WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROMAN MOTA PEREZ, *Applicant*

vs.

SPR OP CO., INC., and REDWOOD FIRE AND CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ12448965
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

ROMAN MOTA PEREZ
LAW OFFICES OF NADEEM MAKADA
GILSON DAUB

PAG/oo

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Anthony N. Corso, Workers' Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Defendant's Petition for Reconsideration seeks an order invalidating the award of temporary disability issued in the Finding and Award and Opinion on Decision. (Findings and Award, April 2, 2021, EAMS DOC. ID: 74030284.) As the Defendant's arguments are neither factually nor legally supported, the undersigned recommends the Reconsideration be denied.

RELEVENT FACTS

The following facts are adopted and incorporated from the original Opinion Decision.

> The Applicant, Roman Mota, while employed on October 18, 2018 in Hayward, California, by SPR Op. Co., Inc, sustained injury arising out of and in the course of employment to his back. At the time of injury, the employer's workers' compensation carrier was Redwood Fire and Casualty Insurance Company, administered by Berkshire Hathaway Homestate Company.
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> At trial on March 12, 2021 the parties stipulated to the following facts: Following his industrial injury, the Applicant continued working on modified duty until March 13, 2020; beginning March 14, 2020 the Applicant's employer shut down following the COVID Pandemic. From March 14, 2020 through present and during all times in question the Applicant has been on modified duty. The Applicant obtained replacement employment beginning September 1, 2020.

DISCUSSION

1) The Pandemic does not offer a distinct factual scenario that offers employers a reprieve from their obligations under California's workers' compensation system.

The Defendant's argument that the Applicant was terminated "for cause" unpersuasively attempts to redefine well accepted terms. The Defendant's Petition for Reconsideration depends entirely upon the erroneous conclusion that "the Applicant was 'terminated for cause' with the cause being the Pandemic and the California government's orders." (Petition for Reconsideration, EAMS Doc. ID: 36454132.) In support of this the Defendant cites to *Ramon Flores, Applicant v. Wal-Mart Associates, Inc., National Union Fire Insurance Company, Defendants*, 2012 Cal. Wrk. Comp. P.D. LEXIS 24. Unaddressed in Defendant's petition is that the "for cause" termination of

the Applicant in *Flores* was the Applicant's violation of company policy. While in other areas of California law a "good cause" termination has been defined in a more limited fashion (See: *Cotran v. Rollins Hudig Hall Internat., Inc.,* 17 Cal. 4th 93), the Defendant provides no citation and the undersigned can find no authority to conclude that this limiting standard applies in the workers' compensation venue. Such a conclusion would both contradict the well established authority cited below and be inconsistent with Labor Code section 3202. As discussed below, the evaluation of liability for temporary disability in the "odd lot" doctrine has instead relied entirely upon an analysis of the employee's bad faith actions leading to termination and which obviate the employer's duty to provide modified duty. As a result, the Defendant's arguments are found to be unpersuasive.

The remainder of Defendant's contentions are addressed in the original Opinion on Decision. For this reason, the below is adopted and incorporated from the original Opinion on Decision.

> The odd-lot doctrine permits payment to the Applicant unless the employer can show that modified duty consistent with the Applicant's work restrictions are both available and offered to the Applicant. The California Supreme Court has previously held "a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages." *General Foundry Serv. V. WCAB (Jackson)* (1986) 42 Cal. 3d. 331, 339, fn. 5. The specific reference to wages suggests the sole issue is whether an injured workers is receiving replacement wages while on modified duty. Moreover, "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." Id. In reliance on this reasoning the WCAB has held that an employee laid off was entitled to temporary disability benefits. *Owens Illinois v. Workers' Comp. Appeals Bd. (Stuart)* (2009) 74 Cal. Comp. Cases 975 (writ denied). Extending this holding further, an Applicant on modified duty restrictions from his primary treating physician was awarded temporary disability following a plant closure. *Bedoya v. Ashley Furniture Industries, Inc.* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 396. These cases make clear that even the lack of available modified duty due to market forces – of which disease is but one of many – does not obviate the obligation to provide the Applicant with temporary disability. Based upon this line of cases, the undersigned concludes that in the present circumstances the employee is entitled to temporary total disability payments.
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> The Defendant's arguments regarding the unique circumstances of the COVID-19 crisis are not persuasive. The Defendant argues it would "be tempting to define the Pandemic as a 'market force' such as a factory plant closure (Bedoya v. Ashley Furniture Industries, Inc., 2018 Cal. Wrk. Comp. P.D. LEXIS 396) or an employer decision to reduce costs in a business *(Owens Illinois v. Worker's Compensation Appeals Board (Stuart)* 74 Cal. Comp. Cases 975), that simply would not recognize the global impact of the current crisis razing the world for the last year." (Defendant Post-Trial Brief, Page 4.) Defendant then goes on to cite numerous statistics that demonstrate the severity of the present crisis in terms of economic loss, loss of life, and the Federal and state government

responses to the crisis before concluding without any authority "[t]he above demonstrates that the pandemic is no ordinary distinguishing fact. It is a monumental historical event that must be analyzed for its unique impact on every facet of American life. In short, it is no ordinary market force." (*Id.* At 4-5.) The lack of support for the Defendant's argument is reflective of its standing in contradiction to the cases Defendant cites to. While recognizing the historic fact of the present crisis's severity, the undersigned can nevertheless find only that it reflects an extreme market event on par with the global financial crisis causing a reduction in workforce; the employer would no less be responsible for the payment of temporary disability in such a circumstance than the employer is in the present circumstance.

An appropriate reading of Labor Code section 4654 leads to the conclusion that an award of temporary disability in the current circumstances is appropriate. In order to determine that an Applicant is not entitled to temporary disability, an evaluation of the causes of disability must be completed by the undersigned. The Court of Appeals has previously held "if some other ascertainable cause other than the injury substantially contributes to his inability to earn wages, such separate cause must be separately evaluated, and only the proportion chargeable to the industrial injury allowed as compensation. In such a case specific findings are required." *Hardware Mut. Casualty Co. v. Workers' Comp. Appeals Bd.*, 253 Cal. App. 2d 62, 66. In *Hardware* the Court of Appeals determined the Applicant was not entitled to temporary disability benefits because the Applicant was discharged from employment for causes unrelated to his injury. As a matter of public policy, reading *Hardware* in a manner that awards the Applicant temporary disability is consistent with the Labor Code section 3202 mandate for liberal construction of the law in favor of the Applicant. Were *Hardware* read for the proposition that outside factors that result in the closure of a business obviate the employer's obligation for temporary disability, an injured worker on severely limited modified duties would be found not entitled to temporary disability and yet incapable of seeking alternative employment or even reasonably certifying themselves as "able to work and available for work for that week." Cal. Unemp. Ins. Code 1253©. In such a circumstances, an employer could avoid liability for temporary disability by asserting market forces – of any variety, including a pandemic, but conceivably including but not limited to a landlord's closure of a location or a business failure – had required closure of their business; the injured worker in such a circumstance would be unable to apply for unemployment insurance and also not eligible for temporary disability. This reasoning is consistent with the Board's holding in *Owens* and *Bedoya*, supra. Labor Code section 3202 dictates against reaching such a conclusion. The undersigned recognizes the COVID-19 crisis is the causal factor of the employer's inability to provide modified duty; the clear history of case law on the issue demonstrates that where the Applicant is not the cause of the inability to work, the employer is liable for payment of temporary disability. As discussed above, nothing makes the COVID-19 related crisis distinguishable.

The undersigned notes the Workers' Compensation Appeals Board recently denied Reconsideration and affirmed a WCJ's finding that an Applicant capable of modified duty and off work because of a COVID-19 related business closure was entitled to temporary total disability. See: *Salvador Corona v. California Walls Inc., dba Crown Industrial Operators* ADJ13058129, Sept. 25, 2020. In an especially persuasive portion, the Board explained the following:

> The fact that it was impossible for defendant to offer modified duties to applicant because of the COVID-19 orders is inconsequential. In *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389, 406 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we explained that an employer's inability to offer regular, modified, or alternative work does not release an employer from its obligation to provide a supplemental job displacement benefits voucher. Similarly, an employer's inability to accommodate a temporarily disabled employee's work restrictions does not release it from its obligation to pay temporary disability benefits. "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." (*Ibid*. quoting *Rubalcava v. Workers' Comp. Appeals Bd*. (1990) 220 Cal.App.3d 901, 910 [55 Cal. Comp. Cases 196] (internal quotations omitted).) Here, applicant was temporarily disabled due to an industrial injury and there is no misconduct on the part of applicant to justify the termination of temporary disability benefits. Therefore, applicant is entitled to temporary disability benefits regardless of whether defendant is able to provide modified work. That defendant is not able to release itself from paying temporary disability benefits because of its inability to provide modified work is inconsequential.
> *(Id.)*

The undersigned finds this holding particularly persuasive and adopts the same reasoning here. While the Defendant asserts the nature of the employer's business and the effect of the pandemic on Defendant's business warrant unique consideration, the blanket and unconditional nature of the Board's holdings in *Corona*, supra, do not persuade the undersigned that this is a relevant consideration. Holdings by both the Courts of Appeal and the Supreme Court references above demonstrate the relevant inquiry is on the injured worker's access to modified duty – whether with the Defendant employer or some other employer – with no consideration as to the employer's ability to provide such modified duty.

> The Defendant argues the government should bear the burden of paying benefits to the Applicant and that finding the employer liable would be punitive on the employer. The Defendant asserts the Applicant may have been able to receive some government benefits and that those benefits must have been available to the Applicant in order to protect the employer from the effects of the present pandemic. Defendant's argument both fails to cite to or reflect on any relevant case law and neglects to consider the financial aid government provided directly to employers to aid in returning companies to business. First, employers had available small business loans intended to be easily forgiven for the explicit purpose of aiding in returning employees to work. (See: https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program) Further, while the undersigned assumes without deciding that the Defendant is correct in that the Applicant would have been entitled to such benefits, the undersigned will not impose an obligation on the Applicant to apply for other benefits before seeking temporary disability. Such a holding would run counter to well-established case law that an Applicant who is not provided modified duty does not bear the burden of showing they sought other available means to offset the lost wages. See: *Transport Indem. Co. v. Industrial Acci. Com*., 23 Cal. Comp. Cases 30, 32 (Cal. App. 1st Dist. February 11, 1958); *Njoki v. 24 Hour Fitness*, 2016 Cal. Wrk. Comp. P.D. LEXIS 669. The undersigned finds no compelling reason to impose an obligation for the injured worker to apply to unemployment programs before they can receive temporary disability benefits. Even where the Applicant has received unemployment benefits, the Board has repeatedly held the Applicant remains entitled to temporary disability benefits, subject to a lien of the Employment Development Department. See: *Fremont Indem. Co. v. WCAB & Grant E. Gray*, 40 Cal. Comp. Cases 339, 340; *Slocum v. Barrett Bus. Servs*., 2014 Cal. Wrk. Comp. P.D. LEXIS 628, *10. This does not, however, require the Applicant seek such unemployment benefits before the Defendant can be found liable for temporary disability. As a result, the Defendant's arguments are unpersuasive.

Based upon the above analysis, the undersigned against concludes the award of temporary disability benefits is well supported.

CONCLUSION

For the foregoing reasons the undersigned recommends the Defendant's Petition for Reconsideration be denied and the Award be affirmed.

ANTHONY N. CORSO
Workers' Compensation Judge
Workers' Compensation Appeals Board
5/3/2021