

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

**MAXIMILIANO LOPEZ, *Applicant***

**vs.**

**MEATHEAD MOVERS, INC.;;  
VANLINER INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ14382680  
Bakersfield 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, except as noted below, and for the reasons stated below, we will deny reconsideration.

We do not adopt or incorporate the third full paragraph on page 5 of the Report, which begins with the phrase "The first problem" and ends with the word "basis."

An injured employee whose employment has been terminated for good cause is not entitled to temporary disability. However, the defendant has the burden of proving that the applicant's employment was terminated for cause. (*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).) For the reasons stated by the WCJ in the Report, we agree that defendant met its burden.

Moreover, we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 28, 2023**

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

**MAXIMILIANO LOPEZ  
GHITTERMAN, GHITTERMAN & FELD  
COLEMAN, CHAVEZ & ASSOCIATES**

**PAG/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:** Applicant Maximiliano Lopez, then 20 years of age, sustained a specific industrial injury to his thoracic spine and lumbar spine when struck by a bookcase while employed on October 30, 2019 in Bakersfield, California, as a Mover (Occupational Group 560) by Defendant-Employer Meathead Movers, who was insured for California workers compensation liability by Defendant-Carrier Vanliner Insurance Company.

Petitioner was temporarily partially disabled from the injury on October 30, 2019 until becoming permanent and stationary on September 27, 2021. He was provided with satisfactory modified work until terminated for cause on January 29, 2021. Following Trial on November 16, 2022, Findings of Fact & Award issued on December 20, 2022. Petitioner was awarded permanent partial disability indemnity and received a general award of further medical treatment but was not awarded temporary total disability indemnity during the period from the termination of employment until the permanent and stationary date.

Petitioner was legally aggrieved thereby. By timely,<sup>1</sup> verified and properly served petition, reconsideration is sought. *Petition for Reconsideration 12/30/2022 p. 6 (verification); Proof of Service 12/30/2022*. Authorized grounds for reconsideration are alleged consistent with Lab.C. §5903 {c} and {e}. *Petition for Reconsideration 12/30/2022 p. 1 lines 17-20*. Petitioner argues that the termination of his employment for failing to submit to a required drug screening was not based on good cause because the modified work that he had been performing at the time was not the “safety specific” regular work to which the drug testing was directed. The resulting wage losses, Petitioner contends, were compensable temporary disability. *Petition for Reconsideration 12/30/2022 p. 1 lines 23-27, p. 2 lines 16-20, p. 4 lines 17-23*.

Defendants have provided a timely, verified and properly served response to the pending petition. *Defendants’ Response to Petition for Reconsideration 1/16/2023 p. 5 (verification), pp. 6-7 (Proof of Service)*. Defendants argue that 1) An employee terminated for cause is not entitled to temporary disability if the employer could show that modified work was available, and 2) The applicant was terminated for cause.

It is recommended that the petition be denied. An employer may continue enforcing lawful requirements properly imposed on regular work during periods of modified work. Moreover, Petitioner was not terminated exclusively for failing to submit to drug testing, but also for failing to report to work thereafter.

**II. Facts:** Petitioner went to work for Defendant Meathead Movers in or about August 2019. His regular work duties involved moving business and residential furnishings, including work stations, tables, refrigerators and other types of furniture. *Defendant’s Exhibit B: Report of Peter M. Newton, M.D. 7/26/2021 p. 1*.

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<sup>1</sup> The pending petition was filed on December 30, 2022, the 10th day after service of the Findings & Award of December 20, 2022.

Regular working hours were subject to a flexible system whereby employees committed to being available for particular working hours about six weeks in advance. Their commitment could be changed and an employee could even “call out” and leave early from work. *Summary of Evidence 11/16/2022 p. 8 lines 39-43*. The available work assignments were then allocated with an effort to honor all of the requested working time as well as to give employees on modified work the same number of hours as their regular work schedules. *Summary of Evidence 11/16/2022 p. 10 lines 4-15*. In return, however, employees were expected to report for work. Absent employees were expected to report to their supervisor and communicate with their supervisors regarding the reasons for and expected duration of any absences. Employees were subject to potential termination for failing to comply with these attendance and reporting requirements. *Summary of Evidence 11/16/2022 p. 9 lines 32-37; Defendant’s Exhibit G: Employee Handbook 5/03/2019 p. 9 (Attendance)*.

Movers were also subject to drug testing which could be either random or in response to reasonable suspicions arising from the performance, appearance or behavior. *Defendant’s Exhibit G: Employee Handbook 5/03/2019 pp. 8-9 (Drug Testing Policy)*. Movers were considered “safety specific” employees whose duties including moving and driving with heavy items and entering private homes with children and other family members present. *Summary of Evidence 11/16/2022 p. 9 lines 12-16, p. 11 lines 1-15*. Failure to submit to a required drug test was treated as a failed drug test and was grounds for termination of employment. *Summary of Evidence 11/16/2022 p. 9 lines 23-28*.

Defendant Meathead Movers had a comprehensive policy of receiving and honoring medical work restrictions. Movers on modified work retained their classification as Movers, received their regular rate of pay, and an effort is made to provide the same number of working hours. *Summary of Evidence 11/16/2022 p. 8 lines 15-44*. Movers on modified work typically worked in a warehouse or an office performing clerical or light janitorial duties. While performing modified work, Movers did not drive, lift furniture or enter people’s homes. *Summary of Evidence 11/16/2022 p. 11 lines 1-8*. Nevertheless, Movers on modified work remained otherwise subject to their regular work requirements, including attendance reporting and compliance with drug screening. *Summary of Evidence 11/16/2022 p. 9 lines 17-21, p. 11 lines 25-33*.

Petitioner Maximiliano Lopez sustained a specific industrial injury on October 30, 2019 to his thoracic and lumbar spine. Petitioner was moving a clothing cabinet onto a dolly. A bookcase fell and struck his right shoulder and then his lower back. He felt the onset of pain in his right shoulder and back. He reported the injury and was provided with medical treatment, including work restrictions. *Defendant’s Exhibit B: Report of Peter M. Newton, M.D. 7/26/2021 p. 2*. During the period from October 30, 2019 to January 27, 2021, Petitioner was provided with modified work including washing trucks and office work. *Summary of Evidence 11/16/2022 p. 6 lines 11-21*.

Prior to January 27, 2021, Petitioner was randomly selected for drug screening. He failed to keep the drug screening appointment. He thereafter appeared for work but was confronted by supervisor Erin Norton <sup>2</sup> about the missed drug screening. Petitioner testified that he went home and contacted the employer’s Human Resources department in light of his pending workers’ compensation claim and because of prior problems with his supervisor. Petitioner was unable to

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<sup>2</sup> Despite the shared surname, Supervisor Erin Norton and the undersigned PWCJ are unrelated.

identify the person in HR to whom he spoke. He testified that it may have been a Nurse Case Manager. He testified that the HR person apologized for the situation and represented to him that since he was doing office work rather than going into neighborhoods, the drug screening requirement did not apply to him. *Summary of Evidence 11/16/2022 p. 6 lines 23-36.*

The employer disputed this version of events. General Manager Angela Allen credibly testified that Petitioner was scheduled for a random drug screening on January 27, 2021, was not excused from testing because he was performing modified work, failed to appear for the testing and did not show up for work or contact the employer thereafter. *Summary of Evidence 11/16/2022 p. 9 lines 30-37.* Ms. Allen also credibly testified that while HR was available to assist employees having difficulties with their supervisors, Petitioner did not contact them. The HR person who had previously assisted Petitioner with his supervisor was Heaven Signona. She made multiple attempts to contact to contact Petitioner, but her calls were not returned. Ms. Allen testified that there was no Nurse Case Manager employed at the time, and that no one at Meathead Movers had been able to make contact with Petitioner following the January 27, 2021 drug screening, and that no one had indicated he was excused from drug testing. *Summary of Evidence 11/16/2022 p. 10 lines 16-35.*

Peter M. Newton, M.D. served as an Agreed Medical Evaluator in the field of Orthopedic Surgery. After examining Petitioner, reviewing the available records and obtained diagnostic testing (an MRI scan), Dr. Newton provided an initial report of July 26, 2021 and a further report of September 27, 2021. *Defendant's Exhibit A: Report of Peter M. Newton, M.D. 9/27/2021; Defendant's Exhibit B: Report of Peter M. Newton, M.D. 7/26/2021.* Dr. Newton opined that Petitioner "should have been able to continue working with restrictions after March 2021. If his employer could not have accommodated him, he would have been considered TTD through today." *Defendant's Exhibit A: Report of Peter M. Newton, M.D. 9/27/2021 p. 20.*

The primary parties were not able to resolve their disputes. Following Trial on November 16, 2022, Findings of Fact, Award & Orders issued on December 20, 2022. *Minutes of Hearing 11/16/2022; Findings of Fact, Award & Orders 12/20/2022.* In reliance on the expert opinions of AME Dr. Newton, Petitioner was found to have been temporarily partially disabled from October 30, 2019 to September 26, 2021, to have become permanent and stationary on September 27, 2021 with 30% permanent partial disability after applicable apportionment and adjustment and to be in need of further medical treatment. *Findings of Fact, Award & Orders 12/20/2022 pp. 3-4 (Findings of Fact 5-8) p. 4 (Award ¶A&B).*

Petitioner was not awarded temporary disability indemnity for the period from the termination of employment work until identified as permanent and stationary by AME Dr. Newton. *Findings of Fact, Award & Orders 12/20/2022 p. 7 (Opinion on Decision).*

Whereupon Petitioner seeks reconsideration. *Petition for Reconsideration 12/20/2022.*

**III. Discussion:** The pending petition correctly argues that the purpose of temporary disability is to compensate workers for lost wages resulting from industrial injuries, that this entitlement generally includes temporarily partially disabled workers for whom medically appropriate modified or alternative work is not available and that withholding of modified work as a result of a termination of the employment relationship is an exception to this general rule only when the

termination is based on lawful good cause. *Petition for Reconsideration 12/30/2022 p. 3 line 18 to p. 4 line 19*. However, Defendants are correct that an injured worker is not entitled to temporary disability indemnity after being terminated for good cause if medically appropriate modified work would have been available to them but for the termination. *Defendants' Response to Petition for Reconsideration 1/16/2023 p. 2 line 5-22*.

Petitioner argues that the termination of his modified work as a result of his failure to comply with drug testing was not lawful good cause because the modified work that he had been doing for some time (office paperwork and washing trucks) was not the "safety specific work" (moving heavy objects, driving moving vans and entering homes) upon which the drug testing requirement was based. Petitioner argues that drug testing is not favored at law and that the employer has the burden to justify the withholding of modified work. *Petition for Reconsideration 12/30/2022 p. 4 line 19 to p. 5 line 4*.

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The second problem with the argument of the pending petition is that Defendants were not obligated to excuse Petitioner from the requirements from his "safety specific" regular work position while performing modified work. Defendant correctly argues that even while filing documents and washing vans, Petitioner was classified and paid as a Mover and was expected to return to Moving. *Defendant's Response to Petition for Reconsideration 1/16/2023 p. 3 lines 8-14*.

Admittedly, it may be irrational to drug test employees who are never again going to engage in group heavy lifting, drive loaded moving vans, enter the homes of families with children or other engage in other work activities that justify the intrusive measure of drug screening. But it is not irrational to test employees whose regular work involves these "safety specific" activities and who are expected to return to such work as soon as their medical condition permits. Thus, while it is true that Petitioner had been performing modified work for a significant period of time prior to his termination, there is no indication that his modified work duties were a new position or otherwise permanent. Petitioner was still a Mover, expected to return to moving, subject to the testing requirements applicable to Movers and properly terminated when he did not comply.

**IV. Recommendation:** Petitioner's termination was justified by good cause. The failure to award temporary total disability indemnity for the period after the termination was proper. Therefore, it is recommended that the pending petition be denied.

DATE: January 18, 2023

Robert Norton  
PRESIDING WORKERS' COMPENSATION JUDGE