work restrictions:

At this time, Patient is advised to avoid activities that carry risk for eye injury, as she is at this time *functionally monocular*: in particular repair/maintenance work using pneumatic equipment, high speed drills, and pressurized devices.

Polycarbonate lenses are recommended for full time use. Polycarbonate glasses with sided protection are advised whenever engaged in construction activity, or other task that carries risk for eye injury.

Patient has reduced depth perception ability due to visual loss of the Left eye. As such, patient may have difficulty with near manual dexterity tasks, such as threading a needle or placing a small screw into an opening, due to reduced stereo function.

Patient should be excluded from work on scaffolds (and at height above 5 feet) due to reduced depth perception and associated fall risk.

(*Id.* at p. 10.)

These restrictions remained the same in Dr. Sami's subsequent July 8, 2019¹ report, in which he provided a whole person impairment rating, but did not declare applicant's condition to be permanent and stationary yet. (Joint Exhibit No. 101, Report of Panel QME Dr. Sami, July 8, 2019, pp. 13-14.)

Applicant changed treating physicians to Dr. Aimee Edell as of June 13, 2018.

¹ The April 8, 2020 Minutes of Expedited Hearing incorrectly state the date of this report as "July 8, 2018," but review of the exhibit reflects that the correct year is 2019. (Minutes of Expedited Hearing, April 8, 2020, p. 3.)

(Defendant's Exhibit H, Applicant's designation of Dr. Edell as treating physician, June 13, 2018.) Dr. Edell recommended that applicant not drive in her December 4, 2018 report. (Defendant's Exhibit E, Report from Dr. Edell, December 4, 2018, p. 3.)

The matter proceeded to an expedited hearing on April 8, 2020 on the issue of applicant's entitlement to temporary disability on a continuing basis. (Minutes of Expedited Hearing, April 8, 2020, p. 2.) The WCJ issued the original Findings and Award on July 3, 2020. Defendant sought reconsideration of the decision. The Appeals Board granted reconsideration and rescinded the WCJ's decision because the proceedings violated defendant's right to due process.

The matter was returned to the trial level for further proceedings and another expedited hearing was held on January 6, 2021. Two additional exhibits from defendant were offered and applicant testified at the second hearing. (Minutes of Expedited Hearing, January 6, 2021, pp. 2-3.) Applicant testified as follows in relevant part:

The last time she worked for pay was on October 23rd, 2017 for Employer Solutions Staffing. The job did require her to climb ladders. The location was at Home Depot.

...

She was required to drive a commercial vehicle. That was part of her job duties. She had to drive a fork-lift. She brought her own tools to work, which included a cordless drill bit. She used this drill bit to drill into metal to create holes. It was a high speed drill, not the same one you would use at home.

She does have problems since her injury with depth perception of her left eye.

She was required to place small screws into openings. She did have to work at height above five feet. She had to remove merchandise from the top shelf, and she had to replace steel beams. They were industrial steel shelvings that she had to work with.

She had to use tall ladders or scaffolding to move things. She was not provided with a polycarbonate glasses. She was not suggested that she wear one or she provide one for herself. The reason her eyes were damaged was because dust got into her eyes while she was wearing contacts. Until the last day she worked, she worked in an area that did have dust.

She was eventually told that they no longer had any work for her, and that ended her employment. She has received no EDD benefits.

(Id.)

Applicant further testified during cross-examination as follows:

Although a lot of the shelving had predrilled small holes, she still had to drill holes herself. She had to do this on a regular basis. She used a DeWalt brand drill bit. The ID number on it is DCF885. It was a 20-volt drill bit.

She had to get on to scaffolding. It was a boom box that she was in. She has no issues with balance.

The reason she had to put new holes in these shelving was to put up new signage. She didn't have any issues with flying metal.

She moved to Chowchilla in June of 2018.

She only had to travel to Oakland for work for this employer.

She has not applied for work anywhere else because she cannot see.

(*Id.* at p. 3.)

The WCJ issued the second F&A finding that applicant is entitled to continuing temporary disability benefits with an award for attorney's fees from retroactive temporary disability. Defendant sought reconsideration again.

DISCUSSION

I.

Labor Code² section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Defendant's

² All further statutory references are to the Labor Code unless otherwise stated.

Petition was timely filed on March 22, 2021. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

II.

Temporary disability indemnity is a workers' compensation benefit which is paid during the time an injured employee 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 employee is off work. (*Gonzales, supra*, at p. 847.)

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. Industrial Acc. Com. (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*, 95 Cal.App.3d at p. 868, original italics.)

Thus, the language used by the *Huston* Court reflects that an employer's showing that modified work is available and offered affects an injured employee's entitlement to temporary disability.

The Appeals Board has accordingly previously found that an employer is not liable for temporary disability if the injured employee could have continued to work modified duty but for the employee's termination for cause. (See *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.)) Defendant must show that an injured employee's termination while performing modified duty was for good cause. (See *Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 (writ den.)) Pursuant to established case law, defendant holds the burden of proof to show that an employee was terminated for good cause. (See *Huston, supra*; *Butterball, supra*; see also Lab. Code, § 5705 [the party with the affirmative of the issue holds the burden of proof].)

The record reflects that applicant last worked for defendant on October 23, 2017 when she was notified of her termination by text. She was not given a reason for her termination other than the employer had no more work for her. As stated above, it is defendant's burden to show that applicant was terminated for good cause. In the absence of substantial evidence regarding applicant's termination, defendant has not met its burden of proving that applicant was terminated for good cause. (See *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record].)

Defendant contends that applicant's work restrictions from the treating physician and QME would not have precluded her from performing her usual and customary job duties. This contention conflicts with applicant's testimony regarding the type of work she performed for defendant. Defendant did not provide sufficient evidence that applicant was offered modified duty in accordance with her work restrictions.

Lastly, defendant contends that applicant is not available to return to work for defendant due to her relocation to Chowchilla. Defendant cites no authority to support its contention that an employee's residential location relieves the employer from its obligation to offer modified duty or liability for temporary disability where the employee has work restrictions that cannot be accommodated. This contention is therefore without merit.

In conclusion, we will deny defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on March 2, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 16, 2021

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

**BOXER & GERSON
D'ANDRE LAW
JAMIE BODINE**

AI/pc

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