

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

PATRICK DURAN, *Applicant*

vs.

**ZIONS BANCORPORATION, N.A.;
WCF NATIONAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13899166
San Diego District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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 grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of April 12, 2022.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of April 12, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of April 12, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

STIPULATED FACTS

1. Applicant PATRICK DURAN born [], while employed on September 28, 2020 as a Financial Services Representative, Occupational Group No. 111, at Chula Vista California by ZIONS BANCORPORATION NA, sustained an injury arising out of and occurring in the course of his employment to his neck and low back.

2. At the time of injury, the employer's workers' compensation carrier was WCF NATIONAL INSURANCE.
3. At the time of injury, the employee's earnings were \$577.27 per week warranting an indemnity rate of \$381.00 PER WEEK for temporary disability and \$290.00 for permanent disability.
4. The employer has furnished some medical treatment and the primary treating physician is Glenn Nussbaum, D.C.
5. [Deleted.]
6. [Deleted.]

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 30, 2022

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

**PATRICK DURAN
HEWGILL, COBB & LOCKARD
LAW OFFICE OF JACK PONCE**

SAR/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I.

INTRODUCTION

- | | |
|--------------------------------|--|
| 1. Applicant's Occupation: | Financial Services Representative |
| Occupational Group No.: | 111 |
| Applicant's Age: | 58 |
| Dates of Injury: | September 28, 202[0] |
| Parts of Body Alleged: | Low Back |
| 2. Identity of Petitioner: | WCF NATIONAL INSURANCE
COMPANY ADMINISTERED BY
ADVANTAGE ROCKLIN |
| 3. Timeliness: | Petition was timely |
| 4. Verification | The Petition was verified |
| 5. Date of Issuance of Order: | April 12, 2022 |
| 6. Petitioner's Contention(s): | |

CONTENTION A: THERE IS NO ALLEGATION OR EVIDENCE OF A RIGHT KNEE INJURY SO A FINDING AS TO THE RIGHT KNEE IS IN ERROR

CONTENTION B: THE EMPLOYER WAS AT ALL TIMES ABLE TO PROVIDE MODIFIED WORK PER THE TESTIMONY OF THE WITNESSES SO THE FINDING OF TEMPORARY TOTAL DISABILITY WAS IN ERROR

CONTENTION C: THE APPLICANT BEGAN LOOKING FOR WORK WITHIN THE FIRST MONTH OF BEING TERMINATED AS IS THUS LIMITED TO TEMPORARY DISABILITY WITHIN THE FIRST 30 DAYS AFTER BEING TERMINATED FOR CAUSE II

II.

FACTS

Applicant Patrick Duran worked at ZIONS BANCORPORATION from October 11, 2019 to approximately October 1, 2021 as a financial service officer/bank teller). He suffered an admitted industrial injury on September 28, 2021 to his neck and back. He was found to be

permanent and stationary on November 3, 2021 by his primary treating physician, Dr. Glenn Nussbaum (Jt. Ex. 1). He was treated by Concentra through December of 2020 (Applicant's Ex. 1). He was temporarily partially disabled from the date of injury through the date he was found to be at MMI. No temporary partial disability or temporary total disability was paid as the defendant asserted that he had been terminated for cause on October 1, 2020 and that accommodated work was available but for the termination. Applicant contested both these allegations.

The matter went forward to trial on September 8, 2021. The applicant testified as well as two bank employees. The matter was submitted on February 22, 2022. A Findings and Award was issued on April 22, 2022 by the undersigned, finding that the termination had been for cause, but that the defendants' failed to sustain their burden of proof on the ability to accommodate the applicant and awarded temporary disability from October 2, 2021 through the date the applicant became permanent and stationary (November 3, 2021, Jt. Ex. 1). The finding that the termination was for cause was not appealed. The defendants filed their timely petition for reconsideration on the "finding" that the applicant had sustained a knee injury (an admitted error by the WCJ) and the award of temporary disability.

III.

DISCUSSION

CONTENTION A: THERE IS NO ALLEGATION OR EVIDENCE OF A RIGHT KNEE INJURY SO A FINDING AS TO THE RIGHT KNEE IS IN ERROR

This contention is correct. Reconsideration should be granted as to this Finding and the Findings and Award amended accordingly.

CONTENTION B: THE EMPLOYER WAS AT ALL TIMES ABLE TO PROVIDE MODIFIED WORK PER THE TESTIMONY OF THE WITNESSES SO THE FINDING OF TEMPORARY TOTAL DISABILITY WAS IN ERROR

The finding that the applicant was terminated for cause was not appealed by the applicant. However, the applicant is claiming temporary total disability owed from October 1, 2020 to the November 3, 2021. The medical record (App. Ex. Nos. 2, 3, 4, 5, 6, 7, and 8 as well as Joint Ex. 2, 3, and 4) shows that the applicant was able to return to modified work. Dr. Nussbaum declared the applicant as MMI on November 3, 2021 (Joint Ex. 1). The defendant asserts that they had

modified work available but the applicant was terminated for cause on September 29, 2020 and were thus unable to provide modified work. The date of injury is September 28, 2020. He was terminated on October 1, 2020.

The applicant worked at most for one day after the date of injury. The Concentra records (Applicant's Ex. 2) show work restrictions of "no bending", "May lift/push/pull up to 10 lbs" and "May change positions frequently from sit to stand as needed" on September 30. On October 9, 2020 the restrictions were "Limit bending/stooping to 2 hours (cumulative) per 8 hour shift", Limit lift/push/pull to no more than 10 pounds", Allow 5 minute stretch every 60 minutes from prolonged weight bearing" and "sit down job if patient cannot tolerate weight bearing". On October 16 (App. Ex. 2) the restrictions were "May lift up to 20 lbs occasionally" and "May push/pull up to 25 lbs occasionally". On October 23, 2020 (App. Ex. 2) the restrictions increased back to "No bending, may lift/push/pull up to 10 lbs, may change positions frequently from sit to stand as needed" At his last visit at Concentra on November 3, 2020.(App. Ex. 2) the restrictions were "limit bending/stooping to 4 hours (cumulative) per 8 hour shift", "Limit lift/push/pull to no more than 15 lbs.", "Allow 5 minute stretch break every 60 minutes from prolonged weight bearing" and "Sit down job if patient cannot tolerate weight bearing".

On December 2, 2020 (App. Ex. 3) Mr. Duran began treating with Dr. Glenn Nussbaum. He stated that Mr. Duran was "precluded from lifting, carrying, pushing and pulling with greater than 15 pounds effort", "also precluded from repetitive or sustained bending at the waist" and "should further be allowed to alternate between sitting and standing to manage his back". These restrictions were carried through on his PR-2 reports dated 12/14/2020 (App. Ex. 4), 12/28/2020 (App. Ex. 5), 1/7/2021 (App. Ex. 6), and 1/13/2021 (App. Ex. 7). On February 3, 2021 (App. Ex. 9), the restrictions for lifting, carrying, pushing or pulling increased to 25 lbs effort, the restrictions as to repetitive/sustained bending remained and the "sit/stand" option was dropped. The applicant returned to Dr. Nussbaum on March 17, 2021 (Jt Ex. 2), May 18, 2021 (Jt. Ex. 3) and June 22, 2021 (Jt. Ex. 4). He was declared permanent and stationary on November 3, 2021 (Jt. Ex. 1).

Ms. Johnson testified that she was aware of applicant's need for modified duty. She believes that the bank would have been able to provide the accommodated duty. (MOH/SOE 2/22/2022, Gina Johnson testimony 2: 10-12). She recalls that Mr. Duran had a chair and that he brought in a pillow. Ms. Johnson also testified that it was not her job to find work for Mr. Duran.

That was the job of Erin Austin and HR Diane Shibati (MOH/SOE 2/22/2022 3: 15-20; 4: 1-6, neither of whom testified).

Rachel Spriggs, the current HR manager testified that she could not recall exactly what work restrictions Mr. Duran had but she does recall limitation to sitting and standing, needing to take breaks to do stretching and that was available to him up to the date of termination. However, she has never been to the branch Mr. Duran worked at. (MOH/SOE 2/22/2022 Rachel Spriggs testimony 6: 18-22; 7: 13-15) and was not part of the accommodation at the time of termination. So, the availability of work is speculative at best.

Neither Ms. Johnson nor Ms. Spriggs were involved in the accommodation process for Mr. Duran, nor had they reviewed the limitations on the reports up to the time the applicant was declared permanent and stationary. Therefore, the testimony of Ms. Spriggs and Ms. Johnson on the issue availability of accommodated work is speculative at best. Therefore, the finding that the applicant is entitled to total temporary disability from October 1, 2021 through November 3, 2021 less amounts previously paid on account, less amounts paid by EDD, and less attorneys' fees should be sustained.

CONTENTION C: THE APPLICANT BEGAN LOOKING FOR WORK WITHIN THE FIRST MONTH OF BEING TERMINATED AS IS THUS LIMITED TO TEMPORARY DISABILITY WITHIN THE FIRST 30 DAYS AFTER BEING TERMINATED FOR CAUSE

After his termination the applicant had no wages and no temporary disability indemnity being paid to him. The fact that he looked for work should not be a reason to limit the period to which the applicant is entitled to temporary disability indemnity. This contention should be denied.

IV

RECOMMENDATION

The opinion on decision should be modified as outlined under Contention A, above. Otherwise, it is recommended that the Petition for Reconsideration be denied.

Date: May 17, 2022

Respectfully submitted,
LINDA F. ATCHERLEY
Workers' Compensation Judge