

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

ZENAIDA GARCIA, *Applicant*

vs.

**RIVERSIDE MAGNOLIA CORPORATION dba EXTENDED CARE HOSPITAL OF
WESTMINSTER, and CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOME STATES COMPANIES, Defendants**

**Adjudication Number: ADJ11297130
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on March 17, 2020, wherein the WCJ found that applicant did not meet her burden of proof regarding her entitlement to a Supplemental Job Displacement Voucher (SJD voucher) and the WCJ upheld the Administrative Director Determination that applicant was not entitled to Supplemental Job Displacement benefits.

Applicant contends that based on the Physician's Return-to-Work & Voucher Report from Harold S. Black, D.C., applicant complied with the applicable Labor Code requirements and is entitled to an SJD voucher.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received a Response (Answer) from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind

¹ Commissioner Lowe, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

the F&O and substitute a new Findings and Award, finding that applicant has met her burden of proof and is entitled to a SJD voucher, and we will award applicant a \$6,000.00 SJD voucher.

BACKGROUND

Applicant claimed injury to her left upper extremity while employed by defendant as a housekeeper on October 22, 2017. The injury claim was settled by Compromise and Release (C&R); the Order Approving Compromise and Release was issued on October 8, 2018. The issues settled by the C&R included permanent disability and future medical treatment. The issue of applicant's entitlement to an SJD voucher was specifically excluded from the settlement.

On October 31, 2018, Harold S. Black, D.C., submitted a Physician's Return-to-Work & Voucher Report which stated that applicant's condition was permanent and stationary, and the injury caused permanent partial disability; it also identified applicant's work restrictions. (App. Exh. 1, Dr. Black, October 30, 2018.)

The parties proceeded to trial on February 27, 2020. The issue submitted for decision was applicant's appeal of the October 25, 2019 Administrative Director's Determination that applicant was not entitled to supplemental job displacement benefits. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 27, 2020, p. 2.)

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020, stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In

re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc.) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020, and the Petition was timely filed.

Labor Code section 4658.7 states in part:

- (a) This section shall apply to injuries occurring on or after January 1, 2013.
 - (b) If the injury causes permanent partial disability, the injured employee shall be entitled to a supplemental job displacement benefit as provided in this section unless the employer makes an offer of regular, modified, or alternative work ...
 - (d) The supplemental job displacement benefit shall be in the form of a voucher redeemable as provided in this section up to an aggregate of six thousand dollars (\$6,000). ...
 - (g) Settlement or commutation of a claim for the supplemental job displacement benefit shall not be permitted under Chapter 2 (commencing with Section 5000) or Chapter 3 (commencing with Section 5100) of Part 3.
 - (h) The administrative director shall adopt regulations for the administration of this section, including, but not limited to, both of the following:
 - (1) The time, manner, and content of notices of rights under this section.
 - (2) The form of a mandatory attachment to a medical report to be forwarded to the employer pursuant to paragraph (1) of subdivision (b) for the purpose of fully informing the employer of work capacities and of activity restrictions resulting from the injury that are relevant to potential regular work, modified work, or alternative work. ...
- (Lab. Code, § 4658.7.)

Pursuant to Administrative Director rule 9785:

- (h) When the primary treating physician determines that the employee's condition is permanent and stationary, the physician shall, unless good cause is shown, report within 20 days from the date of examination any findings concerning the existence and extent of permanent impairment and limitations and any need for continuing and/or future medical care resulting from the injury.
...
- (i) The primary treating physician, upon finding that the employee is permanent and stationary as to all conditions and that the injury has resulted in permanent partial disability, shall complete the "Physician's Return-to-Work & Voucher Report" (DWC-AD 10133.36) and attach the form to the report required under subdivision (h).
(Cal. Code Regs., tit. 8, § 9785(h), (i).)

In order to be entitled to an SJD voucher the injured worker must show that his or her condition is permanent and stationary and that the injury has resulted in permanent partial disability. (Cal. Code Regs., tit. 8, § 9785(i).)

Here, any issues as to the extent of applicant's impairment and her entitlement to future medical treatment was resolved by the C&R. Therefore, the parties had no need for a P&S report concerning the existence and extent of permanent disability and applicant's need for continuing and/or future medical care resulting from the injury. (Cal. Code Regs., tit. 8, § 9785(h).) However, as noted above, applicant's entitlement to an SJD voucher was not, and could not be, resolved by the C&R. (Lab. Code, § 4658.7(g).)

In the Petition, citing *Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan)* (2019 W/D) 84 Cal.Comp.Cases 634, applicant argues that, since the Appeals Board found "... a P&S report without the AD form is enough to trigger defendant's liability for the SJDB voucher, the Physician's Return-to-Work & Voucher Report provides the information necessary to entitle applicant to receive the voucher." Applicant then argues that to require a P&S report in addition to the report submitted by Dr. Black "would place form over substance" (Petition, p. 3.) Defendant argues that Dr. Black's Physician's Return-to-Work & Voucher Report "... does not address whether the injury caused permanent partial disability" so it does not meet the requirements of Labor Code section 4658.7(b). (Answer, p. 2.) As noted by the WCJ in his Report, "The SJDB Form completed by Dr. Black does state that the disability is permanent and stationary, and it does state the restrictions or work capacities of the Applicant." (Report, p. 6.) We agree with the WCJ that Dr. Black's report states applicant's condition was permanent and stationary, that the injury caused permanent partial disability, and that applicant had work restrictions. Thus, it complied with the requirements of Administrative Director rule 9785(i). (Cal. Code Regs., tit. 8, § 9785(i).)

Based on the foregoing, it appears the actual issue being argued by the parties is whether, pursuant to the Labor Code, the Physician's Return-to-Work & Voucher Report, or the P&S report, or both are mandatory as to applicant's entitlement to an SJD voucher.

"A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) Where the words of a statute are clear and unambiguous, the plain language of the statute governs.

If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. [Citation.] (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, (citations omitted).)

Where a statute is theoretically capable of more than one construction we must choose that which most comports with the intent of the Legislature. (*Tripp v. Swoap* (1976) 17 Cal.3d 671.) In that context, we note that the 2011–2012 Legislative Counsel's Digest regarding Senate Bill No. 863 includes the following:

This bill would provide, for injuries that cause permanent partial disability and occur on or after January 1, 2013, for a supplemental job displacement benefit in the form of a voucher for up to \$6,000 to cover various education-related retraining and skill enhancement expenses, as specified, which would expire 2 years after the date the voucher is furnished to the employee or 5 years after the date of injury, whichever is later. The bill would exempt employers who make an offer of employment, as specified, from providing vouchers. This bill would provide, for injuries that cause permanent partial disability and occur on or after January 1, 2013, for a supplemental job displacement benefit in the form of a voucher for up to \$6,000 to cover various education-related retraining and skill enhancement expenses, as specified, which would expire 2 years after the date the voucher is furnished to the employee or 5 years after the date of injury, whichever is later. The bill would exempt employers who make an offer of employment, as specified, from providing vouchers.

ANALYSIS:

Existing law:

15. Establishes a Supplemental Job Displacement Benefit, but contains functional impediments in most cases that prevent delivery of these benefits in a manner helpful to an injured worker who needs retraining. (p. 3.)

This bill:

Modifies the Supplemental Job Displacement Benefit (SJDB) rules to:

- A. Change the point in time the benefit is triggered;
- B. Prohibit “cashing out” the retraining voucher in settlements;
- C. Establish which schools are qualified to be paid by the retraining voucher;
- D. Limit the time period during which the voucher is valid to 2 years; and

E. Specify that an injury that occurs during retraining does not constitute a compensable injury. (p. 9.)

SJDB. Return to work after an injury is crucial to an injured worker's long term financial and emotional health. California, unfortunately does a poor job of returning its injured workers to work. In 2004, SB 899 adopted a supplemental job displacement benefit designed to provide retraining services for injured workers who could not return to their existing job. However, this program has never worked well because the trigger for the benefit occurs far too late for the benefit to work well. This bill attempts to reform the SJDB to make its promise of retraining viable. (p. 18.)

(2011–2012 Legislative Counsel's Digest.)

A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute. (*Pulaski v. American Trucking Associations, Inc.* (1999) 75 Cal.App.4th 1315, 1328 [64 Cal.Comp.Cases 1231, 1236].)

We first note that the purpose of the Physician's Return-to-Work & Voucher Report is to provide the parties with the information necessary to determine if an injured worker is entitled to an SJD voucher. (Lab. Code, § 4658.7.) Clearly, with SB863, the Legislature intended to make Supplemental Job Displacement Benefits (in the form of the voucher) more easily accessible to injured workers. As discussed above, the Physician's Return-to-Work & Voucher Report submitted by Dr. Black provides the parties all of the information necessary to determine whether applicant is entitled to the \$6,000.00 voucher, i.e. applicant's condition was permanent and stationary, the injury caused permanent partial disability, and applicant had work restrictions. Also, as discussed above, since applicant is not seeking, or entitled to, temporary disability indemnity, permanent disability indemnity, or medical treatment, neither party would benefit from a P&S report and the report would serve no purpose. Thus, under the circumstances of this matter, to determine that a P&S report is "mandatory" would deny applicant the SJD voucher to which she is otherwise entitled, would be placing form over substance, and would be inconsistent with the intent of the legislature when it amended the Labor Code by enacting SB683.

Accordingly, we rescind the F&O and substitute a new Findings and Award, finding that applicant has met her burden of proof and is entitled to a SJD voucher, and awarding applicant a \$6,000.00 SJD voucher based thereon.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on March 17, 2020, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. The November 30, 2018 "Physician's Return-to Work & Voucher Report" submitted by Harold S. Black, D.C., is substantial medical evidence in support Applicant's claim of entitlement to a Supplemental Job Displacement Voucher.
2. Applicant has met her burden of proof regarding her entitlement to a Supplemental Job Displacement Voucher.

A W A R D

AWARD IS MADE in favor of Zenaida Garcia and against Riverside Magnolia Corporation dba Extended Care Hospital of Westminster, and Cypress Insurance Company, administered by Berkshire Hathaway Home States Companies as follows:

a. Supplemental Job Displacement benefits in the form of a Voucher in the amount of \$6,000.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 4, 2021

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

**ZENAIDA GARCIA
SHAUN CUNNINGHAM
DORMAN SUAREZ**

TLH/pc

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