

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

***ANA R. SANCHEZ, Applicant***

**vs.**

**FOREVER 21, INC.;**  
**ACE AMERICAN INSURANCE COMPANY C/O BROADSPIRE, *Defendants***

**Adjudication Number: ADJ11573028**  
**Marina del Rey District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendants Forever 21, Inc. and ACE American Insurance Company c/o Broadspire. This is our Opinion and Decision After Reconsideration.

Defendants seek reconsideration of the August 17, 2021 Order, wherein the workers' compensation administrative law judge (WCJ) ordered defendants (1) to provide applicant with a Supplemental Job Displacement Benefit Voucher (SJDB); and (2) to pay reasonable attorney's fees; and deferred the issue of penalties and sanctions.

Defendants contend that Victor Navarro, M.D., applicant's primary treating physician, was not predesignated pursuant to Labor Code,<sup>1</sup> section 4600; Dr. Navarro's report was not substantial medical evidence; Dr. Navarro did not include a Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) and defendants are not obligated to issue a SJDV until this report is submitted; defendants made an offer to return to regular work per the report of Eleby Washington, M.D., orthopedic panel qualified medical evaluator, that was rejected; and an award of attorney's fees is not supported by the evidence.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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<sup>1</sup> All future statutory references are to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we rescind the August 17, 2021 Order and return this matter to the trial level for further proceedings.

## **FACTS**

As the WCJ stated,

The Defendant Employer provided the Applicant with some medical treatment for her injuries claimed herein. The Applicant's Primary Treating Physician, Victor Navarro, D.C., dated August 20, 2019 (Applicant's Exhibit A), noted Applicant's job duties included repetitive hand motion, lifting boxes up to 60 pounds, unloading boxes, pulling racks full of boxes, bending, squatting, reaching, twisting, turning and in constant motion for 8-12 hours each day she worked. The Applicant's Primary Treating Physician reported the Applicant was precluded from performing heavy work.

The medical evidence presented by the Defendant, Dr. Eleby R. Washington III, allowed the Applicant to return to her usual and customary job duties (Defendant's Exhibits 1 and 2).

Although the Defendant argued that an offer of regular or modified work was offered to the Applicant, its timeliness was argued as well as whether the appropriate forms were signed acknowledging receipt of an offer to return to work. Applicant further argued that Defendant was on notice that Applicant remained treating with her doctor.

There were no witness presented. (Report, p. 2.)

## **DISCUSSION**

Section 5313 requires the WCJ to,

... make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (§ 5313.)

Section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIA 74].) The WCJ's opinion on decision "enables the

parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision “must be based on admitted evidence in the record” (*Hamilton*, at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

Furthermore, the WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra*, at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10566; *Hamilton, supra*, at p. 476.)

Here, we are unable to ascertain the basis for the WCJ’s decision as her Opinion on Decision and Report are devoid of analysis. As such, we rescind the August 17, 2021 Order and return this matter to the trial level for further proceedings.

Nevertheless, in light of the parties’ arguments, we provide the following guidance with respect to applicant’s claim for a SJDB voucher. Applicant is entitled to a SJDB voucher upon showing that she sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work, regardless of whether the record contains a Physician’s Return to Work & Voucher Report. (§§ 4658.7(b), 5705.) In *Opus One Labs v. Workers’ Comp. Appeals Bd. (Fndkyan)* (2019) 84 Cal. Comp. Cases 634, 636 [2019 Cal. Wrk. Comp. LEXIS 51] (writ denied), a different Appeals Board panel concluded that:

We are persuaded by applicant’s contention here that, in this instance, defendant had the burden to obtain a Physician’s RTW form when defendant was apprised of applicant’s permanent disability status and work preclusions in the QME report. The purpose of a Physician’s RTW form is to inform defendant that

applicant has become permanent and stationary, the industrial injury caused permanent partial disability, and of applicant's work capacities and restrictions. (Lab. Code, § 4658.7(b)(1), (h)(2); Cal. Code of Regs., tit. 8, § 10133.31(b).) The QME report here provided this information. To conclude otherwise would place form over substance. (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal. App. 4th 301, 321, 200 Cal. Rptr. 3d 714 ["A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect a public interest. (citations omitted.) It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit.' (citations omitted)."]; *Pulaski v. American Trucking Associations, Inc.* (1999) 75 Cal. App. 4th 1315, 1328 [64 Cal. Comp. Cases 1231, 1236] ["Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute . . . . Where there is compliance as to all matters of substance technical deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations omitted)."] (internal quotations omitted [by WCAB]; emphasis in original).) [Citations to record omitted]

We agree. The burden of proof remains with defendant to show that it offered regular, modified or alternative work, irrespective of whether defendant received a Physician's Return to Work & Voucher Report.

Moreover, the offer of regular, modified or alternative work must be bona fide. In *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we held that,

Our review of statutes and case law, however, leads us to conclude that an employer's inability to offer regular, modified, or alternative work does not release an employer from the statutory obligation to provide a SJDB voucher. (§ 4658.7(b).) "Labor Code section 3202 requires the courts to view the Workers' Compensation Act from the standpoint of the injured worker, with the objective of securing the maximum benefits to which he or she is entitled." (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 910 [269 Cal.Rptr. 656, 55 Cal.Comp.Cases 196].) Thus, absent a bona fide offer of regular, modified, or alternative work, regardless of an employer's ability to make such an offer, and regardless of an employee's ability to accept such an offer, an employee is entitled to a SJDB voucher. (*Dennis, supra*, 85 Cal. Comp. Cases at 406.)

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that defendants Forever 21, Inc. and ACE American Insurance Company c/o Broadspire's Petition for Reconsideration of the August 17, 2021 Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**DECEMBER 5, 2022**

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

**ANA R. SANCHEZ  
HINDEN & BRESLAVSKY  
WAI & CONNOR, LLP**

**LSM/pc**

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