

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

PAOLA FLORES, *Applicant*

vs.

**WESTSIDE ACCURATE COURIER SERVICES and STATE COMPENSATION
INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ11673008
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on April 7, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her neck and claimed to have sustained injury to her head, nervous system, both arms, both legs, and excretory system; and that applicant was not entitled to temporary disability indemnity benefits.

Applicant contends that her immigration status is not a relevant factor to be considered; that she was "constructively discharged" from employment with defendant so she is entitled to temporary disability indemnity benefits; and that defendant is estopped from denying applicant temporary disability benefits.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition) and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O.

BACKGROUND

Applicant claimed injury to her head, nervous system, neck, both arms, both legs, and excretory system while employed by defendant as a driver on August 23, 2018.

The parties proceeded to trial on January 21, 2021. The parties' stipulations included:

4. Compensation has been paid by the employer/carrier of temporary disability at \$353.34 from February 9, 2019 through February 26, 2019.

7. Primary treating physician, Dr. Patchett, said in his report dated August 19, 2020 that, because of the August 23, 2018 injury, applicant could only do modified duty, but the employer was not able to accommodate applicant and return her to modified duty.

8. The panel qualified medical evaluator, Dr. Ratnarathorn, said in his report of September 1, 2020 that applicant was temporarily disabled for the industrial injury if there were no accommodations for modified work.

10. After the date of injury, the employer had to perform a background check on applicant's Social Security number; applicant was not able to provide this background information to the employer.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), January 21, 2021, p. 2.)

Applicant testified that after the August 23, 2018 motor vehicle accident she returned to work and the employer told her they had plans to promote her but they needed to verify some information about applicant before they could give her the promotion. Felipe Orduno then told applicant there was a problem with her Social Security number. (MOH/SOE, January 21, 2021, p. 4.) The stipulations were accepted into the record, and the matter was continued to February 3, 2021. (MOH/SOE, January 21, 2021.)

At the February 3, 2021 trial applicant testified, defense witness Felipe Orduno testified, and the matter was again continued. The WCJ's summary of applicant's testimony included:

The company promised to return the applicant to work. It was the person in charge who made this promise. The applicant could not recall his name. She eventually suggested it was the manager named Martin. Mr. Orduno was on the telephone call at the time.... ¶ ...The applicant resigned only because the employer told her that she would be rehired. The applicant would not have resigned otherwise. She had no benefit from resigning except for the employer's promise to rehire her once her papers were fixed from Immigration. The only reason she signed the resignation was because the employer promised her that she would be rehired.

(MOH/SOE, February 3, 2021, pp. 2 – 3.)

The summary of Mr. Orduno's testimony included:

It was Mr. Orduno's decision to terminate the applicant because the applicant could not work in the United States, and he was following company policy. Martin conveyed this decision to the applicant. It was possible for the applicant to have two choices. One was for the applicant to resign, and the other one was for the applicant to be fired because she could not work in the United States. The company offered the applicant the option of resigning instead of being fired. The applicant chose to resign. The resignation occurred on 7/25/2019. If the company found out that a worker was undocumented, it would terminate the worker.

(MOH/SOE, February 3, 2021, p. 4.)

At the March 24, 2021 trial the matter was submitted; the issue submitted for decision was:

Where the injury is admitted, where the medical reports state that applicant can only do modified duty and modified duty is not available so that applicant is temporarily [sic] disabled, and where the employer discovered that the applicant is ineligible to work after the time of the date of injury and where applicant resigned after being told that she could not continue her employment, is applicant entitled to temporary disability?

(MOH/SOE, March 24, 2021; MOH/SOE, January 21, 2021.)

DISCUSSION

There is no dispute that applicant sustained an injury AOE/COE on August 23, 2018, as the result of a motor vehicle accident and that she was temporarily partially disabled as of August 19, 2020. Nor is there a dispute as to whether applicant's employment with defendant ended on July 25, 2019. In the Petition applicant makes various arguments as to why she is entitled to temporary disability benefits but she does not address the actual issue of whether defendant is liable for temporary disability benefits after it learned that applicant could not be legally employed.

Labor Code section 1171.5 states in part:

The Legislature finds and declares the following: (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.

(Lab. Code, § 1171.5.)

However, the California Supreme Court explained:

We first consider the postdiscovery period. ... Such an award would impose liability on the employer for not performing an act (continuing to employ a worker known to be an unauthorized alien) expressly prohibited by federal law. Thus, federal law preempts state Senate Bill No. 1818 to the extent that it makes

a California FEHA lost pay award available to an unauthorized alien worker for the postdiscovery period. (*Salas v. Sierra Chemical Co.*, (2014) 59 Cal.4th 407, 425 [79 Cal.Comp.Cases 782].)

The Court had earlier stated:

We conclude: (1) Senate Bill No. 1818, which extends state law employee protections and remedies to all workers "regardless of immigration status," is not preempted by federal immigration law except to the extent it authorizes an award of lost pay damages for any period after the employer's discovery of an employee's ineligibility to work in the United States, and (2) contrary to the Court of Appeal's holdings, the doctrines of after-acquired evidence and unclean hands are not complete defenses to a worker's claims under California's FEHA, although they do affect the availability of remedies. (*Salas v. Sierra Chemical Co.*, *supra*, at p. 415.)

Although the Court's decision in *Salas* pertained to FEHA, the ruling clearly applies to the provisions of the Labor Code regarding workers' compensation injury claims.

Based on review of the trial record, the facts relevant to this issue are summarized as follows:

Applicant sustained an injury AOE/COE on August 23, 2018, and defendant paid temporary disability indemnity benefits for a brief period in February 2019. Applicant returned to work and in the process of promoting applicant, defendant discovered that applicant was not eligible to work. Applicant resigned on July 25, 2019, after being told she could not continue her employment. Subsequent medical reports state that applicant could only do modified work compatible with the work restrictions identified.

Defendant could only offer applicant modified work if it re-hired applicant, which, based on the Supreme Court ruling in *Salas*, would be a violation of federal law. Complying with the federal law that prohibits an employer from employing an injured worker does not make the employer liable for benefits claimed by the injured worker.

The circumstances in this matter are analogous to those where we have held that an injured employee who is terminated from his or her employment for good cause is not entitled to temporary disability benefits. (*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).) Here, whether applicant resigned or was "constructively discharged," defendant cannot legally employ applicant and in turn cannot be liable for benefits incurred after it learned that applicant could not be employed. Applicant's

inability to work is not the result of defendant's conduct; it is because applicant cannot legally be employed. Thus defendant is not liable for, and applicant is not entitled to, temporary disability indemnity benefits for any period of disability caused by her injury, after July 25, 2019.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on April 7, 2021, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 12, 2021

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

**PAOLA FLORES
BARSOUM LAW
STATE COMPENSATION INSURANCE FUND**

TLH/pc

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