WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GLORIA GONZALEZ, *Applicant*

vs.

LA MIRADA POST-ACUTE, aka SUNNY HILLS POST-ACUTE; AIU INSURANCE, ADMINISTERED BY CORVEL, *Defendants*

Adjudication Number: ADJ17084700
Marina Del Rey 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 and the Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, as quoted in the attachments below, and for the reasons stated below, we will deny reconsideration.

I.

Preliminarily, we note that 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.

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

> (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."

Here, according to Events, the case was transmitted to the Appeals Board on December 9, 2024, and 60 days from the date of transmission is February 7, 2025. This decision is issued by or on February 7, 2025, 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. Labor Code 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 December 9, 2024, and the case was transmitted to the Appeals Board on December 9, 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 December 9, 2024.

The issues framed for trial included applicant's entitlement to temporary partial and/or temporary total disability during the period from November 1, 2022 to May 31, 2023 and whether the change of applicant's employment from full-time on November 1, 2022 to "pro re nata (as needed)" was voluntary or involuntary.

II.

Temporary disability indemnity is a workers' compensation benefit that is paid while an injured worker is unable to work because of a work-related injury and is primarily intended to

substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].)

Generally, a defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd*. (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 236 [58 Cal.Comp.Cases 323].)

As explained by the Supreme Court:

> A "disability" under the Work[ers'] Compensation Law connotes an inability to work. Where an employee has been temporarily disabled by an industrial injury, he is considered temporarily totally disabled if he is unable to earn any income during the period when he is recovering from the effects of the injury. For such a disability, the employee's disability payments are based on his earning capacity, the statute providing that the payment is [two-thirds] of his average weekly earnings. [Citation.] An employee is considered temporarily partially disabled if he is able to earn some income during his healing period but not his full wages. The disability payment in such event is [two-thirds] of the employee's weekly wage loss.
>
> (*Herrera v. Workmen's Comp. Appeals Bd*. (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382].)

Although a partially temporarily disabled worker is expected to work during their partial disability if suitable work is available, as the Supreme Court explained in another case:

> Under the "odd lot" doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages. [Citation.] This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. [Citations]
>
> (*General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375].)

In *Huston, supra*, 95 Cal.App.3d 856, the Court of Appeal stated:

> In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [Citation.] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [Citation.] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [Citation.] If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability. [Citation.] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled ***or there is no showing by the employer that work is available and offered***, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.
>
> (*Huston, supra*, at p. 860 emphasis added.)

The holding in *Huston* links an employer's showing that modified work is available and offered with an injured worker's entitlement to temporary disability. Thus, in order to be relieved of potential liability for temporary disability for an injured worker capable of returning to modified duties, the employer must establish that work within applicant's restrictions is both ***available*** and ***offered***.

In this case, the employer has not met the burden of proof necessary to establish that it effectively offered modified or alternative duties to applicant. Section 4658.1 defines "regular work"; "modified work"; and "alternative work" as follows:

> (a) "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.
>
> (b) "Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury.
>
> (c) "Alternative work" means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those

> paid to the employee at the time of injury, and that is located within reasonable commuting distance of the employee's residence at the time of injury.

AD Rule 10116.9 subsection (k) states, in relevant part, that: "Offer of modified or alternative work" means an offer to the injured employee of medically appropriate employment with the date-of-injury employer through the use of … Form 10133.35 Notice of Offer of Regular, Modified, or Alternative Work for Injuries Occurring on or after 1/1/13." (Cal. Code Regs., tit. 8, § 10116.9.)

While there appears to be validity to the WCJ's finding that applicant's change from full time employee to a "PRN" employee was uninformed and, therefore, involuntary, we are not persuaded that this question is relevant to the determination of defendant's liability for temporary disability benefits. In order to be relieved of potential liability for temporary disability for an injured worker capable of returning to modified duties, the employer must establish that work within applicant's restrictions is both ***available*** and ***offered***.

As we held in our en banc decision in *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389, 405, "an offer of regular, modified, or alternative work must be bona fide." (*Id.*; see *Jackson v. California Prison Industry Authority* (August 2, 2017, ADJ9968628) [2017 Cal. Wrk. Comp. P.D. LEXIS 368, ["act of sending the job offer notice, by itself, did not establish a bona fide job offer. Defendant indicated to Applicant that she was 'no longer available for employment,' and that there were no positions available."] *Robertson v. Workers' Comp. Appeals Bd.* (2003) 112 Cal. App. 4th 893 [68 Cal. Comp. Cases 1567] [defendant's offer of the invoicer job did not constitute an offer of alternative work that satisfied defendant's vocational rehabilitation obligation because defendant did not actually offer applicant the alternative position of invoicer when it used the phrase "would have offered." (*Id.* at p. 901, underline in original); see also *White v. Workers' Comp. Appeals Bd.* (2004) 69 Cal. Comp. Cases 525 [2004 Cal. Wrk. Comp. LEXIS 133] (writ den.); *K-Mart v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1209 [1996 Cal. Wrk. Comp. LEXIS 3399] (writ den.)

Defendant asserts in its Petition for Reconsideration that it has shown that modified work was available and offered (Petition for Reconsideration, at p. 23:11-12) but made no specific citation to the record for this claim. Defendant's Exhibit G appears to be a handwritten summary of a discussion regarding scheduling changes dated October 8, 2022 and includes the statement: "It is in the best interest of faculty to have nursing scheduled daily ensuring nursing staff is on a

4/2 schedule to meet daily staffing needs. Employees would have to be on a 4/2 schedule to be full time in order to meet daily staffing needs." However, Exhibit G is not a valid offer of modified or alternative work. In fact, there is no documentary evidence of defendant's use of Form 10133.35 or any other written evidence of a valid offer of modified or alternative work. On this record, defendant has not met the burden of proof necessary to establish that it effectively offered modified duties to applicant and was therefore not relieved of its liability for temporary disability.

Moreover, 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 determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 7, 2025

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

GLORIA GONZALEZ
OZUROVICH, SCHWARTZ & BROWN, APC
LEWIS BRISBOIS BISGAARD & SMITH, LLP
EMPLOYMENT DEVELOPMENT DEPARTMENT

PAG/kl

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION (PFR: TD ISSUE)

I.

INTRODUCTION

1. Applicant's Occupation:	Certified Nursing Assistant (CNA)
2. Applicant's Age:	N/A
3. Date of Injury:	Specific of 10-07-2022
4. Body Parts Injured:	Left shoulder
5. Manner In Which Injury Occurred:	Lifting a patient at work
6. Identity of Petitioner:	Defendant
7. Timeliness:	Petition was timely filed
8. Verification:	Petition was verified per LC Section 5902
9. Date of issuance of Order:	11-13-2024

10. Petitioner's Contentions:

(a) Petitioner contends the WCJ erred by finding that when applicant was changed from a full-time employee to a PRN (Pro Re Nata/as needed) employee on 11-01-2022, the change in employment status was not voluntary.

(b) Petitioner contends that the WCJ erred when he found that applicant was owed temporary disability (TD) for the period of 11-01-2022 through 06-14-2023.

(c) Even if there is no change in Finding Number One (which indicated that applicant's change in employment status from full-time to PRN was not voluntary on the part of the applicant), the Petitioner contends that the WCJ erred in awarding anything for TD.

(d) Petitioner contends that the WCJ erred by suggesting or implying that the defendant has liability for reimbursement for EDD Unemployment or EDD-SDI because applicant was never entitled to TPD or TTD during the disputed period of 11-021-2022 through 06-14-2023.

(e) Petitioner contends that the WCJ erred by awarding attorney's fees, assuming that the Commissioners agree with some or all of the defendant's above contentions.

II.
FACTS

> [T]he applicant worked at a nursing home facility for about seven years. This facility changed ownership on [August 16, 2022], about seven weeks before the date of injury. So, while it is technically true that applicant began to work at the new employer, Sunny Hills on [August 16, 2022], applicant had been working as a CNA for the facility for about seven years. The WCJ was under the impression that while some CNA's in the facility only worked a weekly schedule of 5 days on and two days off (a so-called 5-2 schedule) for about a year in 2020-

2021 (for Covid-19 reasons), the applicant worked a 5-2 weekly schedule for over two and a half years from early 2020 until [November 1, 2022].

[T]this case involves an admitted left shoulder injury of [October 7, 2022] where substantial medical evidence from a company-chosen physician at Concentra, the company clinic (Dr. Kristen Wong) saw the applicant on the date of the injury and indicated that the applicant was temporarily partially disabled (TPD) from [October 7, 2022] with a restriction of no lifting over five pounds. See applicant's Exhibit 13. The applicant continued to have this five-pound lifting restriction through early May of 2023 and was then given a 20-pound restriction for lifting by Dr. Barba of Concentra, the company clinic. (Please see Applicant's Exhibit 14). Dr. Barba allowed applicant to return to work at full duties on [June 14, 2023]. (Please see Applicant's Exhibit 15). There is agreement that the TD rate is $671.07 per week. [(Minutes of Hearing and Summary of Evidence (MOH/SOE), 5/31/23, at p. 2:8-10.)]

There was a fifteen-minute meeting at work which the applicant attended at 7:00 a.m. on [November 1, 2022] where applicant was advised by her supervisor Ms. Gloria Munoz that her 5-2 weekly schedule must change to a 4-2 weekly schedule. The applicant and defendant (through Ms. Munoz her supervisor) changed the applicant's employment status on [November 1, 2022] from full-time employee to PRN employee.

* * *

The applicant had an admitted work injury while she was a full-time employee, and her TD rate has been agreed upon. Please see trial stipulations One, Three and Thirteen in SOE [May 31, 2023 2:2 – 3:1]. Medical reporting is always needed to support a TD finding. The company clinic's Dr. Kristen Wong's report of [October 7, 2022] (the date of the injury) set out in Applicant's Exhibit 13, put a work restriction on the applicant to avoid lifting of more than five pounds. Anyone familiar with the job duties of a CNA knows that very many of the duties of a CNA require lifting more than five pounds. The employer accommodated these restrictions, and the applicant was doing her job, with restrictions from [October 8, 2022] through [November 01, 2022].

Applicant continued to have the five-pound restriction on lifting through May 9, 2023. On May 10, 2023 Dr. Barba also of Concentra, the company clinic, eased up on the restrictions and allowed applicant to lift up to 20 pounds at work. See Applicant's Exhibit 14. On [June 14, 2023] Dr. Barba released the applicant to full duties. See Applicant's Exhibit 15.

The WCJ's decision that the applicant was TD for the period of [November 1, 2022] through [June 14, 2023] was based on these medical reports in Exhibits 13-15 and the testimony of the applicant and Ms. Munoz…. The defense attorney's reliance in his PFR on the case of Skelton v. WCAB 39 Cal. App 5th

1103 demonstrates the defense attorney's hard work on researching and writing his comprehensive PFR; but it also highlights that there is no genuine case authority which could be considered directly on point for this matter. Even the defense attorney acknowledged in his PFR that the facts in Skelton were "very different" than in the instant case. See PFR 15:19-20.

The defense attorney argued, quoting from the Skelton case on page 1107, that the "employer's obligation to pay temporary disability benefits is tied to the employee's actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom." The facts in our instant case show an employee with an admitted work-related injury and medical reports from [October 7, 2022] through [May 9, 2023] limiting the applicant to lifting only five pounds or less at a job where significant lifting is often required. These reports limit the applicant to lifting 20 pounds at work between [May 10, 2023] and [June 14, 2023]. The facts and the medical reporting in our case at bar seem to come very close to matching the standards set out in *Skelton*.

Defense attorney's arguments in the PFR 18:7 - 20:21 are distinguishable because the applicant never indicated she wanted to take herself out of the open labor market and her conduct suggests considerable diligence about work.

(Report, at pp. 1-3; 5-6.)

OPINION ON DECISION

The WCJ provided the following factual background in the Opinion on Decision:

> The applicant suffered a left shoulder injury at her job as a CNA at the defendant employer on [October 7, 2022]; the defendant has accepted the injury of [October 7, 2022] to the left shoulder. The applicant went to the company clinic at Concentra in Santa Fe Springs and was diagnosed and given a work restriction by Dr. Kristen Wong in Applicant's Exhibit 13 of no lifting of over five pounds. Please see applicant's testimony in the Summary of Evidence (SOE) of [July 13, 2023] pp 4:23 through 5:04. The applicant had injured herself while lifting a patient and her full duties involved lifting well over five pounds. Applicant's five-pound lifting work restriction was initially respected but soon many of her work duties exceeded these limitations. See SOE of [July 13, 2023] p 5:3-6. In approximately November of 2022, applicant complained the work restrictions were not being respected, and applicant mentioned this to Dr. Wong at Concentra. The applicant had this five-pound restriction from [October 7, 2022] until May of 2023, when Dr. Barba eased the lifting restrictions to allow her to lift up to 20 pounds. Please see SOE of [July 13, 2023] p 5:17-20 and Applicant's Exhibit 14, dated [May 10, 2023]. On [June 14, 2023] Dr. Barba of Concentra released the applicant from light duty restrictions to full duty. See SOE of [July 13, 2023] p 5:21-22 and Applicant's Exhibit 15, dated [June14, 2023].
>
> The applicant worked sporadically from [November 1 2022] until her last day of going to work on [May 3, 2023]. At that time, she was still under the five-pound restriction, and it was being followed. See SOE of July 13, 2023 p 5:23-25. Applicant testified at trial that she does not know why she has not worked for the employer defendant at all since [May 3, 2023].
>
> Something important happened at work when the applicant finished the graveyard shift which she started at 11:00 p.m. on [October 31 2022] and ended at about 7:00 a.m. on [November 1, 2022]. She then had a meeting. There are disputes about who was present during this meeting and about what was said but some things are relatively clear. When the applicant walked into the meeting at 7:00 a.m. on [November 1, 2022]: 1. She was a full-time worker as a CNA at the defendant employer; 2. Ms. Munoz was at the meeting and informed the applicant she must henceforth work a 4-2 weekly schedule instead of a 5-2 weekly schedule and 3. the applicant was recategorized as a Pro Re Nata (PRN) or as-needed worker for the employer when applicant left the meeting about 15 minutes later.
>
> Pages 21 and 22 of Defendant's Exhibit F consist of a Payroll Action Form document signed by Supervisor Ms. Munoz on [November 1, 2022] saying the applicant was being made a PRN. The Payroll Action Form has three boxes to check: fulltime, part time or temporary. None of these three boxes was checked.

Applicant indicated she wanted to be a part time employee if the 4-2 schedule was to be mandatory. The applicant said that Ms. Munoz told her that part time was not available, but PRN was available as an option. There was no PRN box, but this option was hand-written onto page 21. The "Reason" at the bottom of the page was also handwritten and it said "Associate wants to go PRN effective [November 1, 2022]." It was signed on [November 1, 2022] by Ms. Munoz, applicant's supervisor. The next page was hand-written by the applicant and said, "Gloria wanted to let you know as of today Nov. 1st, 2022 I Gloria Gonzalez will be going PRN, my availability is Tuesday, Wednesday and Thursdays." The applicant identified her signature on this document.

[T]he applicant stated on SOE of [July 13, 2023] p 9:15-16 that she understood PRN to mean 30 hours per week. The applicant had worked at the facility for over seven years, and she appeared to have an understanding that there was part time work. Ms. Munoz stated at trial that there were no part time workers at the defendant employer. Please see SOE of [May 9, 2024] p 7:5-6. The WCJ finds Ms. Gonzalez to be a credible witness when she indicated she thought there would be part time work available….

What the WCJ found most disturbing about this case is that Ms. Munoz knew full well by [November 1, 2022] what plans the defendant employer had to hire more full-time employees and to seriously diminish the so-called PRN people and the use of CNAs from other companies, the so-called Registry. Please see SOE of [October 23, 2024] p 5:4-9….

(Opinion on Decision, at pp. 5-7.)