WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SALVADOR CORONA, ***Applicant,*** **vs.** **CALIFORNIA WALLS INC dba CROWN INDUSTRIAL OPERATORS; TRUCK INSURANCE EXCHANGE; FARMERS OKLAHOMA CITY,** ***Defendants.***	**Case No. ADJ13058129** **(San Francisco District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant Truck Insurance Exchange/Farmers Oklahoma City seeks reconsideration of the July 9, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a warehouse worker on February 19, 2020, sustained industrial injury to his bilateral knees and claims to have sustained industrial injury to his right shoulder and lumbar spine. The WCJ found that applicant was entitled to temporary disability indemnity from March 17, 2020 to May 10, 2020, during the time when defendant was required to shut down due to the state and local emergency orders as a result of the COVID-19 pandemic.

Defendant contends that its obligation to pay temporary disability ended when applicant returned to work with modified duties and that applicant's inability to work was caused by the COVID-19 shelter-in-place orders and not the industrial injury.

We received an answer from applicant Salvador Corona and have reviewed it. 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we affirm the Findings and Award.

Preliminarily, we address the timeliness of this decision. Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days.[1] Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act was extended by 60 days. Therefore, this decision is timely.

Here, we have the unprecedented circumstance of applicant returning to work with restrictions, which the employer accommodated for approximately one month until the COVID-19 shelter-in-place orders, which placed all the employees out of work, including applicant.[2] Applicant was left temporarily disabled with no employment for approximately two months. The issue is whether defendant owes applicant temporary disability benefits for this two-month period.

We are instructed by *McFarland Unified School District v. Workers' Comp. Appeals Bd.* (*McCurtis*) (2015) 80 Cal.Comp.Cases 199 [2015 Cal. Wrk. Comp. LEXIS 8] (writ den.), a case similar to the present case. In *McFarland*, the parties stipulated that the employee was temporarily partially disabled and the employer offered modified duties until the employee was terminated. (*Id.* at p. 200.) There was no indication that the employee was terminated for cause and the employee received a severance payment pursuant to the terms of his contract. (*Ibid.*) The WCJ awarded temporary total disability benefits from the employee's termination date and continuing. (*Ibid.*) The employer there, like here, cited *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Stroer*) (1959) 52 Cal.2d 417 and *Hardware Mut. Casualty Co. v. Workers' Comp. Appeals Bd.* (*Hargrove*) (1967) 253 Cal.App.2d 62 [32

[1] Governor Newsom's Executive Order N-68-20 may be accessed here: https://www.gov.ca.gov/wp-content/uploads/2020/06/6.5.20-EO-N-68-20.pdf. (See Evid. Code, § 452(c).)

[2] Governor Newsom's executive order may be accessed here: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf. (See Evid. Code, § 452(c).) San Mateo County's health order may be accessed here: https://www.smcgov.org/press-release/march-16-2020-health-officer%e2%80%99s-shelter-place-order-formal-order. (See Evid. Code, § 452(h).)

Cal.Comp.Cases 291] to argue that there was a separate cause, other than the industrial disability, that accounted for the employee's lost wages. (*Id.* at p. 201.) It argued that the WCJ failed to evaluate the separate causes of earnings loss, and that the employee's termination caused or contributed to his loss of earnings. (*Ibid*.)

The WCJ recommended that the employer's Petition for Reconsideration be denied. The WCJ explained:

> Clearly, applicant's inability to continue work with the school district was due to the termination. His inability to obtain other employment was not due to the termination (it was termination without cause), but rather due to inability to find work within his work restrictions.
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> Pursuant to Labor Code Section 4657, in case of temporary partial disability, the weekly loss in wages shall consist of the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn during the disability. **Due regard is to be given to the ability of the injured employee to compete in an open labor market.** (emphasis added).
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> Petitioner claims that the undersigned did not apply the correct analysis in determining the cause of applicant's loss of earnings. Petitioner argues that an injured worker is expected to be willing to earn wages "as he is able considering his injury" and that if some other ascertainable cause substantially contributes (emphasis added) to his inability to earn wages, such separate cause must be separately evaluated and only the proportion chargeable to the industrial injury allowed as compensation. (Petition for Reconsideration 5:1-25).
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> While the undersigned does not disagree with the above argument, in the instant case, there is no evidence of any other ascertainable cause substantially contributing to applicant's inability to earn wages other than the industrial injury which continues to require modified duty along with due regard given to the ability of applicant to compete in the current open labor market. (Labor Code Section 4657).
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> The case cited by petitioner, Pacific Employers Insurance Company v. IAC (Stroer) (1959) 24 California Compensation Cases 144, 146 (Sup.Crt.in Bank), actually held with specificity that where it is found that the injured employee was temporarily partially disabled but the evidence indicated that no work of a sort which he was able to do was available to him during the period of disability, a finding as to the wages lost is the only ultimate fact that need be found without the necessity for any findings as to the various factors of wage loss involved in Labor Code Section 4657.
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> In the instant case, applicant testified that he had applied for Unemployment Insurance because he was ready, willing and able to return to work based on his doctor's work restrictions of partial disability. He was not totally disabled and therefore felt that he could and wanted to continue to work within the work restrictions. Applicant also testified that

> he continues to look for work as a superintendent and has submitted many applications with but one interview. (Minutes of Hearing and Summary of Evidence 5:9-13). The undersigned found the testimony of applicant to be credible, without exaggeration and unrebutted.
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> The second case cited, Hardware Mutual Casualty Co. v. WCAB (Hargrove) (1967) 32 California Compensation Cases 291 (C/A 3rd), was based on the fact that applicant had suffered a prior back injury with another employer. Upon his return to work elsewhere thereafter, he was provided with lighter work because of his back condition before the injury which was the subject of the case. Therefore, there was clearly another "ascertainable cause" which required evaluation. In the opinion of the undersigned, the facts of the instant case are completely dissimilar.
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> Petitioner appears to be basing its argument on the fact that in the Opinion on Decision, the undersigned stated that applicant's failure to obtain subsequent employment is based in part on the limitations and need for modified work. (Opinion on Decision, page 4, 2nd paragraph, emphasis added). Petitioner ignores the second sentence addressing the open labor market in so far as whether or not a future employer would be ready, willing and able to provide modifications as were provided and could have been provided by the employer. (Minutes of Hearing and Summary of Evidence 7:1-16).
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> In the opinion of the undersigned, there is no other cause contributing to applicant's inability to earn wages to be evaluated.
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> Further, it is the opinion of the undersigned that petitioner's argument that its termination of applicant is the sole cause of his loss of earnings as opposed to his disability flies in the face of logic and of the purpose of the benefit delivery system. Applicant's loss of wages from the McFarland Unified School District is due to his termination but his subsequent inability to earn wages in the open labor market is due to his disability requiring modified work which defendant herein chose not to continue to provide.
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> (Report and Recommendation on Defendant's Petition for Reconsideration dated August 7, 2014, pp. 3-6; emphasis in original;[3] see *McCurtis, supra,* 80 Cal. Comp. Cases at pp. 201-202.)

We, the Appeals Board, denied reconsideration and adopted and incorporated the WCJ's report, and the Court of Appeal denied writ of review. (*McCurtis, supra,* 80 Cal. Comp. Cases at p. 202.)

Similarly, in *Manpower Temporary Services v. Workers' Comp. Appeals Bd.* (*Rodriguez*) (2006) 71 Cal.Comp.Cases 1614 [2006 Cal. Wrk. Comp. LEXIS 349] (writ den.), the employer did not pay temporary disability benefits after the employee was terminated allegedly for cause. (*Id.* at p. 1615.) In

[3] This document is found in Filenet in the Electronic Adjudication Management System (EAMS) under case number ADJ9000306.

recommending that the employer's petition for reconsideration be denied, the WCJ in that case explained that "at the time of Applicant's termination, Applicant was willing and available to perform modified work. . . . that Applicant's termination from employment was without prior reprimand or warning. . . . that Defendant failed to meet its burden of proving 'good cause' or 'misconduct' by Applicant that warranted his termination and disqualification from receiving T[emporary] D[isability] benefits." (*Ibid.*) We denied reconsideration in this case as well and the Court of Appeal denied writ of review. (*Id.* at p. 1616; see also *Butterball Turkey Co. v. Workers' Comp. Appeals Bd.* (1999) 65 Cal.Comp.Cases 61 [1999 Cal. Wrk. Comp. LEXIS 5159] (writ den.) [the employer has the burden to show that it does not have liability to pay temporary disability benefits due to applicant's termination for cause].)

Here, applicant's termination from employment was not for cause, or due to his own misconduct, but was due to COVID-19 shelter-in-place orders. As a result, defendant has not met its burden to show that it is released from paying applicant temporary disability benefits during the period in question.

The fact that it was impossible for defendant to offer modified duties to applicant because of the COVID-19 orders is inconsequential. In *Dennis v. State of California* (April 30, 2020) 85 Cal.Comp.Cases 389, 406 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc), we explained that an employer's inability to offer regular, modified, or alternative work does not release an employer from its obligation to provide a supplemental job displacement benefits voucher. Similarly, an employer's inability to accommodate a temporarily disabled employee's work restrictions does not release it from its obligation to pay temporary disability benefits. "Labor Code section 3202 requires the courts to view the Workers' Compensation Act from the standpoint of the injured worker, with the objective of securing the maximum benefits to which he or she is entitled." (*Ibid.* quoting *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 910 [55 Cal. Comp. Cases 196] (internal quotations omitted).) Here, applicant was temporarily disabled due to an industrial injury and there is no misconduct on the part of applicant to justify the termination of temporary disability benefits. Therefore, applicant is entitled to temporary disability benefits regardless of whether defendant is able to provide modified work. That defendant is not able to release itself from paying temporary disability benefits because of its inability to provide modified work is inconsequential.

Accordingly, we affirm the July 9, 2020 Findings and Award.

For the foregoing reasons,

IT IS ORDERED that defendant Truck Insurance Exchange/Farmers Oklahoma City's Petition for Reconsideration of the Findings and Award issued by the workers' compensation administrative law judge on July 9, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 25, 2020

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

SALVADOR CORONA
LAW OFFICES OF NADEEM MAKADA
HARTSUYKER, STRATMAN & WILLIAMS-ABREGO

LSM/bea

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

SALVADOR CORONA, *Applicant,* vs. **CALIFORNIA WALLS, INC. dba CROWN INDUSTRIAL OPERATORS; FARMERS OKLAHOMA CITY;** *Defendants.*	**Case No. ADJ13058129** **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

I.
INTRODUCTION

Applicant, Salvador Corona, born while employed on02/19/2020, as a warehouse worker, in South San Francisco, California, by California Walls, Inc. dba Crown Industrial Operators, sustained an injury arising out of and arising in the course of employment to the bilateral knees and claims to have sustained an injury arising out of and in the course of employment to the right shoulder and lumbar spine.

The Findings and Award in this case issued on 07/09/2020. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration on 07/29/2020. The Petition for Reconsideration is not legally defective. Applicant has not filed an Answer.

Petitioner contends that the evidence does not justify the findings of fact and that the findings of fact does not support the order, decision or award.

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II.

FACTS

Applicant sustained an accepted injury to the bilateral knees on 02/19/2020. The primary treating physician is Efigenia Dominguez, D.C.

Defendant has not contested the finding that the average weekly wages were $811.97 resulting in a temporary disability (TD) rate of $541.33.

Applicant was placed on modified work and did return to work.

On 03/16/2020 the employer sent all employees home due to the state and local emergency orders related to COVID-19. Applicant did not work for the employer from 03/17/2020 through 05/10/2020, and did not receive any state or federal COVID-19-related benefits.

There is no dispute that the employer did not offer modified or alternate work for the period 03/17/2020 through 05/10/2020. Applicant was available to work.

Applicant sought TD indemnity from Defendant due to the employer not offering modified work during the period 03/17/2020 through 05/10/2020. The employer and Defendant carrier denied those benefits due to COVID-19.

A trial was held on 05/20/2020. A decision issued on 07/09/2020 awarding TD. Defendant has filed a timely Petition for Reconsideration on 07/29/2020.

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III.

LEGAL ARGUMENTS

1. DEFENDANT ALLEGES THAT THE OBLIGATION TO PAY TD ENDS WHEN THE INJURED WORKER RETURNS TO WORK, IS DEEMED ABLE TO RETURN TO WORK OR WHEN THE CONDITION REACHES PERMANENT AND STATIONARY STATUS

There is no dispute that Applicant's condition was not yet permanent and stationary during the period of 03/17/2020 through 05/10/2020.

Applicant is not seeking TD for the period during which he was working.

Applicant was not deemed released without restrictions during the period 03/17/2020 through 05/10/2020. The burden is therefore on the employer to provide modified or alternate work during this period. The employer did not offer modified or alternate work during the period in question.

A. THE EMPLOYER'S OBLIGATION TO PAY TD IS TIED TO THE ACTUAL INCAPACITY TO PERFORM THE TASKS ENCOUNTERED IN ONE'S EMPLOYMENT AND THE WAGE LOSS RESULTING THEREFROM

Defendant cites *Lauher* but the *Lauher* case is not on point herein. In *Lauher* the injured worker was already permanent and stationary and therefore not entitled to TD for attending medical appointments. In this case, Mr. Corona was not yet permanent and stationary and he was not off work to attend medical appointments; he was off work because the employer did not offer modified or alternate work during the period in question. As such, reliance on *Lauher* is misplaced.

However, Defendant correctly indicates that in *Lauher* the California Supreme Court held that the employee is provided medical benefits during the healing period in order to enable them to return to productive employment and **to prevent them from being a public charge**. [emphasis added] Here, Defendant seeks to have Applicant become a public charge by applying for unemployment rather than receiving his mandated TD benefits. This is against public policy and is not to be permitted.

Defendant also relies on *Ward*. The *Ward* case is also not applicable herein, as the injured worker in *Ward* was seeking TD for attending medical appointments. Applicant is not seeking TD for medical appointments and therefore *Ward* does not address the issues herein. Defendant also cites *Skelton* for the same proposition, but again this is not a case where Applicant is seeking TD for attending medical appointment. In both *Ward* and *Skelton* the employer complied with the requirement of offering modified or alternate work, but that is not the case herein.

Defendant asserts that these case ALSO stand for the proposition that ONCE an injured worker returns to work then they can NEVER receive TD for their injury again, and that is simply not the case. If that were true, employers would only have to offer full-time employment for a day or a week and then their obligation to pay TD would cease. That is not the law in California. Offering modified or alternate work is not enough. The offer must continue until the injured worker's condition is deemed permanent and stationary or the work restrictions are lifted. Neither is true in the case of Mr. Corona.

Mr. Corona had returned to work, full-time, but was under work restrictions. The work restrictions were not lifted or lessened from 03/17/2020 through 05/10/2020. During this period, the employer failed to provide modified or alternate work. As such, Applicant is entitled to TD.

2. **WHEN AN EMPLOYEE CONTENDS THAT HE IS ENTITLED TO TD AFTER HIS PHYSICIAN DEEMS HIM FIT TO RETURN TO WORK THE BURDEN OF PROVING THAT HIS DISABILITY CONTINUES RESTS WITH THE CLAIMANT**

Defendant cites *Witt's Dairy* to support their contentions. However, *Witt's Dairy* is not applicable herein. In *Witt's Dairy* Applicant was released to return to work "without handicap" which I infer means "without restriction" and therefore there was no evidence to support a continuing award of TD and consequently the injured worker failed in his burden of proof. Here, there is evidence that Mr. Corona was released to return to modified work. There is no dispute that the employer failed to provide modified or alternate work.

Defense counsel states as page 10, line 9, that Applicant has stipulated that his wage loss is due solely to COVID-19. **THERE IS NO SUCH STIPULATION IN THE RECORD AND DEFENSE COUNSEL SHOULD BE ADMONISHED FOR SO STATING.**

Applicant asserts his wage loss is due to his industrial injury and the employer's failure to offer modified or alternate work.

3. **WHEN A CAUSE OTHER THAN THE DISABILITY ACCOUNTS FOR SOME PART OF THE WAGE LOSS SUCH SEPARATE CAUSE MUST BE SEPARATELY EVALUATED AND ONLY THE PROPORTION CHARGEABLE TO THE INDUSTRIAL INJURY IS ALLOWED AS COMPENSATION**

Defendant cites *Stroer* for the proposition that if there is no evidence that the employer has light work available, then wage loss is total even though the disability is only partial, because the entire wage loss is caused by the industrial injury. This is a California Supreme Court case. Defendant goes on to correctly state *Stroer* holds that the burden is 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.

Defendant also cites *Stuart* where an injured worker received TD when an employer failed to offer modified work after an employee was laid off. And, Defendant cites *Bedoya* where an injured worker was awarded TD when an employee was laid off following a plant closure.

Defendant attempts to distinguish these cases because they are citable but not binding.

Defendant then cites *Hargrove* where an injured worker was performing light duty until discharged for reasons unrelated to his physical condition. In *Hargrove* the Court stated that where a separate cause contributed to the employee's inability to earn wages, there is a requirement of a specific finding and a separate evaluation. In *Hargrove* the problem was one of evaluating a cause of unemployment unrelated to physical capacity.

Defendant seeks for *Hargrove* to control over all other cited cases. Defense counsel states "because *Hargrove* is a Court of Appeals case, it clearly is controlling." Defense counsel forgets the *Stroer* case which she initially cites, and must have overlooked that *Stroer* is a California Supreme Court case.

Defendant offers no guidelines, criteria or legal authority for HOW this Court is to "evaluate" the impact of COVID-19 in this case. I have no basis to believe that the *Hargrove* Court had a pandemic in mind when they considered "separate cause" contributing to an inability to work. More often, when these issues come up, we consider a non-industrial medical condition, incarceration, deportation, or perhaps termination for cause unrelated to the injury. These are fact patterns which tends to infer some subsequent act caused or influenced by the injured worker. Mr. Corona [his last name notwithstanding] did not cause or influence COVID-19, or the state and local emergency orders which were enacted.

4. TD IS NOT AN UNFETTERED ENTITLEMENT

In the Opinion on Decision this Judge discussed the concept of "fault." We have a no-fault system. Mr. Corona was injured. He was placed on modified work. He was offered modified work and did return to work under those work restrictions. The employer then ceased offering modified work for the period 03/17/2020 through 05/10/2020. The reason that there was no offer of modified work during this period was due to a shut-down of the plant due to the state and local COVID-19 orders.

While the shut-down was neither the fault of the employer or the employee, the fact remains unrebutted that Applicant was not allowed unrestricted work. He was not able to access the open labor market for other work, as his labor market was restricted. Further, there is ample evidence from record local, state and national unemployment that there really was NO open labor market during the period in question.

The employer has insured against this loss with the purchase of workers' compensation coverage. There is insurance in place to cover this loss. Applicant's other remedy, which Defendant strongly encouraged during trial, was for Applicant to seek unemployment. This would render Applicant a public charge, which the California Supreme Court has specifically stated is against public policy in workers' compensation cases. It would also transfer the liability from the carrier, who has been paid a premium to insure against this loss, to the employer. This is simply not permitted.

As between the employer, the injured worker, and the carrier, the liability is clearly on the carrier given the specific facts of this case.

Applicant is not asking to be made whole; that would be to request full wages rather than the 2/3 which he is entitled to via temporary disability. Applicant has no ability to go back in time and work from 03/17/2020 through 05/10/2020. The ability to earn wages during that period has been irretrievably lost. The employer insured against this loss. The carrier has not established that Applicant was released to full duty. There is no dispute that Applicant had work restrictions from 03/17/2020 through 05/10/2020. There is no dispute that the employer did not offer ANY work during this period. As between Applicant seeking unemployment and the carrier paying temporary disability, public policy and long-standing legal precedent requires that the carrier pay TD.

IV.

RECOMMENDATION

The Petition for Reconsideration should be denied.

DATE: 08/07/2020

ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE

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Date: August 10, 2020
Copy served by U.S. Mail on all parties as are listed on the current Official Address Record as are listed below.
By: Melissa Ledesma

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