

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

ARMANDO CASTELLON, *Applicant*

vs.

**MANN VS. PEST;
IMPERIUM INSURANCE COMPANY, ADMINISTERED BY ATHENS
ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ12265568
San Diego District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to provide an opportunity to further study the legal and factual issues raised by the Petition. This is our Opinion and Decision After Reconsideration.

Defendant Imperium Insurance Company, administered by Athens Administrators (defendant), seeks reconsideration of the May 13, 2021 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that the employer failed to make an effective offer of alternate or modified work and that applicant was not terminated for cause. The WCJ further determined that applicant was temporarily totally disabled from January 11, 2019 to the present and continuing, subject to the statutory maximum set forth in Labor Code section 4656(c)(2), less credit for sums previously paid, sums paid by the Employment Development Department (EDD), and attorney fees.¹

Defendant contends that the employer made a good faith offer of modified work within applicant's work restrictions, obviating the award of temporary disability.

We have reviewed applicant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ All further statutory references are to the Labor Code unless otherwise stated.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the May 13, 2021 Findings and Award.

FACTS

Applicant sustained injury to his right knee, including pain in the right leg, while employed as a carpenter by defendant on January 2, 2019.

Applicant sought treatment at a Concentra clinic on January 11, 2019. He was diagnosed with a right knee strain, and was released to work with restrictions. The restrictions included limited lifting of up to 10 lbs. occasionally, pushing/pulling of up to 10 lbs. occasionally, walking occasionally, weight bearing as tolerated, no squatting, no kneeling, no walking over uneven terrain, and no climbing stairs or ladders. (Ex. 19, Concentra encounter note, dated January 11, 2019.) Applicant continued to treat at Concentra through May, 2019. The Concentra clinic continued applicant's modified duties during this period, assigning work restrictions at each visit. (Exs. 12 through 18, Records of Concentra clinic, various dates through May 30, 2019.)

The applicant filed a Declaration of Readiness to Proceed to Expedited Hearing (DOR) on July 21, 2020, seeking temporary total disability. The parties appeared at trial on January 13, 2021, and stipulated to injury to the right knee with radiating pain in the right leg, and raised the issue of temporary disability for the period January 11, 2019 through the present, subject to the statutory maximum set forth in Labor Code section 4656(c)(2). (January 13, 2021 Minutes of Hearing/Summary of Evidence (Minutes) at 2:24.)

Applicant testified at trial that each time he was provided a return to work slip, he would deliver it to the company office. (January 13, 2021 Minutes, at 6:5.) Applicant testified that he was not provided with modified work directly following the January 2, 2019 injury. (*Id.* at 6:10.) A meeting at the company offices was held eventually, at which time the employer offered to pay applicant to study to take a "certification test," and that he would study for two weeks at home. (January 13, 2021 Minutes, at 6:12; 9:17; March 15, 2021 Minutes, at 3:8) Applicant picked up materials from the office and studied at home. Upon returning to the office after studying for two weeks, applicant learned his pay check was not ready, and was told to study for an additional two weeks. (March 15, 2021 Minutes, at 4:10.) Applicant denied ever receiving a formal return to work

offer. Applicant denied receiving contemporaneous notice of the termination of his employment until being informed by his attorney at deposition in September, 2020. (*Ibid.*)

Defense witness Ronda Ackerman testified to working as the operations manager for defendant starting in May, 2019. (March 15, 2021 Minutes, at 6:25.) Prior operations manager Jerome Bracamonte left the position on February 10, 2019, and the position was unfilled until Ms. Ackerman started on May 9, 2019. (*Id.* at 8:18.) Upon assuming the position, Ms. Ackerman learned that applicant was still listed as an employee, but had no ongoing work history. Ms. Ackerman drafted a letter offering modified duties to the applicant, which entailed studying for the “applicator test.” (Ex. A, Correspondence of Mann vs. Pest, dated May 28, 2019.) The offer was to study for the exam at the office, not from home. (*Id.* at 7:16.) Ms. Ackerman then instructed office assistant Geselle Diaz to schedule a meeting with applicant on May 28, 2019 to present the written offer to applicant, as Ms. Ackerman did not possess a phone number, postal address or e-mail address for applicant. (*Id.* at 12:1.) Applicant appeared in the office prior to the scheduled meeting, seeking a paycheck he felt he had been promised. Ms. Ackerman was not aware of this issue. (*Id.* at 7:14.) When applicant failed to appear for the May 28, 2019 meeting, applicant’s employment was terminated three days later for “refusal to accept available work effective 5/28/2019.” (Ex. C, Notice to employee, Change of Relationship dated May 31, 2019.)

Defense witness Geselle Diaz testified to her work as an office assistant for defendant. Ms. Diaz communicated with applicant via text message from her personal cellular phone. (March 15, 2021 Minutes, at 12:24.) Defense witness Ronald D. Mann testified to his position as owner and operator of Mann vs. Pest. Mr. Mann disclaimed any offer to applicant to study for the examination from home, as the company only offered modified work in the form of studying at the office. (*Id.* at 17:4.)

The WCJ issued the F&A on May 13, 2021, finding that employer did not make an effective offer of alternate or modified work, and that applicant’s termination was not “for cause.” The WCJ found applicant temporarily totally disabled for the period commencing January 11, 2019 through the present and continuing, up to the limits of section 4656, less credit for sums previously paid, less credit for EDD previously paid, and less credit for attorney fees.

DISCUSSION

Defendant contends a good faith offer was tendered by defendant, and that applicant's trial testimony is unreliable. Accordingly, defendant asserts the award of temporary disability is not supported in the record. (June 4, 2021 Petition for Reconsideration at 11:7.)

Temporary disability indemnity is a workers' compensation benefit that is paid while 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].)

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, supra*, 95 Cal.App.3d 856, the Court of Appeal stated:

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. [Citation.] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [Citation.] 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. [Citation.] 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. [Citation.] 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.)

The holding in *Huston* links an employer's showing that modified work is *available* and *offered* with an injured worker's entitlement to temporary disability. Thus, in order to be relieved of potential liability for temporary disability for an injured worker capable of returning to modified

duties, the employer must establish that work within applicant's restrictions is both *available* and *offered*.

Here, it appears that following applicant's injury and initial treatment at Concentra, applicant was provided with work restrictions, including push/pull limitations, weight-bearing and squatting/kneeling restrictions. (Ex. 19, Concentra encounter note, dated January 11, 2019.) Applicant testified to providing copies of the work restrictions to the employer (January 13, 2021 MINUTES, at 6:1), and the reporting from Concentra was among the documents contained in applicant's subpoenaed personnel file. (Ex. 21, Subpoenaed records of Mann vs Pest, p.MVP000059.) The record reflects no bona fide offer of modified duties conforming to applicant's work restrictions made by the defendant directly following applicant's injury. Applicant continued to seek medical treatment for his injuries, initially with the Concentra Clinic, and later with Glen Nusbaum, D.C. The record reflects no good faith offer of modified duties through at least May, 2019.

During this interval, a meeting transpired wherein applicant was instructed to study for the California Structural Pest Control Applicator Examination. (January 13, 2021 Minutes, at 6:12; March 15, 2021 Minutes, at 17:8.) There is a dispute as to whether applicant was authorized to study from home, with applicant averring he was told to gather the test materials and to study from home, and witnesses Ackerman, Diaz and Mann all indicating that the standard practice was for employees to study for the test in the office, not at home. (March 15, 2021 Minutes, at 2:13; 7:16; 13:16; 17:4.) Applicant testified to gathering the test materials and studying from home for two weeks. (March 15, 2021 Minutes, at 3:8.)

It was during this time that Ms. Ackerman was hired as Operations Manager, after the position had been vacant since February 10, 2019. (March 15, 2021 Minutes, at 8:17.) Ms. Ackerman testified that the prior Operations Manager left no documentation in the personnel file as to applicant's work status. (*Id.* at 10:9.) Ms. Ackerman drafted a proposed offer of modified work that included applicant studying for the Applicator Examination. (*Id.* at 7:9.) However, Ms. Ackerman had no way to contact applicant, and so directed Geselle Diaz to arrange for an in-office meeting to go over the offer with applicant. Ms. Diaz testified that she used her personal cell phone to send a text to applicant instructing him to come into the office. (*Id.* at 12:24.)

Applicant testified he returned to the office prior to the designated date, and that he thought he was to be paid for the two weeks he spent studying for the Applicator Examination at home.

(*Id.* at 3:14.) Applicant was informed that no paycheck had been prepared for him. Applicant was further instructed to complete forms related to the Applicator Examination. Applicant completed the forms as instructed. (Ex. B, Application for structural pest control, dated May 24, 2019; Ex. 21, Subpoenaed records of Mann vs Pest, p.MVP000014). Applicant did not return to the office for the May 28, 2019 meeting with Ms. Ackerman, and three days later, applicant's employment was terminated for "refusal to accept available work effective 5/28/2019." (Ex. C, Notice to employee, Change of Relationship dated May 31, 2019.)

On this record, the employer has not met the burden of proof necessary to establish that it effectively offered modified duties to applicant. The employer alleges a verbal offer of modified duties, but there are disagreements evident in the record as to the circumstances surrounding the offer, when it was made, the location applicant would study, and how the modified work would comport with applicant's work restrictions. It is unclear whether the defendant was aware of applicant's job restrictions at the time of the alleged verbal offer of modified work, and there is no evidence that those work restrictions formed the basis of the offer of modified duties. A good-faith offer of modified duties cannot be made without acknowledging the underlying limitations necessitating the modified duties. The alleged offer is not memorialized in writing, and there is no record of when the offer was extended, or by whom. (Cal. Lab. Code § 4658.1; see *Dennis v. State of California Dept. of Corrections and Rehabilitation Inmate Claims* (2020) 85 Cal.Comp.Cases 28 [2020 Cal. Wrk. Comp. P.D. LEXIS 1] (Appeals Bd. en banc).)

It further appears that if the offer was made, the agreement would provide for wages to applicant during the period of study. Applicant testified without rebuttal that he was never paid for the two weeks spent studying for the Applicator Examination. (Cal. Lab. Code § 4658.1(a)-(c).)

The draft offer of modified work prepared by Ms. Ackerman does discuss applicant's work restrictions with specificity. However, the record does not establish that this written offer was ever successfully communicated to applicant. The written offer was never mailed to applicant, as the employer had neither mailing address nor e-mail address for applicant. (March 15, 2019 Minutes, at 12:1.) Per the testimony of Ms. Diaz, she sent a text message to Mr. Castellon's cell phone asking him to come into the office, and to "come in on a Tuesday, but Mr. Castellon came in the Friday before that Tuesday." (March 15, 2021 Minutes, at 13:1.) The offer of modified work was not discussed with applicant, as Ms. Ackerman was not at work when applicant arrived.

Applicant's employment was unilaterally terminated by the employer the following week. Thus, the written offer of modified work was never successfully communicated to applicant.

Additionally, the employer's decision to terminate applicant's employment while he was recovering from an industrial injury relied heavily on the assumption that applicant was notified of a separate meeting following his May 24, 2019 office visit, to be held the following Tuesday, May 28, 2019, a contention which applicant denies. (March 15, 2021 Minutes, at 4:8.) Irrespective of applicant's purported termination of employment, however, the record does not establish that the employer at any point conveyed a good-faith, appropriate offer of modified work to applicant. As is set forth in *Huston, supra*, 95 Cal.App.3d 856, defendant bears the burden of proof to establish both the existence of modified work, and that such work has been offered to applicant. We agree with the WCJ that the burden has not been met herein.

Accordingly, and for the reasons stated above, we will affirm the May 13, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 13, 2021 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

**ARMANDO CASTELLON
DAVID JANE & ASSOCIATES
MINAIE LAW GROUP**

SAR/abs

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