

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

FERNANDO CAC CHUB, *Applicant*

vs.

LOLLICUP USA, INC.;
GREAT AMERICAN ALLIANCE INSURANCE COMPANY,
administered by GREAT AMERICAN STRATEGIC COMP CINCINNATI, *Defendants*

Adjudication Numbers: ADJ21050654; ADJ21050683
Van Nuys District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) served and filed on March 4, 2026, by the workers' compensation administrative law judge (WCJ). By the F&A, as relevant here, the WCJ found that applicant was temporarily partially disabled, but defendant failed to offer modified work to accommodate applicant's work restrictions; and that applicant is entitled to temporary disability benefits for the period from June 3, 2025 to and including the present, payable at the rate of \$590.66 per week.

Defendant contends that the WCJ erred by finding that applicant was entitled to temporary disability indemnity for the period following his termination on June 3, 2025 because defendant was able to accommodate applicant's work restrictions and applicant's inability to return to work was due to not having a valid work permit.

We have not received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition for Reconsideration be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons stated in the Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

DISCUSSION

I.

Former Labor Code section¹ 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.”

Here, according to Events, the case was transmitted to the Appeals Board on April 16, 2026, and 60 days from the date of transmission is June 15, 2026. This decision is issued by or on June 15, 2026, 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 April 16, 2026, and the case was

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

transmitted to the Appeals Board on April 16, 2026. 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 April 16, 2026.

II.

The Workers' Compensation Act provides for temporary and permanent disability indemnity. (Lab. Code, § 4650 et seq.) Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Unlike permanent disability, which compensates an injured employee for diminished future earning capacity or decreased ability to compete in the open labor market, temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753; see also *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].)

Temporary total disability occurs when an employee is unable to earn any income during the period of recovery. (*Herrera v. Workers' Comp. Appeals Bd. (Goleta Lemon Association)* (1969) 71 Cal.2d 254, 257.) Temporary partial disability occurs when an employee is able to earn some income during his or her recovery period but not their full wage. (*Ibid.*)

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 *General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375]:

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.]

In *Huston v. Workers' Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806], the Court of Appeal stated:

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. [Citation.]

(*Id.* at p. 860, emphasis added.)

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.

(Lab. Code, § 4658.1.)

An offer of regular, modified, or alternative work must be bona fide in order for the employer to avoid liability, even if there are circumstances that prevent the making of a bona fide offer. (*Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389, 404-406 [2020 Cal. Wrk. Comp. LEXIS 19] (Appeals Board en banc) [The Board held that “an employer must show that it made a bona fide offer of regular, modified, or alternative work in order to avoid liability for a supplemental job displacement benefit voucher.”]; see also *Berkshire Hathaway Homestate Companies v. WCAB* (2021) 86 Cal.Comp.Cases 997, 999-1000 (writ den.) [The Court of Appeal upheld the WCAB’s application of the same standard when considering an employer’s liability for temporary disability benefits.])

Temporary disability ends when (1) the employee returns to work, (2) the employee is deemed medically able to return to work, or (3) the employee's medical condition becomes permanent and stationary. (*Huston, supra*, 95 Cal.App.3d at 868; *Bethlehem Steel Company v. Industrial Accident Commission and Harvey Lemons* (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250, 252]; *Industrial Indemnity Exchange v. Industrial Accident Commission and Riccardi* (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25, 26-27].)

The issue before us is whether applicant is entitled to temporary disability benefits where applicant's employment was terminated the day after the industrial injury because his work permit expired, and applicant has not been legally permitted to work since. Here, we find the record is sufficient to affirm the WCJ's finding that applicant is entitled to temporary disability benefits from the date he stopped working, for the reasons set forth in the Report. Defendant has not met its burden of proof necessary to establish that defendant made applicant a bona fide offer of modified work to relieve itself of liability to pay applicant temporary disability benefits.²

As noted by the WCJ in the Report, the testimony of defense witness, Ms. Lai, does not establish an offer of modified work necessary to relieve defendant from the obligation to pay benefits where applicant is temporarily partially disabled. Defense witness, Ms. Lai, testified she was a human resources (HR) manager. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 22, 2025, p. 5, lines 16-18.) However, Ms. Lai did not demonstrate the requisite knowledge regarding jobs that were *actually* available and that applicant could perform within his work restrictions. Applicant's work restrictions required that applicant "must use crutches." (Joint Exh. Z3, PTP Report of Mark Harvey, P.A., June 2, 2025, p. 11, "Treatment Status"). Yet, the two "sedentary" jobs identified by Ms. Lai do not provide sufficient detail to determine if applicant could do those jobs while on crutches, and in consideration of applicant's other limitations, his education history, or his level of English proficiency. (MOH/SOE, January 22, 2025, p. 6, lines 4-6.) Additionally, Ms. Lai testified defendant would work with different departments to find work applicant can do. (MOH/SOE, January 22, 2025, p. 6, lines 6-7.) Again, that is not actually an offer of modified work nor does it establish which jobs in those departments applicant would be able to perform given his limitations. Similarly, the email from defendant regarding accommodations for applicant, which states, "Attached is Fernando's most recent work

² Although the F&A only refers to modified work, defendant bore the burden of demonstrating that modified *or* alternative work was offered. Nevertheless, here, there is no dispute that no offer was made.

status report. Please note that Lollipop would accommodate his work restrictions if still employed,” does not establish a bona fide offer of modified work because is similarly vague. (Def. Exh. B, dated June 9, 2025.)

Lastly, we consider that the WCJ found applicant’s trial testimony credible. (Opinion on Decision, p. 5, ¶ 2), and found the trial testimony of defendant’s witness, Ms. Lai, at best equivocal and ambiguous. (Report, p. 3, ¶ 5.) 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].) Moreover, following our independent review of the record, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ’s credibility determinations (*Id.*)

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the March 4, 2026 Findings of Fact and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 15, 2026

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

**FERNANDO CAC CHUB
PISEGNA ZIMMERMAN CANOGA PARK
Y AND L LAW, LLP**

DC/pm

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. **Applicant's occupation:** Warehouse Staff II
2. **Applicant's age at dates of injury:** 47 years old
3. **Dates of injury:** 6/2/25
4. **Parts of body injured:** lumbar spine, left hip, left thigh, and left knee
5. **Identity of petitioner:** Defendants Great American Alliance Insurance Company administered by Great American Strategic Comp Cincinnati
6. **Timeliness:** Yes, Findings and Award, dated 3/3/26, was served On 3/4/26 and Defendants Petition for Reconsideration is dated 3/24/26
7. **Verified:** Verified: Yes, the petition was verified
8. **Answer Filed:** No, Applicant has not filed an Answer
9. **Date of Action:** The Award was issued on 3/3/26
10. **The petitioner's contentions:** Petitioner contends the WCJ erred by: (1) purportedly requiring an "actual offer" of modified work; (2) not finding the employer witness testimony to be sufficient evidence; (3) relying on cases where employer knew about applicant's modified work status before termination; (4) finding Defendant did not prove the availability of modified work at the relevant time; and (5) awarding retro and continuing TD payments, subject to proof.

**II.
FACTS**

Applicant sustained injury arising out of and occurring in the course of employment to his lumbar spine, left hip, left thigh, and left knee on 6/2/25, while employed by Defendant. Applicant was terminated on 6/3/25, due to his failure to renew his work visa by that date. On that same date, Applicant's treating physician released him to return to work with modified duties.

Applicant contends that he is entitled to temporary disability (TD) benefits, as he has not returned to work following the industrial injury. Defendant contends that modified work within Applicant's medical restriction was available and would have been offered to Applicant but for his inability to legally remain employed.

The matter proceeded to trial on 1/22/26. Following trial, the WCJ found that Defendant failed to meet its burden of proving that modified work was actually available for Applicant during the relevant period. Accordingly, the WCJ issued a Findings and Award in favor of Applicant, awarding TD benefits from 6/2/25, and continuing, subject to proof and statutory limitations.

Defendant thereafter filed a timely Petition for Reconsideration.

III. DISCUSSION

1. Elements of "hypothetical offer" are not met:

Defendant contends that the WCJ applied an erroneous legal standard by purportedly requiring an "actual offer" of modified work. This contention lacks merit and reflects a mischaracterization of the WCJ's Opinion on Decision. The WCJ did not impose a requirement that Defendant make an actual offer of modified work where it was legally precluded from doing so.

As set forth in the Opinion on Decision, while it is generally true that an employer may be relieved of liability for temporary disability (TD) benefits upon offering modified or alternative work within the Applicant's medical restrictions, that principle is not absolute. Where the employer is legally unable to extend such an offer, the inquiry shifts to whether Defendant can establish the functional equivalent of a bona fide offer. Specifically, Defendant must demonstrate by a preponderance of the evidence that: (1) modified work within the Applicant's restrictions was actually available; and (2) Defendant would have offered such work but for Applicant's termination for cause. *Green Valley Farm Supply, Inc. v. Workers' Comp. Appeals Bd. (Rivera)* (2020) 85 Cal. Comp. Cases 617, 619-620; 2020 Cal. Wrk. Comp. LEXIS 33. *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal. Comp. Cases 61 (writ den.). Such scenario

is described in the case of *Esparza* as "a hypothetical one." *Esparza v. Barrett Bus. Servs.*, 2012 Cal. Wrk. Comp. P.D. LEXIS 21, 18.

Defendant failed to meet this burden. The evidentiary record does not establish that modified work was actually available for the Applicant at the relevant time because there are no facts substantiating what objective investigation into Applicant's work restrictions relative to available job duties was conducted by Defendant at the time of receipt of Applicant's work restrictions notice, how the Defendant could have accommodated those restrictions, and if such modified position was available for this Applicant. Absent such a showing, Defendant does not satisfy the first requirement of the "hypothetical offer" analysis (i.e., that modified work actually was available), which should be met before the analysis over whether Defendant would have offered such work but for Applicant's termination can even be discussed. Consequently, Defendant is not relieved of its obligation to provide TD benefits.

2. Testimony of employer witness is equivocal and ambiguous, and even when coupled with employer email (Defendant s Exhibit B) lacks sufficiency:

Defendant further contends that the testimony of its employer witness, Ms. Lai, on the day of Trial, must be accepted as dispositive because it was not expressly found to be not credible, and therefore constitutes substantial evidence that modified work was available and would have been offered to the Applicant. This argument is unpersuasive.

The WCJ is not required to accept testimony at face value merely because it is not explicitly rejected as untruthful. Rather, the WCJ, as the trier of fact, is charged with determining whether the evidence constitutes substantial evidence. Testimony that is equivocal, conclusory, or lacking in foundation does not meet this standard.

Here, the employer witness' testimony was, at best, equivocal and ambiguous. While the witness asserted in general terms that modified work was available and that the employer would have accommodated Applicant, those assertions were not supported by specific, concrete facts demonstrating the actual existence of such work available to the Applicant at that moment in time. As testified by Ms. Lai on the day of Trial, "If [Applicant] was employed, the employer could accommodate these work restrictions. He would do office work, such as filing, or putting air in plastic bags. These are sitting positions. HR would work with different departments to find work

that he can do [...] An office position was available at the time Applicant would have been on restrictions [...] Every employee who has had modified duties has been accommodated [...] if [Applicant] had renewed his documentation, the employer would have been able to accommodate." (See SOE, dated 1/22/26, 6:1-11). Although the witness provided general examples of tasks such as filing or performing seated office work, these statements were not supported by any analysis demonstrating how such duties comported with Applicant's specific medical restrictions. Ms. Lai testified that "office work" and "filing" was available, but Applicant utilized an interpreter at the time of trial. As such, it is unclear whether an office job or filing would require the presence of an interpreter for the Applicant to perform such duties, and if not, how the employer can establish Applicant would be able to perform "office work" and "filing" considering his restrictions. Further, Ms. Lai testified that applicant could "[put] air in plastic bags." It is unclear what tasks this job duty would even entail. On surface level, filling up plastic bags with air sounds like a warehouse position, which Applicant cannot do. Hence, the testimony was equivocal. The testimony did not establish how the employer determined that these duties were in fact available for the Applicant at the relevant time, nor did it explain the process by which Applicant's work restrictions were evaluated against those purported tasks. Defendant produced no evidence to establish any investigation of modified duty conducted concurrently with Defendant's receipt of Applicant's temporarily partially disabled ("TPD") notice. Defendant's retrospective recollection of what Defendant would have done, had Applicant not been terminated, is not substantiated by any evidence of an investigation of modified duty that was conducted concurrently upon receipt of Applicant's TPD notice.

Further, the witness failed to describe the actual nature, scope, or physical requirements of the identified duties with sufficient specificity to permit a determination that Applicant could realistically perform them. The testimony amounted to generalized statements of willingness to accommodate, which are insufficient to establish that modified work was actually available. There is no evidence of a tangible, identifiable position that existed at the relevant time, nor any showing of a structured process by which the employer assessed and matched applicant's restrictions to available duties.

Absent such foundational detail, these generalized assertions do not constitute substantial evidence that modified work was actually available within Applicant's restrictions. Thus, the WCJ

cannot determine whether the purported modified work was real, available, and within Applicant's restrictions, as opposed to a retrospective assertion offered for purposes of litigation. In other words, there is no substantial evidence demonstrating that a bona fide offer of modified work would have been made but for the legal impediment to doing so.

Additionally, Defendant's Exhibit B, which is an email from the employer to its carrier on 6/9/25, states in one-sentence that "[Defendant] would accommodate [Applicant's] work restrictions if still employed." This email alone,, and coupled with the employer witness testimony, lacks specificity on what specific accommodations would be made, how Applicant's restrictions comport to what is required in such modified work, and that such suitable modified work was even available for the Applicant during the relevant time.

Accordingly, Defendant has failed to meet its burden under the "hypothetical offer" analysis, and its reliance on the employer witness' testimony does not compel a different result.

As the employer is responsible for its injured workers, and as the injury did cause TPD, and it was not ascertained whether a true modified position would have been available, applicant is entitled to receive TD benefits.

3. Employer's obligation to evaluate whether modified work actually exists at the relevant time does not change based on the timing of employer's knowledge relative to applicants termination:

Defendant further attempts to distinguish the authorities relied upon by the WCJ by focusing on the timing of the employer's knowledge of applicant's work restrictions relative to the termination. Specifically, defendant argues that the cited cases are inapposite because, in those matters, the employers were aware of the applicant's restrictions prior to termination and therefore had the opportunity to assess and offer modified work before the employer relationship ended. Implicit in this argument is the assertion that the employer's obligation to evaluate the availability of modified work is diminished, or otherwise altered, where termination precedes such an assessment.

The WCJ disagrees. The relevant inquiry. whether modified work was actually available within Applicant's restrictions. does not change based on the timing of the employer's knowledge

or the fact of termination. because Defendant still has to make a good faith effort to investigate whether modified work was even an option when Defendant received notice of Applicant's TPD status to justify that Defendant *would have accommodated, but [for Applicant's termination]*. An employer's obligation to engage in a diligent, good faith evaluation of available work remains the same. To conclude otherwise would improperly allow Defendant to apply a different and more lenient standard solely because Applicant was deemed ineligible for continued employment, thereby giving rise to an impermissible inference of prejudice against the Applicant. The analysis must remain focused on objective evidence of available work, not on post hoc justifications shaped by the circumstances of termination.

The WCJ's analysis of cases where employers had knowledge of applicant's modified work status before termination, is material because it informs whether the employer engaged in a diligent, good-faith effort, independent of the termination, to objectively assess the applicant's restrictions and determine whether modified duty in fact existed. The same standard of diligence, irrespective of termination, should be applied to the case at hand because Defendant is not relieved of its obligation to conduct a good faith investigation into the existence of modified duty at the time Defendant receives notice of Applicant's TPD status.

Defendant relies on two panel decisions, **Venancio v. White Labs**, 2017 Cal. Wrk. Comp. P.D. Lexis 181; 2017 LX 89880, and **Flores v. Westside Accurate Courier Services** (2021) 86 CCC 1151, analogizing those cases to the present matter based on the timing of events; specifically, that Applicant resigned or was terminated and thereafter asserted a claim for TD benefits following the discovery of Applicant's inability to legally work. Defendant contends that, as in those cases, it satisfied its burden of establishing the availability of modified work notwithstanding Applicant's legal ineligibility for employment. These cases, however, are distinguishable and do not compel a different result than what the WCJ here found.

In the 2017 panel decision of *Venancio*, the trier of fact found the employer's testimony credible and sufficiently specific to establish that modified work within the Applicant's medical restrictions was actually available. The decision turned on the presence of substantial evidence supporting a concrete and identifiable modified duty position. Similarly, in 2021 noteworthy panel decision of *Flores*, the applicant had already performed the modified work at issue prior to

encountering legal barriers to continued employment. Thus, the existence and suitability of the modified work were not speculative, but instead established through applicant's actual performance of those duties. Notably, *Flores* is consistent with cases such as *Salazar and Del Taco*, where the availability of modified work was demonstrated by concrete evidence, including prior performance of the modified position. Both *Venancio* and *Flores* are not binding authority, and neither persuasively support defendant's position under the facts presented here.

Defendant's emphasis on the timing of applicant's termination relative to the employer's knowledge of work restrictions is a red herring. The critical inquiry is not when the employer became aware of the restrictions, but whether there is substantial evidence demonstrating that: (1) employer objectively and adequately evaluated applicant's restrictions; and (2) modified work was actually available within those restrictions.

In this regard, the 2020 California court of appeal case of *Green Valley* is more analogous to the present case. As in *Green Valley*, *Salazar*, *Del Taco*, and *Flores*, the sequence of events involved an iteration of employer knowledge, termination, and subsequent awareness of modified work restrictions. However, what distinguishes *Green Valley* and aligns it with the instant matter, is the insufficiency of the employer's proof. In *Green Valley*, the Defendant's evidence regarding the availability of modified work was vague and lacked the specificity necessary to constitute substantial evidence. Despite knowledge of the applicant's restrictions, both before and after termination (since there, employer received modified work status reports both before and after applicant's termination), the employer failed to clearly identify or substantiate the existence of a bona fide modified position for the applicant during the relevant time.

Likewise, in the present case, Defendant's purported showing of available modified work is ambiguous and unsupported by specific, objective evidence. In the case at hand, the employer testimony of Ms. Lai only established what the employer would have done, not what actually was done to determine the availability of modified work.

To succinctly reiterate its opinion, the Court does not require the defendant to extend an offer where it is legally precluded from doing so; rather, it requires that the defendant first conduct a diligent and objective investigation into whether suitable modified work actually existed at that moment in time (i.e., concurrently upon receipt of the TPD notice) and that such modified work

would have been available for this Applicant. before considering the impact of termination. While the Applicant's inability to be legally employed may relieve the employer of the obligation to make an offer, it does not relieve the employer of its independent obligation to investigate and establish through actual evidence, not speculation, that modified work was in fact available and would have been offered to this particular Applicant, at that moment in time (i.e., when the Defendant received notice of Applicant's TPD status and work restrictions).

As described above, Ms. Lai's testimony is ultimately conclusory and unsupported by specific facts demonstrating that any meaningful evaluation was undertaken. As such, it fails to meet the evidentiary threshold required to establish that modified work was actually available and would have been offered but for applicant's termination.

Because Defendant has failed to demonstrate what efforts were actually undertaken to assess the Applicant's restrictions and identify available modified work, it has not met its burden of establishing, by a preponderance of the evidence, that such work existed.

4. Defendant's evidence does not establish the availability of modified work for this Applicant at the relevant time:

Defendant further argues that it need not establish the availability of modified work through a stipulation, asserting that its employer witness testimony sufficiently proves that modified work was available and would have been offered, and should be afforded the same evidentiary weight as a stipulation. This contention is unpersuasive.

As an initial matter, Defendant's position presumes the existence of sufficient proof, which in this case, is an assumption not supported by the record. It is precisely because Defendant failed to establish, by substantial evidence, that modified work was actually available that the WCJ referenced cases involving stipulations and concrete factual showings. In the case of *Esparza*, the WCAB found the stipulation of the parties as to the availability of modified work to be the basis of not awarding Applicant with TD. *Esparza*, id. at 6. In the cases of *Salazar* and *Del Taco*, applicant actually worked the modified duties at issue prior to termination. *Salazar v. Kodiak Roofing & Waterproofing*, 2020 Cal. Wrk. Comp. P.D. Lexis 277, 3. *Del Taco v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.. App. 4th 1437, 1439-1440; 65 Cal. Comp. Cases 342. In these cases, the existence of modified work was not in dispute, as it was either expressly stipulated to by the

parties or demonstrated through specific evidence, such as the Applicant's actual performance of modified duties.

In contrast, the central issue in the present matter is whether modified work was available at all. Unlike the cases cited, there is no stipulation and no comparable factual showing establishing the existence of a bona fide modified position. The differentiating factor is here: Defendant provides no evidence of an objective investigation into Applicant's work restrictions and whether Defendant could have accommodated those restrictions (if so, how and would such suitable modifications be available for the Applicant). at the time Defendant received notice of Applicant's TPD status (i.e. here, on 6/9/25). Defendant only states what it would have done, not what was done to support its position that modified work was available for the Applicant at that moment in time. The authorities relied upon by the WCJ illustrate the type and quality of evidence necessary to meet Defendant's burden, evidence that is notably absent here.

Accordingly, while a stipulation is not required, Defendant must nevertheless produce evidence sufficient to meet its burden of proof by a preponderance of the evidence. The evidence presented falls short of that standard. Rather than demonstrating that it is more likely than not that modified work existed and would have been offered, Defendant's evidence remains speculative, unsupported and insufficient to tip the evidentiary scale in its favor.

5. Defendant remains liable for TD benefits:

Lastly, Defendant contends that the WCJ's award of ongoing TD benefits is improper on the basis that Applicant's unemployment is legally, rather than medically, driven. This argument is without merit.

As discussed above, Defendant has failed to meet its burden of establishing that it is relieved of its obligation to provide TD benefits. Specifically, the evidence does not demonstrate that modified work was actually available within Applicant's restrictions, nor that a bona fide offer would have been made but for the alleged legal impediment. Absent such a showing, Defendant remains liable for TD benefits.

Moreover, the WCJ's award of continuing TD is not indefinite or improper. The award expressly provides that continuing TD is payable in accordance with statutory limits and is subject to proof. Accordingly, the award is properly tailored and consistent with applicable law.

RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that the petition for reconsideration be denied.

Dated: 4/16/26

Hon. Cheryl Simbulan Beach
Workers' Compensation Judge