

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

WILLIS MCDOWELL, *Applicant*

vs.

**CONSTANT STAFFING, LLC;
UNITED WISCONSIN INSURANCE COMPANY,
administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ16908618
Long Beach 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 below, we will grant reconsideration, amend the award of temporary disability. We will otherwise affirm the February 28, 2023 Findings and Award and Order for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted below.

Contrary to the WCJ, we find that the medical evidence in the record supports an award of temporary disability from October 18, 2022 through February 27, 2023, which is 45 days from the last medical report addressing his work status dated January 13, 2023. (Cal. Code Regs., tit. 8, § 9785(f)(8).) Therefore, we amend the award of temporary disability accordingly but reserve jurisdiction over the issue of further temporary disability. To the extent possible, the parties should adjust the issue of additional temporary disability informally subject to proof.

As to the remaining issues, we adopt and incorporate the Report as quoted below:

STATEMENT OF THE CASE AND FACTS

Applicant sustained an admitted injury while working for the insured employer, a staffing agency. Following the injury, the Applicant had a modified work status from his Primary Treating Physician (PTP). The employer was able to accommodate the modified work status until October 17, 2022. On October 18, 2022, the Applicant was called into the staffing agency office instead of the work site.

While the Applicant was at the office, staffing agency employer representative Stephanie Valdez communicated with the Applicant via text message while she was commuting into the office herself. Ms. Valdez did not know why the Applicant was in the office that morning and not at the work site.

Upon arriving to the office, Ms. Valdez and the Applicant had a discussion. Ms. Valdez believed that discussion to result in the Applicant's termination, while the Applicant did not believe that discussion to result in termination. The Applicant received no written paperwork documenting a termination or change in employment relationship.

Defendant did not pay any wages or temporary disability after October 17, 2022, despite a Temporary Partially Disabled (TPD) work status and not offering modified work. Applicant's Attorney filed for an Expedited Hearing seeking temporary disability and the matter proceeded to trial on February 8, 2023.

The undersigned issued a Findings of Fact, Award, and Order on February 28, 2023 in favor of the Applicant. Defendant's attorney filed the instant Petition for Reconsideration (Petition) on March 13, 2023. The attorney filing the Petition, and verifying the events of the underlying trial, was not the attorney appearing for Defendant at the trial itself.

III

DISCUSSION

Medical reports support Applicant's disability status

Generally, temporary disability is payable when a work related injury results in the inability to participate in the labor market or when the injury results in a limited capacity to participate in the labor market and the injured worker cannot be accommodated in said capacity. An employer's obligation to pay temporary disability is relieved when an Applicant working in a modified work capacity is terminated for cause. [(See, e.g., *Drews v. Workers' Compensation Appeals Bd.*, 69 Cal. Comp. Cases 799 (Cal. App. 4th Dist. June 18, 2004); *Tolozza v. Dolan*

Foster Enters., 2011 Cal. Wrk. Comp. P.D. LEXIS 51 (Cal. Workers' Comp. App. Bd. January 3, 2011); *Russell v. Workers' Comp. Appeals Bd.*, 2018 Cal. Wrk. Comp. LEXIS 49 (Cal. App. 5th Dist. May 10, 2018.)) A party asserting an issue has the burden of proof. [(Labor Code §5705.)] The burden of proof is a preponderance of the evidence. [(Labor Code §3202.5.)] The court is entitled to “draw reasonable inferences from the evidence.” [(*Ybarra v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 987, 990.)]

The undersigned again notes that the Applicant introduced the only medical reports in evidence. (Applicant's Exhibits 2-5). These medical reports consistently demonstrate a TPD work status. The most recent report in evidence is dated January 13, 2023, noting a TPD status. If the Applicant is not accommodated in a modified capacity while TPD, then the disability becomes total, and Temporary Disability (TD) is owed. On the facts herein, the Applicant demonstrated that he is TPD as of January 13, 2023. (Applicant's Exhibit 2). The undersigned notes that a Primary Treating Physician (PTP) is required to report no less than forty-five days from the last report when treatment is continuing. [(CCR §9785 (f)(8).)]

....

Defendant did not prove a termination for cause

As stated above, a defendant's obligation to pay temporary disability is relieved when an Applicant who is TPD and is working modified duties is terminated for good cause. Defendant has the burden of proof on this issue, i.e., proving that there is a termination for good cause by a preponderance of the evidence.

The facts at hand merely demonstrate that the Applicant may have been an underperforming employee. The facts may establish that good cause for a termination might exist, but the facts do not establish that an actual termination took place. Defendant has the burden of proof on this issue, and it has not met it. The Petition acknowledges that there is no written termination letter. (Petition, Page 5). One would expect that the employer, a staffing agency who is in the business of actually employing people, would have documentation of an actual termination. There is no such written documentation in evidence.

The undersigned notes that the attorney filing the verified Petition for Reconsideration, attesting to the events of the underlying trial, is not the same attorney that conducted the trial on behalf of the Defendant.

The undersigned then examined the testimony provided on the issue of termination, in connection with the exhibits in evidence. Essentially, the Applicant testified that there was a discussion with Stephanie Valdez on October 18, 2022 and that he was not terminated during that discussion and had

no understanding of a termination. Ms. Valdez testified that the Applicant was terminated in that discussion and that there was an understanding. The testimony of Mitzi Ituarte was not persuasive and the undersigned did not find her to be a compelling or credible witness. On cross-examination, Ms. Ituarte was not certain about at least one fact that she had just testified to on direct. The testimony does not provide a consensus as to what actually happened as two different competing versions of the discussion are presented. The testimonial evidence does not weigh in favor of a preponderance supporting a termination for good cause and therefore Defendant meeting its burden.

The exhibits, when read in connection with the competing testimony, also do not meet the preponderance standard for Defendant. The text messages between the Applicant and Ms. Valdez demonstrate that the Applicant was told to be at the staffing office and to meet Ms. Valdez. The responses from Ms. Valdez confirm that she herself did not know why the Applicant was called to the staffing office. (Defendant's Exhibit H, Page 15). One would think that if Ms. Valdez, the area manager, were terminating the Applicant that day, she would have been aware of it. Additionally, if the Applicant were presenting a safety issue, as indicated in some of the testimony, it is reasonable to believe that the termination of a potentially volatile employee would be orderly, documented, and clinical. The alleged termination instead appears haphazard, undocumented, and ambiguous.

On balance, Defendant has not proven that there was a termination for good cause as the testimony and exhibits do not establish by a preponderance of the evidence that a termination took place.

The Award and Order allow for adequate repayment to EDD and calculation of attorney's fees

The Award and Order is clear as to repayment to the Employment Development Department and as to Applicant's Attorney's fees. Applicant received an Award of TD from October 18, 2022 to present, and continuing. This Award is less amounts paid by EDD from September 20, 2022 through January 30, 2023. [(Defendant is in fact ordered to reimburse the September 20, 2022 through October 17, 2022 period, but it is noted that this period is the responsibility of the Applicant as the Applicant was working during this period. Defendant is allowed credit for this period as it appeared more equitable to have Defendant reimburse EDD in total, than order an injured worker to provide repayment from their own funds.)] This amount is the "unpaid temporary disability." From that amount, Applicant's Attorney is to receive a 15% attorney fee and the Applicant to receive the remaining lump sum, with ongoing TD payments then paid at the stipulated rate of \$573.36.

EDD did not appear to be making ongoing payments at the time of trial. The issue of ongoing payments from EDD was not raised by EDD or by any party.

For the sake of convenience, the underlying Award and Order may be amended to account for EDD payments through “present date.”

The Temporary Disability Award is not unlimited

The Petition asserts that the Award and Order is unlimited as to TD benefits. (Petition, Page 7, Lines 23-25). The underlying Award and Order does not provide for “unlimited” TEMPORARY DISABILITY benefits. This assertion is not supported by the underlying Award and Order.

The Petition contains misrepresentations and language impugning the integrity of the undersigned

The verified Petition states that there is no credit allowed for wages earned after the date of trial and “[t]he Applicant has been offered a modified position by Constant Staffing.” (Petition, Page 3, Lines 11-12). There is no evidence offered to support this assertion that the employer has further offered modified work. This assertion would also seem inconsistent with the Petition’s repeated assertions that the Applicant was terminated for cause. This appears to be an outright misrepresentation unsupported by the record.

The verified Petition impugns the integrity of the undersigned by accusing the undersigned of engaging in “conjecture” in presiding over this case. (Petition, Page 4, Line 9).

The verified Petition further impugns the integrity of the undersigned by accusing the undersigned of acting with “blatant disregard.” (Petition, Page 6, Lines 23-24).

IV

CONCLUSION

The undersigned respectfully recommends that the Petition for Reconsideration be denied for the reasons set forth above.

* * *

(Report, at pp. 1-7.)

Finally, we have given the WCJ’s credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*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 determinations. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the February 28, 2023 Findings and Award and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 28, 2023 Findings and Award and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. The injury herein resulted in temporary disability for the period from October 18, 2022 through February 27, 2023, payable at the rate of \$573.36 per week, with jurisdiction reserved at the trial level on the issue of additional temporary disability.

* * *

AWARD IS MADE in favor of **WILLIS MCDOWELL** against **UNITED WISCONSIN INSURANCE CO.** administered by **NEXT LEVEL FOLSOM** of:

a. Temporary disability indemnity at the rate of \$573.36 per week beginning October 18, 2022 through February 27, 2023, less credit for any sums heretofore paid on account thereof; less amounts paid by EDD from September 20, 2022 through January 30, 2023, and less a 15% fee payable to PRATT LAW LONG BEACH as attorney fees.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSEPH V. CAPURRO, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 12, 2023

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

**WILLIS MCDOWELL
PRATT LAW CORPORATION
LAW OFFICES OF STOODY & MILLS**

PAG/abs

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