

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

**SANDRA BUFFINGTON, *Applicant***

**vs.**

**REGENTS UNIVERSITY OF CALIFORNIA FIELDING SCHOOL,  
permissibly self-insured administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ11078470  
Marina del Rey District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of January 12, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while employed as an administrator/fundraiser by Regents University of California Fielding School on January 31, 2016, sustained injury arising out of and in the course of employment to her right ankle and right foot, and that applicant is entitled to temporary disability from February 1, 2018 - the day after her last day worked at University of California Fielding School - to the present and continuing, at the current rate of \$1,356.31 pursuant to Labor Code section 4661.5, subject to the 104-week cap, with defendant entitled to credit for permanent disability advances. The WCJ also found that applicant is not permanent and stationary. Finally, the WCJ deferred the issues of further medical treatment and applicant's claim of injury to her head and psyche.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the WCJ did not comply with Labor Code sections 5313 and 5708, and that the WCJ did not comply with WCAB Rule 10787. (Cal. Code Regs., tit. 8, § 10878, "Trials.") Defendant further contends that applicant failed to prove she is entitled to temporary total disability benefits, that substantial evidence does not show that applicant's industrial injury prevented her from returning to "the same type of work," that substantial evidence does not show that "the cause of

employment for the temporary disability was caused by the applicant's orthopedic injury," that applicant was only temporarily partially disabled "at a rate that reflects the portion chargeable to the industrial injury under Labor Code section 4657," that there was no finding of the cause of applicant's disability, that the "odd lot" doctrine does not apply, that this case does not involve "a company going out of business," and that the medical reporting of Dr. Triche and Dr. Nicola is not substantial evidence. Finally, defendant contends that substantial medical evidence does not support the WCJ's finding that applicant is not permanent and stationary, and that the WCJ erred in concluding there was no rebuttal to applicant's testimony.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

In response to the WCJ's Report, defendant filed a request to submit a supplemental petition along with the proposed supplemental petition. Finding good cause to approve the supplemental petition, we exercise our discretion to accept and consider it. (WCAB Rule 10964(b), Cal. Code Regs., tit. 8, § 10964(b).)

Based on our review of the record and applicable law, we conclude that the WCJ must revisit and resolve the following issues: whether the restrictions caused by the industrial injury to applicant's right ankle and right foot (not the alleged psyche and head injuries) precluded her from fundraising and thereby resulted in the closure of the employer's program and loss of her job; if so, whether the medical evidence specifically establishes, with reference to the time of claimed temporary disability of February 1, 2018 and continuing, that applicant was temporarily disabled due to the orthopedic injury; and if so, whether applicant's wage loss was total or partial during any such period. In order to allow the WCJ to revisit and resolve these questions, we will rescind the Findings and Award of January 12, 2021, and we will return this matter to the trial level for further proceedings and new decision by the WCJ.

### **FACTUAL BACKGROUND**

The WCJ provides a detailed statement of facts in his Report, as follows:

Applicant was employed by University of California Fielding School (Hereinafter, "UCLA") as the Funding Director of Global Media Center for Social Impact. She founded and directed the center. She designed strategies to raise money for the center. Her job required her to travel in order to build relationships with potential donors. Prior to her injury on January 31, 2016, in Kyoto, Japan, she was required to do domestic and foreign travel. Between her date of hire and date of injury, she would travel to foreign locations including Japan, India, Europe, and England.

These trips would take from five days to two weeks. Domestically, she would visit New York, Washington D.C., Atlanta, San Francisco, and Chicago. These trips would take between two days and a week. This travel and speaking at events were an integral part of her duties. (MOH, Sum of Evid., August 26, 2020, Page 4, lines 18 through Page 5, line 7).

In Kyoto, Japan she tripped over a small table and fell on the right side of her body, hitting her right temple, right knee and right hand, and she believes she torqued her shoulders. She immediately sought medical attention in an emergency room in Japan. Upon returning, she reported the injury to UCLA and was referred to Sedgwick. Sedgwick told her that as the injury was overseas, they would refer to AIG. After approximately one-year that AIG was working with her they stopped responding to her so she reached out to an attorney. (MOH, Sum of Evid., August 26, 2020, Page 5, lines 8 through 23).

After her injury on January 31, 2016, her job duties remained the same but she could not do them. She would work from home keeping her ankle elevated and was doing her best from there. Her mobility was restricted. She continued to work through January 2018 as she was able to modify her duties. There was some travel, however, it was arduous as it required her to use a wheelchair in airports. She could no longer multitask like she did before to keep the funding coming in. The program ceased operations on January 31, 2018. (MOH, Sum of Evid., August 26, 2020, Page 6, lines 1 through 13).

From February 1, 2018 forward, her mobility has been the same, as she has torn tendons and some tissue pushed up between the torn tendons, causing a barrier between the tissue. Her ankle is unstable, and when it goes out she is then required to put the boot back on. She believes that if she had surgery and healed, then she could have returned to traveling, but now she cannot be on a plane in her present condition. She cannot walk through airports or urban cities now. (MOH, Sum of Evid., August 26, 2020, Page 6, lines 14 through Page 7, line 2).

Dr. Nicola, Dr. Triche, and every other orthopedic doctor said she required surgery. (MOH, Sum of Evid., August 26, 2020, Page 7, lines 7 through 12). Dr. Euclid and Dr. Trish told her that her condition, if treated with proper medical treatment, is reasonably expected to be cured or materially improve orthopedically. (MOH, Sum of Evid., October 14, 2020, Page 6, lines 2 through 3).

She has received some intermittent engagements since she last worked at UCLA in January 2018, and has received approximately \$7,000.00 in honorarium. (MOH, Sum of Evid., August 26, 2020, Page 7, lines 13 through 15).

Prior to 2016, she would normally work from 9:00 a.m. to 5:00 p.m., and evenings. She would work between 40 to 60 hours per week. 35% to 45% of the year was spent traveling. (MOH, Sum of Evid., August 26, 2020, Page 9, lines 4 through 14).

In August 2017, she believes she did have a right ankle injury while hiking. She does not remember the dates as her ankle would reinjure all the time. (MOH, Sum of Evid., August 26, 2020, Page 9, lines 18 through 20).

Applicant's current restrictions are two torn tendons that pulled apart, and the tissue that goes up between the two tendons cause the tendons not to reconnect without surgery. Her daily activity restrictions are due to extreme pain and an unstable ankle. Her ankle swells, has pain, and becomes black and blue, which requires her to elevate and ice. She cannot work due to the limitations of her ankle. She continued to have symptoms while working at UCLA for the two-year period. (MOH, Sum of Evid., October 14, 2020, Page 2, lines 14 through 23).

As she was no longer able to continue bringing in money for UCLA, her job ended. (MOH, Sum of Evid., October 14, 2020, Page 3, lines 16 through 17).

After her termination at UCLA, she applied to at least five other locations for work. She has not received any full-time work offers. She has had interviews for consulting work. In 2018, she had consulting work for a couple of weeks. She also moderated online in 2020.

In 2018, she believes she did have two short-term consulting jobs, which consisted of presentations and being a judge on films in 2018 and 2019, both in Cairo. She had a lot of restrictions during the consulting work, and they had to accommodate her as she could not walk, and keeping her leg elevated. The trip lasted approximately two weeks. When she was at the airport, she required accommodations of a wheelchair. She had special-scheduled transportation, where others would walk. With the modifications, she could perform the work. The online panels took place in 2020, but she does not remember exactly when. These would last one-hour and were virtual from her residence. (MOH, Sum of Evid., October 14, 2020, Page 3, lines 14 through Page 4, line 15).

She has applied for five positions online. The orthopedic restrictions did not prevent her from applying to those positions. She hoped to learn the job duties that were required to be performed during the interviews. (MOH, Sum of Evid., October 14, 2020, Page 5, lines 13 through 17).

Rachael Triche, M.D., Orthopedic Surgeon at Cedars-Sinai/Kerlan-Jobe Institute, issued a January 7, 2020 report. His assessment was right peroneus brevis tendon tear, and right ankle possible ligamentous laxity. He was ready to proceed to surgery. Applicant was wearing tall walking boot. She was limited in her activities due to the ankle. She was doing better since last visit. He noted that she may consider surgery since the pain in her ankle has been recurring for the past couple of years and is limiting her activities including walking, hiking, and going to the gym.

There is a notation where on March 26, 2019, the Applicant's complaints started three days ago after a hike. She notes she had hiked the trail in the past and was wearing her regular hiking shoes with an ankle wrap. She notes her ankle is more prone to sprains since her injury and did reinjure the ankle twice with the most recent being in January of 2019. (Applicant's Exhibit 3.)

Frederick Nicola, M.D., Orthopedic Surgeon, has issued three medical reports. He has also diagnosed right ankle tendon injury, peroneus brevis tear and right ankle instability. He also recommends right ankle arthroscopy repair of peroneal tendons and repair of ankle instability. He released the Applicant to return to work with the restrictions of sedentary work. (Applicant's Exhibit 4)

Dr. Nicola issued a May 17, 2019 supplemental report with records review. He stated the Utilization Review ("UR") physician did not authorize repair of the peroneus brevis and longus tendon, however, when discussing the California MTUS Guidelines, the UR physician does not follow through on indications as this claim has had greater than six months of duration and has lateral ankle ligament instability and failure of non-operative therapies. He keeps the applicant on semi-sedentary work restrictions. (Applicant's Exhibit 5)

Dr. Nicola issued an April 22, 2019 Orthopedic Medical Evaluation report where on page 11, he reviews a right ankle MRI of February 2, 2016, showing a chronic-appearing split tear of the peroneal tendon. On page 12, he reviews an MRI study of the right ankle dated March 28, 2019, and the referring physician is Rachael Triche, M.D. Her findings are split peroneus brevis tendon, peroneus longus intertwined in the peroneus brevis split. Applicant continues to be symptomatic and has instability and pain with ambulation and continues to wear an AFO Boot. Restricted to semi-sedentary type work. (Applicant's Exhibit 6)

Finally, Applicant was evaluated by Qualified Medical Evaluator, Babak Samimi, M.D. on January 14, 2020. The Applicant may continue to work with modifications precluded from prolonged standing or walking more than one hour at a time and she should avoid walking on uneven terrain. She should be allowed to utilize an ankle brace as needed. Based upon her job description, [Dr. Samimi stated that] she may return to the type of work that she was performing. (Joint Exhibit DD)

On May 19, 2019, Defendant issued a Notice Regarding Temporary Disability Benefit Delay, from April 22, 2019, advising of the delay in deciding as to whether UCLA could accommodate Applicant's restrictions. (Defendant's Exhibit A).

The January 21, 2020 Utilization Review Report of Daryl Luke, M.D., denied the request for surgery. (Defendant's Exhibit C)

The January 31, 2020 Utilization Review Report of Donald Dinwood, M.D., denied the request for surgery. (Defendant's Exhibit B).

## DISCUSSION

After the industrial injury to applicant's right ankle and right foot on January 31, 2016, her job duties remained the same but she had to modify the way she worked to get them done. Applicant would work from home keeping her ankle elevated. Although applicant's mobility was restricted, she continued to work through January 2018. However, the traveling part of her job was difficult because it required her to use a wheelchair in airports. Applicant testified that she could no longer multitask like she did before to keep the funding coming in, and that this was the reason the employer's program and her job ended on January 31, 2018. Also according to applicant's testimony, her (diminished) mobility has been the same after February 1, 2018. Thus applicant claims entitlement to temporary disability benefits from February 18, 2018 to the present and continuing. (See Minutes of Hearing, August 26, 2020, p. 2.)

We believe that applicant's claim for temporary disability benefits, in the context of the closure of the program for which she worked as a fundraiser, is analogous to an injured employee's claim of temporary disability benefits following termination or retirement. (See *Gutierrez v. Omega Extruding of California* (2024) 2024 Cal. Wrk. Comp. P.D. LEXIS 233 [layoff by employer and disability due to industrial injury resulted in applicant not working - not unwillingness to work, voluntary removal from the job market or lack of earning capacity]; *Munguia v. Los Angeles Unified School Dist.* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 327, citing *Gonzales v. Workers' Comp. Appeals. Bd.* (1998) 68 Cal.App.4th 843 (63 Cal.Comp.Cases 1477) [if injured worker voluntarily removes herself from the job market and does not retire because of disability from industrial injury, there may be no evidence of willingness to work or lost wages to be replaced].)

In this case, it appears that applicant had a restriction to sedentary work because of the industrial injury to her right ankle and right foot; defendant accommodated the restriction until the funding for applicant's program ran out and it had to be shut down. However, if the reason the funding ran out was because the industrial right ankle and foot injury prevented applicant from doing the work necessary to get additional funding, then defendant's inability to continue accommodating her relates to the injury, and she would be entitled to temporary disability indemnity. On the other hand, if applicant was terminated for poor performance completely unrelated to the injury, defendant would no longer have an obligation to offer her modified work. (*Agosto-Cisneros v. Hack's Food Safety Specialists* (2023) 2023 Cal. Wrk. Comp. P.D. LEXIS

329 at p. \*7, citing *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 (44 Cal.Comp.Cases 798) [employer may be relieved of potential liability for temporary disability for an injured worker capable of returning to modified duties, if employer establishes that work within applicant's restrictions was both available and offered].)

Here, if applicant's right ankle and foot injury prevented her from doing the work necessary to raise the money to keep defendant's program going, the fact that it was shut down for lack of funding is due to the injury, and temporary disability benefits may be payable. Since this issue was not clearly articulated at trial, we conclude that the WCJ must revisit it, and applicant and defendant must have an opportunity to further address it at the trial level.

If temporary disability benefits are payable under the circumstances presented here, the next issue is identifying medical evidence that demonstrates applicant was temporarily disabled for the period claimed, i.e., from February 1, 2018 and continuing. In the WCJ's Report, it is stated that "the reports of Dr. Triche, Dr. Nicola and Dr. Samimi are substantial evidence on the issue of temporary disability." However, if the WCJ finds the employer's program was shut down because applicant's right ankle and foot injury prevented her from fundraising to keep it going, the WCJ must specifically identify where the reporting physicians opine that applicant was temporarily disabled after February 1, 2018. Of course, the WCJ may rely on circumstantial evidence and inferences arising from reasonable probabilities flowing from the evidence. (*Guerra v. Workers' Comp. Appeals Bd. (Rodas)* (2016) 246 Cal.App.4th 1301 [81 Cal.Comp.Cases 324].) To do that, however, the WCJ must specify the medical evidence that may support reasonable inferences applicant was temporarily disabled during the claimed period of February 1, 2018 and continuing.<sup>1</sup> At the same time, the WCJ and the parties should note that temporary disability is not apportionable. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 405 [33 Cal.Comp.Cases 647].)

Finally, if the WCJ specifically identifies medical evidence demonstrating that applicant was temporarily disabled after February 1, 2018, the WCJ also must revisit whether applicant's wage loss was total or partial during any such period. (Lab. Code, § 4657.) It appears there is some indication of partial wage loss here. The WCJ's Report indicates that applicant briefly did some consulting work in 2018, and that she had some online work in 2020. However, if nothing

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<sup>1</sup> Although it is questionable whether a finding that applicant is not permanent and stationary is a "final order" under Labor Code section 5900, the WCJ should take the same approach in determining the permanent and stationary date.

other than the right ankle and foot injury contributed to applicant's inability to earn wages during the period she was temporarily partially disabled, her wage loss may be taken at 100 percent. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* 52 Cal.2d 417, 421 [4 Cal.Comp.Cases 144].)

In conclusion, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ, in light of the discussion set forth above. The WCJ may revisit the remainder of defendant's contentions and further develop the record as the WCJ deems necessary or appropriate. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matter which its acquired specialized knowledge should identify as requiring further evidence].)

Finally, our opinion herein should not be interpreted as insinuating that defendant acted in bad faith or that any liability under Labor Code section 132a should be contemplated. Indeed, any such issue was not raised at trial. As noted before, we have focused on the fact that the program for which applicant worked was terminated for lack of funding, which may not insulate defendant from liability for temporary disability benefits if the program's termination relates back to applicant's right ankle and foot injury. Since we are concerned only with the orthopedic injury, the WCJ's alleged reliance on the as-yet unresolved claim of psyche and head injury to award temporary disability benefits is off-point. In any event, we express no final opinion on the merits of applicant's claim for temporary disability benefits as a result of her orthopedic injury. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*



For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of January 12, 2021 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



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

**November 1, 2024**

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

**SANDRA BUFFINGTON  
ACUMEN LAW, LLP  
LESTER FRIEDMAN, APC**

**JTL/ara**

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