

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

DEBBIE FRANZEN, *Applicant*

vs.

**CALVARY MURRIETA CHRISTIAN SCHOOL; CHURCH MUTUAL INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ15957076
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of September 14, 2023, wherein it was found that "applicant failed to sustain her burden of proof that she is entitled to temporary disability benefits from 9/11/2022 to the present." In this matter, while employed on October 5, 2021, applicant sustained admitted industrial injury to the head. Applicant was paid temporary disability corresponding to the period October 6, 2021 through September 11, 2022. The issue at the August 28, 2023 trial was applicant's entitlement to temporary disability benefits during the period that qualified medical evaluator (QME) neurologist Eleonora S. Spokoiny, M.D. opined applicant was temporarily partially disabled. The WCJ found that applicant was not entitled to benefits because she refused an offer of modified work.

Applicant contends that the WCJ erred in finding that she was not entitled to temporary disability indemnity corresponding to the period after September 11, 2022. Applicant argues that her refusal of modified work was reasonable because the nature of the work restrictions and modified duties was not adequately communicated to her. Applicant alternatively argues that the WCJ should have relied on the reporting of primary treating physician (PTP) neurologist Thomas Schweller, M.D. who found that applicant continued to be temporary totally disabled. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, applicant's refusal of defendant's modified work offer was reasonable, given that it was not clearly communicated to the applicant how the offer incorporated modified duties commensurate with her condition. We therefore grant reconsideration, rescind the Findings and Order of September 14, 2023, and issue a new decision reflecting entitlement to additional temporary disability benefits from September 12, 2022 to October 3, 2023.

Applicant sustained injury to her head on October 5, 2021 when a door became loose and hit her on the head. (Minutes of Hearing and Summary of Evidence of August 28, 2023 trial at p. 5.) Applicant testified that she was originally hired as a graphic designer and that her regular job duties included computer usage for 95-98% of her job. (Minutes of Hearing and Summary of Evidence of August 28, 2023 trial at p. 7.) It was stipulated that applicant was entitled to (and was paid) temporary total disability benefits from the date of injury until September 11, 2022.

Applicant was evaluated by QME Dr. Spokoyny who issued a report dated August 8, 2022. In the report, Dr. Spokoyny wrote that "patient is able to return to work" with restrictions of "no computer work for more than 1 hour at a time with 10 minutes break," "no lifting, pushing pulling > 10 lbs," "no repetitive head bending," and "no overhead work." (August 8, 2022 report at p. 19.) Applicant's PTP Dr. Schweller continued to find applicant temporarily totally disabled through at least July 13, 2023. (June 1, 2023 report at p. 3.)

Based on Dr. Spokoyny's work restrictions, which were communicated to applicant's employer by defendant's claims adjuster (Minutes of Hearing and Summary of Evidence of August 28, 2022 trial at pp. 8-9), applicant was sent a written offer of modified work dated September 1, 2022, for work that was to commence on September 12, 2022. The offer states, in part, "Your doctor released you for temporary/modified duty work. We are offering you and temporary alternate modified duty job, as described below." The job title was listed as "assistant director," with a wage of \$15 per hour, with hours of Monday from 10 am to 2 pm, Tuesday from 11 am to 3 pm, Wednesday from 11 am to 3 pm, and eight additional hours at home with an undefined schedule. The job duties were listed as the following bulleted list:

- Create monthly newsletter
- Create school forms
- Maintain school website and calendar
- Update and maintain social media
- Coordinate dates for the Master Calendar with school and church
- Work with leaders with activity requests

- Create rosters for activities
- Create family directory
- Design all graphic arts for program
- Help with yearbook layout and graphics
- Design senior tribute pages
- Create programs for promotions and graduations
- Create slideshow for promotions
- Communicate through email
- Work in office to answer phone calls and help families (added this one)

The written offer did not list the work restrictions found by Dr. Spokoyny, nor was there any explanation of how the job was modified to accommodate her health condition.

It is unclear whether applicant was aware of Dr. Spokoyny's opinions regarding her ability to work and work restrictions when she received the offer of work. (Minutes of Hearing and Summary of Evidence of August 28, 2023 trial at pp. 5, 7-8.) At the time that she received the offer, applicant had not been released to work by her PTP. There were no other communications to the applicant, either written or oral, about the job offer. (Minutes of Hearing and Summary of Evidence of August 28, 2023 trial at p. 5.) Applicant refused the job offer, emailing the employer as follows:

I just received your certified letter today (Saturday, 9/10/2022) My primary treating physician and neurologist, Dr. Schweller, has not released me to return to work. Please see attached Work/Disability Status Form. I am assuming you are receiving a copy of these forms.

I have sent your letter to my work comp attorney, but they will not receive it until Monday. I will have them contact you after I hear back from them.

Thus, I can not sign anything right now, as I have not been released by Dr. Schweller, and cannot return to work on 9/12/2022 as indicated on your letter.

(September 10, 2022 email from applicant to employer.)

No other communication regarding this issue was placed in evidence, either from the employer to applicant, or from defendant insurer to applicant's counsel.

At trial, the employer's representative testified that the "job duties [on the work offer] were the same as before her injury, but they added answering the phones, so that if she couldn't do the computer work, she could do the phones." (Minutes of Hearing and Summary of Evidence of

August 28, 2023 trial at p. 9.) However, “answering phones” was listed on the offer as an additional task, not one that would be done as an alternative to the other tasks.

As explained by the Supreme Court:

A “disability” under the Work[ers’] Compensation Law connotes an inability to work. Where an employee has been temporarily disabled by an industrial injury, he is considered temporarily totally disabled if he is unable to earn any income during the period when he is recovering from the effects of the injury. For such a disability, the employee’s disability payments are based on his earning capacity, the statute providing that the payment is [two-thirds] of his average weekly earnings. [Citation.] An employee is considered temporarily partially disabled if he is able to earn some income during his healing period but not his full wages. The disability payment in such event is [two-thirds] of the employee’s weekly wage loss.

(*Herrera v. Workmen’s Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].)

Although a partially temporarily disabled worker is expected to work during his or her partial disability if suitable work is available, as the Supreme Court explained in another case:

Under the “odd lot” doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages. [Citation.] This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. [Citations]

(*General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375].)

We have found that an applicant may be estopped from claiming temporary disability indemnity corresponding to periods that her or she has refused suitable modified work *without good cause*. (*Vittone v. Workers’ Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 [writ den.] [emphasis added].) However, here we find that applicant had good cause to not report for modified duty until she was told the exact nature of the work. Applicant was not made aware by employer of her work restrictions, or how the work offered was commensurate with those restrictions. As employer’s representative testified, the job description read as if it was applicant’s regular duties. Without explanation, which was not provided by the employer, applicant could reasonably believe that she was not capable of performing the work offered.

We therefore grant reconsideration, and find applicant entitled to additional temporary disability benefits corresponding to the period September 12, 2022 to October 3, 2023 (when benefits cease by operation of Labor Code section 4656(c)(2)) in the accrued amount of \$13,426.69¹ less attorneys' fees of \$2,014.00. We note applicant changed attorneys during the period of temporary disability found herein and that a lien claim has been filed by applicant's former counsel. We therefore order that defendant hold the attorneys' fees in trust until current and former counsel agree to a split of fees, or pending order of the WCAB. Since we find applicant entitled to the maximum Labor Code section 4656(c)(2) temporary disability benefits on this basis, we need not determine whether the WCJ should have followed the opinions of the PTP, who found the applicant totally temporarily disabled for the maximum 104 weeks.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Order of September 14, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of September 14, 2023 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Debbie Franzen, age 57 on the date of injury, while employed on October 5, 2021, sustained injury arising out of and in the course of employment to her head, all disputed body parts are deferred.
2. The carrier has paid temporary disability indemnity corresponding to the period October 6, 2021 through September 11, 2022 at the rate of \$233.37 per week.
3. Applicant is entitled to additional temporary disability indemnity benefits corresponding to the period September 12, 2022 through October 3, 2023 at the rate of \$242.86 per week pursuant to Labor Code section 4661.5, in the accrued amount of \$13,426.69.
4. Applicant's counsel has performed services entitling it to a reasonable attorneys' fee of \$2,014.00. This amount should be held in trust by

¹ Although the parties stipulated at trial that applicant's temporary disability rate is \$233.37 per week, the minimum temporary disability indemnity payment for a 2023 injury is \$242.86 per week. Although applicant was injured on October 5, 2021, she is now entitled to the higher rate pursuant to the provisions of Labor Code section 4661.5, since the payment will be made more than two years from the date of injury. The minimum rate is not increasing in 2024.

defendant pending agreement of a split in fees between applicant's current and former counsel, with WCAB jurisdiction reserved in the event agreement cannot be reached.

AWARD

AWARD IS MADE for Debbie Franzen against Church Mutual Insurance Company as follows:

a. Temporary disability indemnity, in the accrued amount of \$13,426.69, less attorneys' fees of \$2,014.00 to be held in trust by defendant pending an agreement by applicant's current and former counsel, or pending order by the WCAB.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 4, 2023

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

**DEBBIE FRANZEN
WORK INJURY LAW GROUP
GOLDMAN, MAGDALIN & KRIKES
WORKERS COMP LAWYER CORONA**

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