

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

SANTOS RODRIGUEZ, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION,
CALIFORNIA MEN'S COLONY, legally uninsured;
adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ14381978
San Luis Obispo 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 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, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 19, 2022

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

**SANTOS RODRIGUEZ
WEISNER ENGLISH
STATE COMPENSATION INSURANCE FUND**

PAG/cs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I INTRODUCTION

- | | | |
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| 1. | Applicant's Occupation: | Cook, Occupational Group No. 322 |
| | Applicant's Age: | Born [] (24) |
| | Date of Injury | September 24, 2020 |
| | Parts of body alleged: | Lumbar spine |
| 2. | Identity of Petitioner: | Defendant CA Dept. of Corrections &
Rehabilitation-CA Men's Colony (SCIF) |
| 3. | Verification: | The Petition was appropriately verified. |
| 4. | Timeliness: | Petition was timely filed |
| 5. | Date of Issuance of Order appealed: | 6/27/22 |
| 6. | Issue presented: | (1) Was the medical reporting of Dr. Patel
substantial evidence sufficient to
support the Findings and Award for
payment of temporary disability.

(2) Did applicant's procurement of
employment within his physical
capabilities abrogate the duty of the
employer to pay temporary
disability when employer refused to
provide employment within his
work Restrictions. |

II

FACTS, CONTENTIONS AND ISSUES

Defendant, CDCR-CMC, has caused to be filed this Petition for Reconsideration asserting that the worker's compensation judge's exceeded his authority in finding the applicant

entitled to temporary disability during the period February 10, 2021 through January 25, 2022. Such period of temporary disability was set forth in the reporting of Dr. Patel, applicant's treating physician. Defendant further asserts that the reporting of Dr. Patel was not substantial evidence on the issue of temporary disability due to an inaccurate history purportedly provided by the applicant. Defendant seeks an order vacating the finding of temporary disability. It is the posture of the WCJ that Dr. Patel's reporting was substantial evidence and that any inconsistencies were de minimis and were rectified in his deposition testimony.

As will be more particularly discussed below, defendant's assertions are untenable as Dr. Patel, through his medical reporting and deposition testimony, carefully reviewed all relevant facts and information in this case and delivered well-reasoned medical opinions which support his findings and accurately utilized the facts of the case. Any inconsistencies in his earlier reporting were rectified by his deposition testimony of February 4, 2022, and, therefore, the Petition for Reconsideration should be denied.

The facts of this case demonstrate that applicant suffered a massive disc herniation to his lumbar spine on September 26, 2021 while stirring a 120 gallon pot in his job as a cook. Applicant could not return to work and was paid IDL. His employment as a cook required heavy and substantial lifting and carrying of items in excess of 50 lbs. As previously mentioned, he was paid IDL until February 10, 2021.

On February 10, 2021, at the request of his employer, he was seen by Dr. Herron. Despite a massive herniated disc in his back, Dr. Herron found the applicant maximally medically improved with a 25 lb. weight lifting restriction. Surgery was not recommended, although applicant testified at trial that his pain was so great he would have accepted the surgery if it were offered.

At the time of trial, applicant credibly testified that he was unable to return to his former employment. He also testified that his employer refused to allow him to return to work and did not offer any form of modified work whatsoever. Based upon the reporting of their self-selected doctor, the employer terminated IDL and refused to pay temporary disability.

Desperate for income, applicant retained counsel who was able to procure authorization for treatment evaluation with Dr. Patel. A first evaluation was set for April 27, 2021, when applicant was not being paid temporary disability and was not working at any location.

In his deposition of February 4, 2022, Dr. Patel testified that he first saw the applicant on the April 27, 2022 date. Applicant had not yet returned to any form of employment and, therefore, Dr. Patel took no history of current employment. Dr. Patel found that the applicant was temporarily disabled from his job at the employer CDCR -CMC. The doctor prepared a request for authorization for two forms of injections and also for Gabapentin. Despite the massive herniation in the applicant's lower back, injections were denied by the employer as well as the Gabapentin medication which was calculated to dissipate the leg pain suffered by the applicant. Desperate for money, and not getting any better, applicant found lighter employment as a driver with Door Dash after his first examination with Dr. Patel. The Door Dash employment was much lighter than his physical duties at CDCR-CMC.

As explained in his deposition of February 4, 2022, Dr. Patel was aware throughout his reporting that applicant was denied Gabapentin medication and injections. In his reports he had stated applicant started Gabapentin. He therefore corrected his medical reports at the time of deposition and confirmed his prior opinion. The doctor was also aware that the employer refused to provide modified work to the applicant and that applicant was physically unable to return to his usual and customary job at the employer. The doctor therefore continued to find applicant temporarily disabled throughout the [remainder] of 2021 and the first month of 2022. Dr. Patel testified that despite the refusal to provide treatment and medications, applicant's condition began to improve from May 2021 through January of 2022 such that he ultimately became maximally medically improved on January 25, 2022. Clearly, applicant was not maximally medically improved on February 10, 2021 as his condition continued to improve substantially during those last months of 2021.

The medical finding by Dr. Patel, that applicant was disabled from his employment at CDCR-CMC from February 10, 2021 through January 25, 2022 is actually consistent with all other medical reporting at that time. Both Drs. Herron and Johnson found the applicant restricted from lifting greater than 25 lbs., which was required at his employment at the Men's Colony. In

the absence of an offer of employment within his work restrictions, applicant was entitled to temporary disability and continued to be so entitled until January 25, 2022, when he actually became maximally medically improved.

Defendant's assertion that procuring a lighter form of employment with no lifting requirements somehow abrogated or vitiated defendant's duty to pay temporary disability is untenable. Further, although Dr. Patel never inquired of applicant about his work activities at Door Dash or the Chevy dealer, such jobs were within the work restrictions that had been placed upon applicant and did not denigrate the findings of Dr. Patel. Working as a driver or at a sales desk was not inconsistent with the findings of Dr. Patel of disability from applicant's prior form of employment as a cook. Accordingly, applicant was entitled to temporary disability, less a credit to the employer for any monies he earned performing the lighter form of employment.

III

RECOMMENDATION

Premised upon the foregoing, the findings of Dr. Patel were substantial evidence and should be followed requiring denial of this Petition for Reconsideration.

July 25, 2022

Respectfully Submitted,
JAMES M. ZERBONI
Workers' Compensation Judge