WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GODOFREDO CEJA, *Applicant*

vs.

DUTTON-GOLDFIELD WINERY, LLC; NATIONAL CASUALTY COMPANY, administered by MIDWEST INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ16419847
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the August 26, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a cellar hand on October 8, 2021, sustained industrial injury to his low back. The WCJ found that applicant was entitled to temporary total disability commencing October 11, 2021, but that applicant was hired as a seasonal worker. Accordingly, the WCJ determined that defendant's liability for temporary disability benefits was limited to the period of applicant's regular seasonal employment.

Applicant contends that he was hired as a full-time employee and is therefore entitled to temporary total disability on a continuing basis for up to the statutory maximum of 104 weeks.

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

We have considered the Petition for Reconsideration (Petition), the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons set forth in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

FACTS

Applicant sustained injury to his low back while employed as a cellar hand by defendant Dutton-Goldfield Winery, LLC, on October 8, 2021.

The parties have selected Adam J. Stoller, M.D., to act as the Qualified Medical Evaluator (QME) in orthopedic medicine. Dr. Stoller first evaluated applicant on June 24, 2022 and found injury to the low back with industrial causation. (Ex. J1, Report of Adam Stoller, M.D., dated June 24, 2022, at p. 10.) With respect to applicant's disability status, the QME opined that applicant was temporarily totally disabled from the date of injury forward and was not yet permanent and stationary. (*Id.* at p. 11.)

The parties proceeded to trial on July 9, 2024, at which time defendant stipulated to the injury, but also that it had paid no temporary disability to applicant. (Minutes of Hearing and Summary of Evidence (Minutes), dated July 9, 2024, at p. 2:21.) The parties placed in issue applicant's claim of temporary total disability from October 11, 2021 and continuing, up to a maximum of 104 weeks. The WCJ heard applicant's testimony, and ordered the matter submitted for decision the same day.

On August 26, 2024, the WCJ issued her decision. Therein, the WCJ found that applicant had met his burden of establishing that he was temporarily totally disabled. (Opinion on Decision, at p. 3.) However, the WCJ also found that at the time of injury applicant was working as a seasonal employee and that pursuant to *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790 [71 Cal.Comp.Cases 1044], defendant's liability for ongoing temporary disability would be limited to the periods of applicant's regular seasonal employment. The WCJ identified the season as mid-August through mid-November, and thus awarded temporary disability for the periods of October 11, 2021 through November 15, 2021, August 16, 2022 through November 15, 2022, and August 16, 2023 through November 15, 2023. (Finding of Fact No. 5.)

Applicant's Petition contests the determination that he was a seasonal employee. Applicant concedes that in the past he had worked only as a seasonal employee, but that he had started working for defendant because it paid more and there was the opportunity for permanent work. (Petition, at p. 2:8.) Applicant testified at trial that he was told by the "cellar master" that he would be receiving a full-time position, and that applicant's testimony is prima facie evidence that he was hired on a permanent basis. Because defendant did not offer evidence overcoming applicant's

testimony, applicant asserts the WCJ erred in concluding applicant's employment was seasonal in nature.

Defendant's Answer responds that the email from the employer to applicant dated August 12, 2021 is clear evidence that applicant's position was temporary in nature. (Answer, at p. 2:27.)

The WCJ's Report acknowledges that applicant testified that he thought the employment to be permanent, but notes that the only documentary evidence responsive to the issue was the employment offer email contained in applicant's personnel file, and that the offer explicitly offers seasonal employment. (Report, at p. 4.) Accordingly, the WCJ recommends we deny applicant's Petition.

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

[1] All further references are to the Labor Code unless otherwise noted.

Here, according to Events, the case was transmitted to the Appeals Board on October 1, 2024 and 60 days from the date of transmission is Saturday, November 30, 2024. The next business day that is 60 days from the date of transmission is December 2, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on December 2, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 1, 2024, and the case was transmitted to the Appeals Board on October 1, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 1, 2024.

II.

The instant dispute presents the question of the extent of applicant's entitlement to temporary total disability benefits. As the party seeking an award of temporary disability, applicant carries the initial burden of proof to establish the baseline entitlement to temporary disability benefits. (Lab. Code, § 5705.) Following our review of the medical record we agree with the WCJ that applicant became temporarily totally disabled as of his date of injury. (Ex. J1, Report of Adam Stoller, M.D., dated June 24, 2022, at p. 10.) However, pursuant to *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790 [71 Cal.Comp.Cases 1044], "a seasonal employee who voluntarily or by necessity makes herself unavailable for employment during part

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

of the year may not receive temporary disability payments during her regular off season of unemployment." (*Id.* at p. 801; cf. *Sandoval v. A. M. Harvesting* (October 19, 2015, ADJ8968241) [2015 Cal. Wrk. Comp. P.D. LEXIS 643] [applicant who credibly testified to off-season work entitled to TTD during off-season].)

Applicant contends that he was hired as a permanent, full-time employee, and is therefore entitled to ongoing temporary disability up to a maximum of 104 weeks. (Lab. Code, § 4656(c)(2).) Applicant testified at trial that when he was hired he was told by "cellar master Michael that it would be a full-time position, not seasonal," and that "when certain employees failed to show to work, it became clear that applicant was staying on full time at Dutton to be Michael's right-hand man." (Minutes, at p. 4:15.)

The WCJ's Opinion on Decision observes, however, that the offer of employment made by defendant on August 12, 2021 was explicit: "The position is a full-time temporary position, from mid-August through mid-November, depending on the fruit." (Ex. B, Personnel File, dated June 11, 2024, at p. 2.) In addition, the "Hiring Checklist" signed by applicant further indicated the position to be "temporary" rather than "regular" or "intern." (*Id.* at p. 3.) The WCJ noted that applicant's *prior* work history was limited to seasonal work, and that applicant offered no evidence of off-season earnings. (Opinion on Decision, at p. 3; Minutes, at p. 4:43.) Thus, the WCJ weighed applicant's testimony as to his belief that he had been hired on a permanent basis but found the contemporaneous written offer of employment as well as applicant's prior history of seasonal employment to be the more persuasive evidence. (Report, at p. 4.)

We have given the WCJ's credibility determination 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, 504-505].) Moreover, following our independent review of the record, we conclude there is no evidence of considerable substantiality that would warrant disturbing the WCJ's conclusions as to the weight of the evidence.

We will affirm the F&A, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2024

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

GODOFREDO CEJA
MEECHAN, ROSENTHAL & KARPILOW
ALBERT AND MACKENZIE

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

Applicant, by and through his counsel, Richard Meechan of Meechan, Rosenthal & Karpilow, PC, filed a timely and verified Petition for Reconsideration challenging the Findings and Award dated August 26, 2024.

The applicant sustained injury to his low back on October 8, 2021 while working as a cellar hand for Dutton Goldfield Winery. (MOH/ SOE, p. 2, lines 8-12.) The applicant was 34 years old on the date of injury.

In the Findings & Award dated August 26, 2024, the undersigned WCJ awarded the applicant temporary total disability (TTD) at the rate of $980.43/week for the seasonal periods in 2021, 2022 and 2023 less a 15% applicant attorney fee. Specifically, TTD was awarded to the applicant from October 11, 2021 through November 15, 2021, August 16, 2022 through November 15, 2022, and August 16, 2023 through November 15, 2023. Any additional TTD owed during the 2024 season and after was deferred with WCAB jurisdiction reserved.

Petitioner files for reconsideration requesting a finding that the applicant is entitled to TTD on a continuing basis starting October 11, 2021 up to 104 weeks. *Petition, p.1.*

II

FACTS

The applicant sustained injury to his low back on October 8, 2021 while working as a cellar hand for Dutton Goldfield Winery. (MOH/ SOE, p. 2, lines 8-12.)

The parties stipulated that applicant's earnings were $1,470.64/week, yielding a temporary disability rate of $980.43/week. (MOH/SOE, p.2, lines 18-19.) At issue was applicant's entitlement to temporary disability from October 11, 2021 up to 104 weeks (and attorney's fees therefrom). (Id. at p.2, lines 38-46.)

The applicant was hired by Dutton Goldfield with a start date of August 16, 2021. (*Def. Exh. B*, p.2.) The written offer of work was for a full-time temporary position from mid-August through mid-November, commonly referred to as the "crush season." (Id.) The applicant testified that he had not worked since October 8, 2021 due to his injury. (MOH/SOE, p.5, line 13.) The

applicant further testified that, although he believed he was hired full-time, he did not have any written evidence offering him full-time work. (MOH/SOE, p.5, lines 44-45.)

The applicant did not testify to any earnings in the "off-season" from mid-November through mid-August. The applicant testified to working as a seasonal worker for three wineries prior to Dutton Goldfield. (MOH/SOE, p.4, line 43 thru p.5, line 2.)

Three medical reports from Qualified Medical Evaluator (QME) Dr. Adam Stoller were submitted as joint exhibits J1 through J3, along with Dr. Stoller's deposition transcript as joint exhibit J4. (Id. at p.3.) Dr. Stoller reported that the applicant has been TTD since October 8, 2021 due to his low back injury. (*Exh*. *J1*, p.11.) Dr. Stoller provided work restrictions, but no evidence was presented that those work restrictions were, or could be, accommodated.

The Findings & Award dated August 26, 2024 awarded the applicant TTD for the seasonal period, mid-August thru mid-November, in 2021, 2022, and 2023 (and deferred any further TTD for the seasonal periods in 2024 and after). It is from this Findings and Award that Petitioner seeks reconsideration.

III
DISCUSSION

A. THE APPLICANT BEARS THE BURDEN OF ESTABLISHING INJURY AND RIGHT TO BENEFITS

Petitioner asserts that TTD should have been found up to the 104 weeks on a continuing basis because the undersigned WCJ incorrectly placed the burden of proof on the applicant. *Petition, p.3, lines 5-8.* However, Petitioner's argument is misplaced.

Applicant bears the burden of establishing injury and a right to benefits. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604,621 [Appeals Board en banc].) A defendant has no duty to assist an injured worker in meeting his or her burden of proof.

In the instant case, Petitioner cites a single legal authority to support its position – Labor Code section 5705. However, Labor Code section 5705 makes no mention of seasonal work or temporary disability. Petitioner's argument that "limiting the extent of temporary disability is an affirmative defense" and is "implied" within Labor Code section 5705, is unsupported by any legal authority. *Petition*, *p.3, lines 5-8.*

Petitioner next asserts (without any citation to statute or case law) that there are four factors to consider when determining whether the applicant is a full-time employee. *Petition, p.3, lines 9-14.* The alleged factors are (1) the intent of the injured worker, (2) the needs of the employer, (3) the injured worker's work history, and (4) the contract with the injured worker. Even if Petitioner was correct that these factors apply in the instant case, Petitioner admits that these factors must be weighed separately and supported by substantial evidence. In weighing these alleged factors, the evidence supports the WCJ's finding that the applicant was a seasonal worker.

First, the applicant testified that he thought his employment would be full-time but offered no evidence of this. (MOH/SOE, p.4, lines 15-19; p.5. lines 44-45.) Second, no evidence was presented at Trial to show the needs of the employer. Any statements by Petitioner to the contrary are mere speculation. Third, applicant testified that his work history included only seasonal work for three prior wineries. (MOH/SOE, p.4, line 43 thru p.5, line 2.) The applicant never testified that he worked off-season as a musician, and no evidence was presented as to applicant's earnings in the off-season. Fourth, no contract for employment with the injured worker was placed into evidence at Trial, if any existed. What was placed into evidence was the personnel file which contained the offer of seasonal work to the applicant. (*Def. Exh. B*.)

The Court can only determine the issues based on the evidence presented at Trial. When weighing the evidence in this case, it points to applicant be hired as, and intended to be, a seasonal employee at Dutton Goldfield Winery.

B. APPLICANT WAIVED HIS RIGHT TO OBJECT TO THE ADMISSIBLITY OF EVIDENCE AS HEARSAY

Raising objections to evidence after Trial has concluded is tantamount to the objection being waived by the party. (*City of Riverside v. WCAB (Dillard) (1996) 61 CCC 614 (writ denied)*; See also *Thompson v. County of Tulare,* 2015 Cal. Wrk. Comp. P.D. LEXIS 451; *City of Bakersfield v. WCAB (Johnson)* (1998) 63 CCC 121.)

Petitioner admits that the employment documents (i.e. the personnel file admitted as *Defendant's Exhibit B* at Trial) show evidence that seasonal work was offered to the applicant. *Petition, p.2.* However, Applicant, for the first time in his Petition for Reconsideration, objects to this written evidence as hearsay. *Id. at p.2, lines 20-23.* At no time during Trial, or at the prior Mandatory Settlement Conference, did the applicant object to this evidence coming in. In fact,

when asked if there were any objections to this exhibit at Trial, Applicant's attorney responded in the negative. (MOH/SOE, p.3, lines 30-31.) As a result, the initial objection on reconsideration should be considered waived.

C. HEARSAY EVIDENCE IS ADMISSIBLE IN WORKERS COMPENSATION CASES

Even if Applicant did not waive his right to object to the written evidence (i.e. *Defendant's Exhibit B*) at Trial, hearsay is admissible in workers' compensation cases when it is best calculated to ascertain the substantial rights of the parties. Hearsay evidence may be used in workers' compensation to establish any fact at issue. (*London Guarantee and Accident Co., Limited v. IAC (Murray)* (1927) 203 Cal. 12, 14.) Pursuant to Labor Code section 5708, oral and written hearsay may be admissible when best calculated to ascertain the substantial rights of the parties. (*Linens N' Things v. WCAB (Wiseman)* (2001) 66 CCC 281 (writ denied).)

In the case at hand, the applicant testified that he had nothing in writing from the employer offering full-time employment. (MOH/SOE, p.5, lines 44-45.) The personnel file stated that the offer was a full-time temporary position. (*Def. Exh. B.*) As the personnel file directly relates to applicant's employment and entitlement to TTD, it is admissible to determine the substantive Trial issues.

D. THE PETITION FOR RECONSIDERATION IS DEFECTIVE ON ITS FACE PER 8 CAL. CODE REGS. SECTION 10945

The California Code of Regulations, section 10945 states in part:

(a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition.

(b) Every petition and answer shall support its evidentiary statements by specific references to the record. Petitioner fails to make any specific references to the record in his Petition for Reconsideration in violation of 8 Cal. Code Regs. section 10945.

Therefore, based not only on substantive grounds, but also procedural grounds, the Petition for Reconsideration should be denied.

IV

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Heidi K. Hengel
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Dated: 10/01/2024