

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

**ALEJANDRA GOMEZ, *Applicant***

**vs.**

**FERRARI CARANO;  
STATE NATIONAL INSURANCE COMPANY administered by MEADOWBROOK  
INSURANCE LAS VEGAS ADMINISTRATOR, *Defendants***

**Adjudication Number: ADJ12459250  
Santa Rosa District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.<sup>1</sup>

Applicant seeks reconsideration of the Findings & Order (F&O) issued by the workers' compensation judge (WCJ) on October 10, 2022, wherein the WCJ found in pertinent part that the applicant was a temporary hire and her work assignment ended on November 1, 2018, and that applicant failed to show entitlement to temporary disability following the termination date.

Applicant contends in her Petition that:

“. . . that the evidence fails to establish Ms. Gomez was a temporary/seasonal employee when the employer's job description and termination letter are facially inconsistent. They must be weighed against the QME report and applicant's trial testimony, which establish Ms. Gomez's work history and understanding of the job assignment. The Defendant's evidence is hearsay and not substantial to support the Finding that she was a seasonal worker. The workers' compensation administrative law judge's (WCJ) [*sic*] Order concerning entitlement to temporary disability must be reconsidered.”

We received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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<sup>1</sup> Commissioner Katherine Williams Dodd, who previously served as a panelist in this matter is unavailable to participate at this time. Another panel member has been substituted in her place.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will affirm the Findings & Order (F&O) except that we will amend it to find that applicant is entitled to temporary disability beginning on October 18, 2018 up to 104 weeks, with credit to defendant for amounts paid. (Findings & Order, Findings of Fact 4.)

## **BACKGROUND**

Applicant sustained an admitted industrial injury on October 18, 2018, to her right shoulder and right elbow while employed by defendant as a winery cellar worker. On November 30, 2018, defendant accepted applicant's injury and denied her temporary disability benefits:

“Although liability for your worker’s compensation injury has been accepted, I cannot pay you temporary disability benefits for the period 10/18/2018 through present because payroll indicates you have not lost time as a result of this injury. You were a temporary hire and your work assignment ended on 11/01/18. Therefore you are not entitled to any temporary disability.” (Exhibit E, Notice of Denial of Temporary Disability, 11/30/2018.)

Defendant paid applicant temporary disability from October 28 to October 31, 2018.

On February 8, 2019, the following letter was sent to applicant by defendant employer:

“February 8, 2019, Alejandra Gomez, Social Security Number xxx-xx-xxx Your employment with Ferrari-Carano Vineyards and Winery was terminated November 1, 2018. The reason for the termination was: End of Temporary Assignment (Seasonal Harvest Employment) You received your final paycheck, which was issued to you on November 1, 2018, in the amount of \$527.71 for 40 hours worked during the pay period ending November 1, 2018. Sincerely, Linda Ducouso, Director of Human Resources” (Exhibit D, Letter From Employer to Applicant, 2/8/2019.)

On July 10, 2021, applicant was evaluated by panel qualified medical evaluator (PQME) Joseph Sclafani, M.D., with an interpreter present, and Dr. Sclafani issued a report on September 19, 2021. (Exhibit J9, Report of Joseph Sclafani, M.D., 9/19/2021, p. 2.) Dr. Sclafani stated that applicant presented with “persistent right elbow and shoulder pain.” (Exhibit J9, p. 14.) He determined that applicant had not reached maximum medical improvement and was not yet permanent and stationary for the injuries being evaluated. (Exhibit J9, p. 15.) He concluded that “applicant’s right shoulder condition is consistent with rotator cuff impingement syndrome.” (Exhibit J9, p. 14.) Further, he stated that: “From the evidence currently available for review,

temporary disability should have been initiated on October 18, 2018 and continued through the date [July 10, 2021] of this QME evaluation.” (Exhibit J9, p. 17.)

The parties proceeded to trial on August 3, 2022. The issues submitted for decision were: “1. Temporary disability: Employee claiming the following period: From October 29, 2018 through 104 weeks. 2. Permanent and stationary date: Employee claims not applicable based on the PQME; employer/carrier claims September 14, 2020 based on Dr. Andolsen. 3. Applicant alleges penalties and TTD – Failure to pay anything after the QME. 4. Defendant alleges applicant is a seasonal and temporary employee from August through November.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), 8/3/22, 3:3-3:14.)

At trial, applicant testified in relevant part as follows: she does not read Spanish and is only able to write her name and does not speak English and understands very little. (MOH/SOE, 4:29-4:30.) Prior to working for defendant, she had worked year-round in the fields for Blue Rock. (MOH/SOE 4:34-4:35.) She worked at Blue Rock for six years and hurt her knee resulting in her being out of work for two or three years. (MOH/SOE, 4:41-4:46.) After being out of work, she went to work in the kitchen at a Chinese restaurant, but applicant wanted full time work which they could not offer. (MOH/SOE, 5:1-5:5.)

According to applicant, Maria from Ferrari Carano who spoke Spanish and English helped applicant fill out the application and spoke to applicant in Spanish and when she spoke to her in English applicant did not understand. (MOH/SOE, 5:47-6:4; 6:11-6:12.) She does not recall Maria saying that it [the position] was a temporary job, but that applicant could work year-round. (MOH/SOE, 6:6-6:7.) When she started working at Ferrari Carano, she intended to work full time and she understood that the job could turn into a permanent position and this was important to applicant. (MOH/SOE, 5:8-5:13.) She was hired as a seasonal worker with the possibility of working all year-round. (MOH/SOE, 7:4-7:8.) None of the people who were initially hired with applicant became a permanent employee. (MOH/SOE, 5:17-5:19.)

She experiences difficulties with her right arm and recently had surgery on or around May 16th. (MOH/SOE, 5:22-5:24.) “[H]er hand gets numb. She can’t lift anything with it. She can’t go back to work with her problems with her right arm.” (MOH/SOE, 5:24-5:26.) She would have looked for work elsewhere if defendant had fired her because she has to work to support her children. (MOH/SOE, 7:15-7:18.)

Defendant’s witness, Andrea Hendrix, an adjuster with AmeriTrust, testified as follows, “Her first direct contact with the applicant was on January 21, 2019, telephonically, through an interpreter with the applicant and her husband.” (MOH/SOE, 8:6-8:8.) “The employer provided a job description that the injured worker received, stating that this was a seasonal position from August through November with the opportunity to become full time.” (MOH/SOE, 8:28-8:31.) “According to the witness [Ms. Hendrix], unless she is provided with off-season or pre-season wages, the only [*sic*] temporary disability is paid is for August through November.” (MOH/SOE, 8:31-8:33.) “The applicant refused to provide off-season or pre-season wages.” (MOH/SOE, 8:33-8:34.) “[T]he applicant was hired as a temporary employee which wasn’t a consecutive position, year to year.” (MOH/SOE, 9:12-9:14.) “The season is from August through November, and she [applicant] never received wages for any other period. The employer sent information that said, ‘seasonal/temporary.’” (MOH/SOE, 9:14-9:16.)

## DISCUSSION

Temporary disability is defined as incapacity to work that is reasonably expected to be improved with medical treatment. (*Chavira v. Workers’ Comp. Appeals Bd. (Johns-Manville Sales)* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631] *W. M. Lyles Co. v. Workmen’s Comp. App. Bd. (Butz)* (1969) 3 Cal.App.3d 132, 136 [34 Cal.CompCases 652].) “Temporary disability indemnity is intended primarily to substitute for the worker’s lost wages, in order to maintain a steady stream of income.” (*Chavira, supra* at p. 473 (citation and internal quotations omitted).) An injured employee whose employment has been terminated for good cause is not entitled to temporary disability. However, the defendant has the burden of proving that the applicant's employment was terminated for cause. (*Lopez v. Meathead Movers*, 2023 Cal. Wrk. Comp. P.D. LEXIS 48, \*1 (Cal. Workers’ Comp. App. Bd. February 28, 2023) citing *Butterball Turkey Co. v. Workers’ Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 100 (Appeals Board panel decision).)

In the panel decision of *Meadowbrook Insurance Co. v. Workers’ Comp. Appeals Bd. (Gamez)*, 85 Cal. Comp. Cases 871, 2020 Cal. Wrk. Comp. P.D. LEXIS 143, applicant’s

employment was not considered seasonal based on an Accident Report that was prepared after the applicant was injured.<sup>2</sup> In *Gamez*,

“Applicant Luis Gamez testified that Mr. Ramirez Sandoval hired him on or about September 27, 2018. Mr. Sandoval **did not tell Applicant the work was seasonal, what type of work he would be doing for a certain job, or his job title.** Applicant completed a W-2, a W-4, and provided his name, address and Social Security Number, and a copy of his Green Card.” (*Gamez v. Cal Enter. Labor Solutions*, 85 Cal. Comp. Cases 8712020 Cal. Wrk. Comp. P.D. LEXIS 143, \*6) Further, the Worker Information - -Terms and Conditions of Employment shows the period of employment was from January [\*5] 2018 to January 2019. **This document is the hiring packet. Therefore, it was prepared before Applicant’s injury. Because it was prepared prior to the injury, this document is a reasonable means to determine the nature of Applicant’s employment.** ” (*Gamez v. Cal Enter. Labor Solutions*, 2020 Cal. Wrk. Comp. P.D. LEXIS 143, \*5 [emphasis added].)

In *Gamez*, petitioner relied on a post injury Accident Report that indicated applicant was a seasonal worker which applicant completed after he was injured and with the assistance of the safety officer who was not involved with preparing his initial hire documents. The WCJ found in relevant part that applicant was not a seasonal worker because applicant was not told the work was seasonal when he completed the new hire documents prior to his injury, and the post injury Accident Report which identified him as a seasonal worker did not control. An Appeals Board panel affirmed the WCJ’s finding that applicant who sustained an industrial injury while working as a farm laborer for defendant was a regular worker, and not a seasonal employee. Applicant was entitled to temporary disability indemnity without regard to the seasons since he could be re-hired from one harvest to the next and the hiring documents did not identify applicant as a seasonal employee. Additionally, the fact that applicant’s employment term was not fixed and varied based on need did not make the employment seasonal.

Here, defendant contends that applicant was a temporary or seasonal worker and that her employment ended on November 1, 2018, so that it is not liable for any further temporary disability

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<sup>2</sup> Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority, and the Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions to show continuity amongst our prior panel decisions, which have repeatedly stated that orders affecting trial setting are not final orders.

benefits. In its Answer, defendant contends that applicant was hired for the harvest season which runs from August to November. However, the referenced email that defendant relies on was sent after applicant's injury and her assertion [to defendant] that she would be taking legal action.

Similar to the circumstance in *Gamez, supra*, here applicant completed the pre-injury documents with assistance from "Maria" because applicant does not speak English. When applicant started working at Ferrari Carano she intended to work full time, and she understood that she could work year round and that the position could turn into a permanent position, which was important to applicant. Moreover, there is no evidence that applicant was terminated for cause before her injury. According to her testimony, applicant was unaware of her employment status until she received the termination letter dated November 8, 2019. It is clear that defendant did not make applicant an offer of employment modified or otherwise after October 18, 2018, the date of her injury. Dr. Sclafani reported that applicant is entitled to temporary disability through the date of the QME exam which took place on July 10, 2021. Thus, we conclude that applicant is entitled to temporary disability through July 10, 2021.

Accordingly, we affirm the F&O, except that we amend the F&O to find that applicant is entitled to temporary disability beginning on October 18, 2018 up to 104 weeks, with credit to defendant for amounts paid. (Findings & Order, Findings of Fact 4.)

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 10, 2022 Findings and Order are **AFFIRMED** except it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

4. Applicant is entitled to temporary disability beginning on October 18, 2018, up to 104 weeks, with credit to defendant for temporary disability benefits paid, to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute.

\* \* \*

**IT IS ORDERED** that applicant is entitled to temporary disability benefits as set forth in Finding of Fact 4.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 26, 2024**

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

**ALEJANDRA GOMEZ  
MEECHAN, ROSENTHAL & KARPILOW  
BRADFORD & BARTHEL**

**DLM/oo**

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