WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

UBALDO ESTRADA GARCIA, *Applicant*

vs.

INSOURCE EMPLOYER SOLUTIONS, INC.; SUNZ INSURANCE COMPANY, Administered By NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ19040269
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of January 7, 2026, wherein it was found that while employed on March 9, 2024 as a class A driver, applicant sustained admitted industrial injury to the lumbar spine causing compensable temporary disability beginning August 7, 2025.

Defendant contends that the WCJ erred in finding applicant entitled to temporary disability indemnity. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record, analysis and decision.

Preliminarily, we note that former Labor Code 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, Labor Code 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 Labor Code 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 February 9, 2026 and 60 days from the date of transmission is April 10, 2026. This decision is issued by or on April 10, 2026, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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 February 9, 2026, and the case was transmitted to the Appeals Board on February 9, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 9, 2026.

Turning to the merits, applicant sustained admitted industrial injury on March 9, 2024, reported the injury on March 14, 2024 after the condition did not improve after a few days of rest, and was sent for medical treatment on the day he reported the injury. Applicant was told that he could return to work with restrictions of not lifting over 30 lbs., not pushing or pulling over 30 lbs., and with a requirement that he be allowed to take a break every 3 hours to massage and apply

ice and heat to his back. However, applicant testified that rather than return to these modified duties, he used accrued vacation time to take time off work. Applicant was seen again for medical treatment on March 28, 2024, and was given a much more restrictive limit of five pounds maximum lifting and consistent pushing and pulling.

Soon after the March 28, 2024 appointment, applicant's vacation time ran out, and he returned to work for modified duty on April 1, 2024. The duty given was to pick up stacks of towels about one foot thick. Applicant estimated that the bundles were one to two pounds each. Applicant testified at trial that "at first it was okay, but by the end of the day it was bad." Applicant testified that this duty required frequent bending which exacerbated his pain. Applicant did not complain about the work on April 1st but told his supervisor the next day that he could not do the work. Applicant's supervisor told applicant to get a doctor's note and that the note would be honored.

Applicant procured a note from chiropractor Van Sieng Prom, D.C., who is not in defendant's medical provider network. Dr. Prom said that applicant was temporarily totally disabled from April 4, 2024 to May 4, 2025, and would be able to return to full duty on May 5, 2024. However, two or three days after forwarding Dr. Prom's report to his supervisor, applicant was informed that he needed to provide updated work restrictions from the primary treating physician treating him industrially. Applicant apparently did not respond to this but was seen again at the industrial medical clinic on April 12, 2024 where his work restrictions were unaltered from his prior March 28, 2024 visit. Applicant continued to not show up for work and was sent a letter on April 12, 2024 stating:

> As of 4/10/2024 you have not notified Emerald Textiles of your intent to return to work. We have modified work available, and you have failed to show up, or let us know of your inability to return to work. As of 4/16/2024, if we have not heard from you, we will assume you have abandoned your job, and will process final payment.
>
> If there is a reason for your absence, please let us know as soon as possible.

Applicant was then terminated and retrieved his final check and paperwork on April 22, 2024. According to the Employee Separation Report, applicant was terminated effective April 22, 2024 because he "failed to come in for light duty work as it stated on his doctors note. We gave him a 3 day notice to appear for work or contact us but [he] failed to follow through."

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 his 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. (*Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144].) 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. (*Id.*, at p. 422; *Transport Indem. Co. v. Ind. Acc. Com. (Cooper)* (1958) 157 Cal.App.2d 542, 546 [23 Cal.Comp.Cases 30].)

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

However, an applicant may be estopped from claiming temporary disability indemnity corresponding to periods that they have refused suitable modified work without good cause. (*Vittone v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 [writ den.].) The same rule applies when an injured worker abandons the job after suitable modified work is provided. (*Haile v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 832, 835 [writ den.].)

Here, it appears to be uncontested that applicant refused or abandoned an offer of modified work. The relevant inquiry in this matter is whether applicant's refusal or abandonment of modified work was reasonable under the circumstances of this case. Here, the WCJ did not analyze this issue.

Rather, the WCJ analyzed the issue of whether the subsequent termination was for good cause. Cases have suggested that an injured worker terminated for cause during a period in which her or she is offered modified work is not entitled to temporary disability indemnity. (*Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 [writ den.]; *Drews v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 799, 801-802 [writ den.]; *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 [writ den.].) The rationale expressed in these cases is that conduct leading to a justified termination is, in effect, tantamount to a refusal to perform modified work. However, there is no reason to consider whether conduct is tantamount to a refusal to perform modified work in instances, such as this one, whether there has been an actual refusal to perform modified work. The relevant inquiry in these lines of cases is whether the injured worker has committed misconduct on the job that in effect gives the employer no choice but to terminate them. These cases, and any inquiry into whether or not termination was justified, is not relevant to the situation where an applicant has refused an offer of modified work. (*Ramos v. Global Food Service* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 383, *7.)

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level for further development of the record and decision on the issue of temporary disability. In the further proceedings, the record should be developed through supplemental reporting from the qualified medical evaluator regarding whether applicant had any periods of temporary total disability. The qualified medical evaluator should also comment regarding whether applicant had proper work restrictions at the time he was offered modified work. The parties should be allowed to introduce any additional evidence and argument regarding the issue of whether applicant reasonably refused an offer of modified work or any other issue relevant to any outstanding issue in this case. We express no opinion on the resolution of any issue in this case.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Order of January 7, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of January 7, 2026 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 10, 2026

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

UBALDO ESTRADA GARCIA
LYFE LAW, LLP
GOLDBERG SEGALLA LLP

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