

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

ARNULFO MUNGUIA, *Applicant*

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *Defendant*

**Adjudication Number: ADJ11400252
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the December 24, 2020 Findings of Fact issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant is not entitled to temporary disability from June 23, 2020 to the present and continuing.

We did not receive an answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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, and for the reasons discussed below, we will affirm the December 24, 2020 Findings of Fact.

Temporary disability indemnity is intended to replace wages lost on account of an industrial injury, the amount being "two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." (Lab. Code § 4653.) As the party seeking an award of temporary disability,

¹ Following the grant of reconsideration, Deputy Commissioner Schmitz became unavailable to participate and Commissioner Lowe no longer serves on the Appeals Board. Other panelists were substituted in their place.

applicant carries the burden of proof to demonstrate the extent of his earning capacity subsequent to his retirement by establishing his intent to continue to work after he retired. (Lab. Code, § 5705.)

“[I]n making an award for temporary disability, the focus is on ‘whether an applicant would have continued working at a given wage for the duration of the disability.’ [citation omitted]... An employee unwilling to work cannot be deemed to have an earnings capacity.” (*Gonzales v. Workers’ Comp. Appeals. Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477, 1481].) “The elements of earning capacity include ability to work, willingness to work, and opportunity to work.” (*Id.* at p. 1478.) If an injured worker voluntarily removes him or herself from the job market and did not retire because of the disability from the industrial injury, there may be no evidence of a willingness to work and or lost wages to be replaced.

The applicant in *Gonzales* retired two months after surgery for her industrial injury. She stipulated that she did not have any plans to look for work after her retirement. Her temporary disability benefits were terminated after she retired. Her claim for continuing temporary disability was denied based on the finding that her earning capacity was zero for her post-retirement period. The court held that a retired injured worker who “unequivocally denied any interest in further employment of any sort after her retirement date,” was not entitled to temporary disability indemnity because the worker, by removing herself from the labor market, had no lost earnings to replace through temporary disability benefits. (*Id.* at p. 1481.)

In reaching this outcome, the court cited several cases where injured workers who suffered heart attacks after their retirement were denied temporary disability benefits on the same rationale. Where the evidence established that the injured workers voluntarily removed themselves from the job market, and were not forced to retire by reason of the industrial injury, they were not entitled to temporary disability indemnity. (*Id.* at pp. 1479-1480.)

For the reasons stated by the WCJ in the Report, we agree that applicant did not meet his burden of proving wage loss or earning capacity here. Applicant retired on September 1, 2017 to care for his wife who would be undergoing knee surgeries. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 10/22/22, at p. 3:25 – 4:2.) The wife’s first surgery was in November 2019 (*id.* at p. 4:18) and applicant’s surgery was on June 23, 2020. (*Id.* at p. 3:22.) Although applicant testified vaguely that he had the intention to return to work (*id.* at p. 4:2-3; MOH/SOE, 12/1/20 at p. 2:13-18), there was no evidence that he ever actually attempted to return to work or

demonstrated an actual willingness to work. To the contrary, when he was offered to return to work, he rejected it. (MOH/SOE, 10/22/22, at p. 4:3-9.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 24, 2020 Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 24, 2022

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

**ARNULFO MUNGUIA
LAW OFFICES OF FRED FONG
VANDERFORD & RUIZ**

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**

I

INTRODUCTION

- | | | |
|----|---------------------------------|--|
| 1. | Applicant's Occupation: | Custodian |
| 2. | Applicant's Age: | 66 |
| 3. | Dates of injury: | 7/17/2017 |
| 4. | Parts of Body Injured: | right knee |
| 5. | Identity of Petitioner: | Applicant |
| 6. | Timeliness: | The petition was timely filed. |
| 7. | Verification: | A verification is attached. |
| 8. | Date of Joint Findings of Fact: | 12/24/2020 |
| 9. | Petitioner's contention: | 1. The WCJ's finding that Applicant Is not entitled to temporary disability because he removed himself from the Labor Market is not supported by substantial medical evidence. |

II

JURISDICTIONAL FACTS

The Applicant, Arnulfo Munguia, while employed on 7/17/2017, as a custodian at Los Angeles, California by Los Angeles Unified School District, sustained injury arising out of and in the course of his employment to his right knee.

This matter was initially set for expedited hearing based on Applicant's Declaration of Readiness to Proceed dated 8/18/2020. The Declaration indicates an issue of entitlement to temporary disability following Applicant's 6/23/2020 industrial surgery. The matter was continued to 10/22/2020 for the parties to upload a joint pretrial conference. On 10/22/2020, the stipulations and issues were read into the record and each party submitted their respective documentary evidence which was admitted into the record without objection by either party.

The matter was continued to 12/1/2020 for completion of testimony. The only witness called to testify over the course of both trial dates was the Applicant. The matter was submitted for decision on 12/1/2020.

The only issue submitted for decision was whether Applicant was entitled to temporary disability from 6/23/2020 to the present and continuing. All other issues were deferred. The WCJ issued a Findings of Fact on 12/24/2020 indicating Applicant was not entitled to temporary disability commencing 6/23/2020. Applicant filed a timely, verified Petition for Reconsideration on 1/11/2021. The Petition contends that the WCJ acted without or in excess of her powers, the evidence does not justify the findings of fact, the findings of fact do not support the order that applicant was not entitled to temporary disability. To date, there has been no answer filed by Defendant. For the following reasons the Petition for Reconsideration should be denied.

III

DISCUSSION

Applicant contends that the WCJ's finding that Applicant is not entitled to temporary disability because he removed himself from the labor market is not supported by substantial evidence. The WCJ disagrees. The finding was based on the determination that Applicant removed himself from the labor market and did not establish that he had any earning capacity after he voluntarily retired. *Applicant cites, Gonzales v. Worker's Comp. Appeals Board*, 63 CCC 1477(1998), the applicant was determined to have retired for all purposes and therefore was not entitled to temporary disability indemnity as she had zero earning capacity. The WCJ made the same determination in the instant case.

The basic facts are not in dispute. The Applicant testified at trial that the reason he retired was voluntary and for a non-industrial reason. At trial he stated that "he retired from LAUSD because his wife needed surgery on both knees and he knew he needed to stop working for six to ten months. He retired because he needed to help her with everything." (See Minutes of hearing and Summary of Evidence dated 10/22/2020 page 3 lines 25 to 26 and page 4 lines 1 to 2) In support of this testimony, Defendant introduced a form identified as HI-22, which indicates that Applicant initiated his retirement paperwork on May 3, 2017 with a retirement effective date of 9/1/2017. (See Exhibit B). However, prior to the effective date of his retirement on 9/1/2017, Applicant sustained an industrial injury to his right knee on 7/1/2017. Applicant has received his retirement benefits continuously since 9/1/2017. (See Exhibit A) The Applicant had right knee surgery on 6/23/2020 and is now seeking temporary disability following this surgery.

This temporary disability sought would commence nearly three years after Applicant voluntarily retired for non-industrial reasons from LAUSD. In the instant case, the record is silent with regard to any efforts Applicant has made to seek employment subsequent to his retirement. In fact, when presented with the possibility of returning to work for LAUSD as a substitute employee by letter dated 7/18/2018, the Applicant declined to respond indicating at trial that his knee was not well. (See Minutes of Hearing and Summary of Evidence dated 10/22/2020 page 4 lines 7 to 8 and Exhibit 1)

Both parties submitted trial briefs but Defendant's trial brief dated 11/12/2020 cites an Appeals Board case with a very similar fact pattern as the instant case. In *Sera v. City of Los Angeles*, 2018 Cal.Wrk. Comp. P.D. LEXIS 100, the Appeals Board held that applicant was not entitled to temporary disability following surgery when he voluntarily retired more than two years before his surgery. The Board cited *Gonzales* and determined there was no evidence that Applicant

had any earning capacity after he chose to retire. They found that Applicant's testimony that he planned on returning to work after his 2017 surgery was insufficient to establish that he had any earning capacity after his retirement. These facts are nearly identical to the instant case.

The Applicant in this case retired voluntarily for non-industrial reasons and seeks temporary disability nearly three years after his retirement. The only support that Applicant has earning capacity is his own testimony that when he recovers from his surgery he plans on returning to work. There is no evidence in the record that Applicant made any attempt to seek employment after his retirement. The Petition for Reconsideration should be denied as Applicant is not entitled to temporary disability indemnity from the date of his surgery on 6/23/2020 as he did not establish his earning capacity after his voluntary retirement.

IV

RECOMMENDATION

As the Petition for Reconsideration fails to demonstrate good cause upon which to set aside the 12/24/2020 Findings of Fact, it is respectfully recommended that the Petition Reconsideration be denied for lack of good cause as set forth above.

Respectfully submitted,

CIRINA A. ROSE
Workers' Compensation Judge

Date: 2/2/2021