WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GARY GIBSON, ***Applicant***

vs.

APEX ENVIROTECH, INC.; GREAT AMERICAN INSURANCE COMPANY, ***Defendants***

Adjudication Numbers: ADJ13603159, ADJ16641427
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendants Apex Envirotech, Inc. and Great American Insurance Company seek reconsideration of the February 15, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to receive a Supplemental Job Displacement Benefit (SJDB) voucher.

Defendant contends that applicant lost no time from work and under Rule 10133.31(c) (Cal. Code Regs., tit. 8, § 10133.31(c)), applicant is deemed to have been offered and accepted regular work, making applicant ineligible for the SJDB voucher under Labor Code section 4658.7.

We received an answer from applicant Gary Gibson. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied, or in the alternative, granted in order to review the issue of whether Rule 10133.31(c) exceeds the scope of its enabling statue, making it invalid.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendants Apex Envirotech, Inc. and Great American Insurance Company's Petition for Reconsideration of the February 15, 2023 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2023

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

GARY GIBSON
MARCUS, REGALADO, MARCUS & PULLEY, LLP
LAUGHLIN, FALBO, LEVY & MORESI

LSM/*pc*

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case Nos. ADJ13603159; ADJ16641427

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

GARY GIBSON, *Applicant*,

vs.

APEX ENVIROTECH;
GREAT AMERICAN WALNUT CREEK, *Defendants*.

On February 27, 2023, defendant filed a timely and verified Petition for Reconsideration from the Findings and Award issued on February 15, 2023[1], which found, in pertinent part, that defendant was not excused from providing applicant a return to work offer per Rule 10133.31(c) (Cal. Code Regs., tit. 8, § 10133.31(c),) when the reason that applicant missed no time from work was because applicant had been laid off prior to filing latent injury claims.

In dicta, I further questioned the validity of Rule 10133.31(c) given the expressed amendments to the Labor Code, which changed the triggering event for provision of a supplemental job displacement voucher (SJDV) from receipt of temporary disability to receipt of permanent disability. However, I did not need to decide that issue. Following the Appeals Board's En Banc holding in *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), I found defendant liable for provision of a single voucher.

Defendant argues that Rule 10133.31(c) is both a valid rule and is applicable in cases where applicant is not working at all during the pendency of the claim.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that defendant's Petition for Reconsideration be **DENIED**. I continue to believe that the purpose of Rule 10133.31(c) does not cover the facts of this case and applies only to those cases where applicant continues to work throughout the litigation process with no lost time as discussion in section A of this report.

[1] There are clerical errors on the Findings and Award in that ADJ13603159 was inadvertently omitted from the case caption. Furthermore, the F&A should have been labeled a Joint Findings and Award. The F&A should be deemed amended to correct for these clerical errors.

In the alternative, I would recommend that reconsideration be **GRANTED** in order to review the issue of whether Rule 10133.31(c) exceeds the scope of its enabling statute, and thus, whether it is invalid, as discussed in section B of this report.

FACTUAL AND PROCEDURAL BACKGROUND

This matter proceeded to trial solely on the issue of provision of the supplemental job displacement voucher (SJDV). The parties stipulated to all relevant facts and presented the matter solely as a question of applying the facts to the law. Applicant sustained an industrial injury via hearing loss, which resulted in applicant sustaining a permanent partial disability.[2] Applicant was laid off from work prior to filing any claim in this matter. Applicant's injury did not result in any period of temporary disability. Applicant lost no time from work due to this injury as he was not employed during the pendency of the litigation.

Defendant argues that per Rule 10133.31(c), defendant was not obligated to provide a return to work offer to applicant because applicant did not lose time from work, and thus, no SJDV is due. (Cal. Code Regs., tit. 8, § 10133.31(c).) Applicant argues that defendant either misconstrues the regulation, or in the alternative, the regulation exceeds the scope of its enabling statute in requiring applicant sustain compensable temporary disability as a precursor to receipt of a voucher.

DISCUSSION

A. Whether Rule 10133.31(c) applies to situations where applicant was laid off prior to filing a latent injury claim?

For injuries occurring on or after January 1, 2013, Labor Code section 4658.7 controls whether defendant is liable to provide a supplemental job displacement voucher (SJDV). The section states, in pertinent part:

> (b) If the injury causes permanent partial disability, the injured employee shall be entitled to a supplemental job displacement benefit as provided in this section unless the employer makes an offer of regular, modified, or alternative work, as defined in Section 4658.1, that meets both of the following criteria:
>
> (1) The offer is made no later than 60 days after receipt by the claims administrator of the first report received from either the primary treating physician, an agreed medical

[2] Although there are two injuries plead, the parties stipulated to a single joint award of permanent disability based upon the fact that the hearing loss was inextricably intertwined. As the permanent disability was intertwined, only one voucher was awarded.

> evaluator, or a qualified medical evaluator, in the form created by the administrative director pursuant to subdivision (h), finding that the disability from all conditions for which compensation is claimed has become permanent and stationary and that the injury has caused permanent partial disability.
>
> > (A) If the employer or claims administrator has provided the physician with a job description of the employee's regular work, proposed modified work, or proposed alternative work, the physician shall evaluate and describe in the form whether the work capacities and activity restrictions are compatible with the physical requirements set forth in that job description.
> >
> > (B) The claims administrator shall forward the form to the employer for the purpose of fully informing the employer of work capacities and activity restrictions resulting from the injury that are relevant to potential regular, modified, or alternative work.
>
> (2) The offer is for regular work, modified work, or alternative work lasting at least 12 months.

(§ 4658.7(b).)

In *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), the Appeals Board held:

> [A]n 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*, at p. 406.)

Here, defendant argues that applicant never lost time from work and thus, defendant is deemed to have provided a job offer per Rule 10133.31(c). This argument creates a hyper-technical application of the rule that does not comport with the purpose of the rule or its enabling statute. The purpose of the SJDV is to assist people who are not working, regain employment. When you read the entire Labor Code and regulatory scheme together, it is clear that Rule 10133.31(c) presumes that applicant is actually working for the employer. If applicant continues to work throughout the duration of litigation in the same position and never left that position due to the injury, the employer is deemed to have offered regular work.

In this case applicant was not working at all during the pendency of this litigation. The reason applicant technically lost no time from work was because he was laid off years prior to filing a latent injury claim. These facts do not excuse defendant from providing either a return-to-work offer, or a SJDV. Applicant sustained a permanent partial disability; he was not provided a return-to-work offer. Per the holding in *Dennis*, and per the Labor Code, there is no exception to providing a voucher in cases where applicant retired. If defendant wishes to avoid liability for the voucher in such a scenario, they must offer applicant the opportunity to come out of retirement and work again. Applicant sustained a permanent partial disability; he was not provided a return-to-work offer. Accordingly, a SJDV is due.

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

Hyper-technical arguments tend to be the antithesis of substantial justice.

I would also note that hyper-technical arguments more often than not boomerang back to party who makes them. If I were to analyze this case with hyper-technical application of the law, applicant attended a QME exam and thus, lost at least one day of work. Rule 10133.31(c) makes no exception for whether it is one day of lost work or two years. To that extent, defendant's argument would also fail.

As to applicant's argument that Rule 10133.31(c) is invalid, the rule appears well intentioned, but it may exceed the scope of its authorizing statute. The intent of the rule is based upon a commonsense question: Why would you give someone a return to work offer if they never left work? To which the Labor Code replies: because it is required. The Labor Code requires applicant be given a 12-month offer of employment following the employers receipt of a report indicating permanent partial disability. The fact that applicant continues to work is not equivocal to receipt of a 12-month work guarantee.

Applicant was not working during the pendency of this claim. Applicant sustained a permanent partial disability. Accordingly, defendant was required to provide either a timely return to work offer or a voucher. Defendant failed to offer applicant work.

B. Whether Rule 10133.31(c) is valid?

If my interpretation of Rule 10133.31(c) is correct, then the issue of the rule's validity is moot as applicant has no standing to challenge a rule that is not being applied in his case.

If my interpretation of Rule 10133.31(c) is not correct, the Appeals Board will then need to address applicant's trial argument, which is whether the rule is invalid.

To require applicant to lose time from work, i.e. sustain temporary disability, would appear to create a rule that would exceed the scope of the enabling statute. Section 4658.7 only requires applicant to have sustained permanent partial disability. The statute itself contains no requirement that applicant lose time from work. In fact, the pre-2013 SJDV statutes expressly required lost time from work in order to receive the voucher. (See §§ 4658.5, 4658.6 (establishing eligibility for the SJDV based on receipt of temporary disability).) It may be that Rule 10133.31(c) exceeds the scope of the statute as the Legislature expressly changed the condition for receiving the voucher from receipt of temporary disability to receipt of permanent partial disability. It may be that where applicant sustains no lost time from work, a job offer must still be provided or else a voucher is due. However, I defer any such interpretation of the validity of Rule 10133.31(c) to the Appeals Board.

Based on all of the foregoing, my primary recommendation is to deny reconsideration for the reasons stated in Section A. As applicant is not aggrieved by Rule 10133.31(c), the issue of the rule's validity may be decided in a future case. In the alternative, I respectfully recommend that the Appeals Board grant reconsideration and decide the issue of whether Rule 10133.31(c) is invalid.

Date: March 2, 2023
Eric Ledger
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE