

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

HERMELINDA OSORIO, *Applicant*

vs.

**WEST COAST BERRY FARMS, LLC.; ALASKA NATIONAL INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ16791338
Santa Barbara District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Award issued on May 22, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed by defendant on September 13, 2022, applicant sustained injury to her right hip, right leg, and right ankle arising out of and in the course of employment; (2) applicant is a seasonal worker; (3) the dates of applicant's seasonal employment were August 2022 to November 14, 2022 and January 1, 2023 to July 15, 2023; (4) applicant is entitled to temporary disability (TD) benefits payable at \$364.34 a week from January 1, 2023 to July 15, 2023, subject to the petition to terminate TD benefits and Labor Code section 4656, less attorney's fees and the credit in defendant's favor found below; (5) defendant is entitled to a credit against outstanding TD benefits for overpayment of such benefits for the period of November 15, 2022 to December 6, 2022; and (6) applicants' attorney is entitled to an attorney's fee of 15 percent of the TD benefits owed, less the credit found above, up to the date of first payment.

The WCJ issued an award in favor of applicant in accordance with these findings.

Defendant contends that the evidence fails to establish that it hired applicant for the January 1, 2023 to July 15, 2023 season.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant the Petition and, as our Decision After Reconsideration, affirm the Findings of Fact and Award, except that we will amend to find that the dates of applicant's seasonal employment were August 8, 2022 to November 14, 2022 and January 1, 2023 to July 15, 2023.

FACTUAL BACKGROUND

In the Opinion on Decision, the WCJ states:

WHEN WAS THE SEASONAL PERIOD

...
This Applicant was hired on August 8, 2022 (Exhibit 8) and was working the summer season. Based on the employer witness the Applicant's season would have gone through November 14, 2022 (MOH/SOE page 7 line 11).

At the time of hire, the Applicant was provided with new hire paperwork that contained a document entitled "West Coast Berry Farms, LLC Conventional Season", (Exhibit 8) which states

"I understand and agree that I have been hired as a seasonal agricultural employee, I agree and accept that my employment season begins on or about January 1 and will end on or about July 15 of each year. There is a three week need for planting from around September 28 through October 14 of each year. I further agree and accept that the company may change the ending and/or starting date of my seasonal employment, at its sole discretion, without prior notice to me. It will be my obligation to check with the company office to confirm all hire and anticipated season termination dates.

I acknowledge that as a seasonal employee, I have no seniority over permanent or other regular seasonal employees, not do I have a guarantee of being hired by the company in the future. Future employment is dependent on a number of factors, including production needs timing of the work, necessity of workers, and other related factors. I understand that I must comply with all company policies and procedures and failure to do so can result in immediate termination. By signing this form, you are acknowledging that you understand and agree to the terms of employment described above".

The form was also in Spanish and signed by both the Applicant and the Employer.

According to the Defense Witness the new hire paperwork was for the Oxnard location and was given to the Applicant by mistake (MOH/SOE page 9 lines 7-11). Santa Maria has 3 seasons and Oxnard has one from January 1 to July 15 (MOH/SOE page 9 lines 11-14).

The Applicant may have been given this document by mistake, but she was given this document and both the Applicant, and the employer signed. There was no testimony or evidence that any effort was made to correct the document given to the Applicant and provide her with the appropriate document for Santa Maria.

The document identifies the season as on or about January 1 to July 15 and planting for a three-week period around September 28 to October 14. However, she was working the summer season in Santa Maria which was identified as August to November 14 according to Defense testimony.

Liberal construed, the season can be identified for this Applicant as August to November 14 [of 2022] and as the Applicant was offered and accepted employment, from January 1 to July 15 [of 2023].
(Opinion on Decision, pp. 1-2.)

In the Report, the WCJ states:

The case proceeded to an Expedited Trial on May 1, 2023, on the issue of temporary disability from December 7, 2022, and continuing, whether the applicant was a seasonal worker and if so, defining the seasons, attorney fees, and TD overpayment.

The WCJ found that the applicant was s seasonal worker and defined the seasons as August 8, 2022 (mistakenly referred to as August 2022 in the Finding of Fact), through November 14, 2022, and January 1, 2023, to July 15, 2023.

...

This employer has multiple cities they work out of including, Santa Maria CA, and Oxnard CA (MOH/SOE page 7 lines 8-8 & page 9 lines 8-10). The applicant at the time of injury was working at the Santa Maria location as a strawberry picker.

...

This Applicant was hired on August 8, 2022 (Exhibit 8) and was working the summer season. Based on the employer witness the Applicant's season would have gone through November 14, 2022 (MOH/SOE page 7 line 11).

The Oxnard location has one season January 1 to July 15 (MOH/SOE page 9 lines 11-14).

...

The defense witness testified that the applicant was mistakenly given the new hire paperwork for Oxnard defining the season as January 1 to July 15 (MOH/SOE page 9 lines 7 & Exhibit 8). That was signed by the applicant and the employer.

...

Although she was given the new hire paperwork for Oxnard, she was working the summer season in Santa Maria. Applicant testified that she did not know the season she was hired for (MOH/SOE page 5 lines 5-6 and page 6 lines 1-5).

...

[A]pplicant was given a contract which defined the season as January 1 to July 15. However, the applicant was also working the summer season August 8, 2022, her date of hire which according to defense witness ended November 15, 2022, of that year.

As the applicant was working the summer season, in Santa Maria, she must have been hired for that season, but what were the other seasons[?] . . . [S]he was given a contract which stated the season was January 1 to July 15. Defendants contend the WCJ ignored the language in the contract which said that the company may change

the ending and or starting date of the seasonal employment. The court disagrees. The court did not ignore the language of the contract and it was the very language of the contract that the court relied upon to define the next season January 1 to July 15. The defense witness did not testify that the applicant seasons were changed, she testified that was the season of Oxnard, and she was mistakenly given the new hire contract for Oxnard. There was further no testimony that the employer ever tried to correct the error.

As the applicant was working the summer season, that clearly defined at least one of the seasons in which the applicant was hired to work. . . . [I]f the contract were considered then the next season would have been in January and TTD would be owed starting January 1, 2023, which was found by the court.
(Report, pp. 2-4.)

DISCUSSION

We observe that California has a long-standing policy for providing injured workers with temporary disability. (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 801 [47 Cal.Rptr.3d 878].) "The primary element of temporary disability is wage loss. (Citations omitted.)" (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2nd 399, 403 [445 P.2d 294].) "It is well settled that temporary disability is intended as a substitute for an injured worker's lost wages. (Citations omitted.) '[T]he case law makes clear that the essential purpose of temporary disability indemnity is to help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability.'" (*Ochoa, supra*, 142 Cal.App.4th at 801 (quoting from *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc)).)

In *Jimenez*, the Appeals Board determined the appropriate method of calculating the average weekly earnings of a seasonal farm worker for purposes of awarding temporary disability and vocational rehabilitation benefits. In doing so, it opined that the method of calculation should only apply to true seasonal employees "who work reasonably identifiable and defined seasons of reasonably identifiable and defined duration," and not intermittent employees "where the duration of a particular project may be limited, but the evidence establishes the employee has worked (and/or likely will work) periodically throughout the year." (*Jimenez, supra*, at p. 79, fn. 9.)

Here, defendant contends that the evidence fails to prove that it hired applicant for the January 1, 2023 to July 15, 2023 season on the grounds that it (1) mistakenly provided applicant an agreement for work at the Oxnard location when it intended to hire her at the Santa Maria location, which "does not have does not have a seasonal period of January 1 through July 15"; (2)

reserved the right to change the dates of applicant's seasonal work; and (3) did not hire applicant to work in 2023. (Petition, pp. 4:1-9, 5:3-25.)

In this regard, the record shows that defendant hired applicant on August 8, 2022 and provided her a signed agreement stating that her "season begins on or about January 1 and will end on or about July 15 of each year"—without limitation as to the year or place of work. (Opinion on Decision, pp. 1-2.) We therefore concur with the WCJ's reading of the agreement to provide for applicant to work the January 1, 2023 to July 15, 2023 season. (Report, p. 5.)

However, defendant argues that our reading of the agreement results from its mistake in providing an agreement intended for workers at the Oxnard location to applicant, who worked at the Santa Maria location. Once that mistake is established, defendant argues, the agreement's provision defining the season as the period from January 1 to July 15 should be read to apply only to workers hired at the Oxnard location; and the provision reserving defendant's right to change the dates of the season should be read to effectively foreclose applicant from working the January 1, 2023 to July 15, 2023 period.

But as stated by the WCJ in the Report, defendant did not identify or seek to correct any mistake surrounding the agreement—and did not seek rescission of the agreement. (Report, p. 4.) As the party providing the agreement, however, defendant bore the risk of any mistake in specifying the agreed upon season or place of work and the burden of proving the occurrence of a mutual mistake warranting rescission of the agreement. (See *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 283 [109 Cal. Rptr. 2d 807, 27 P.3d 702] (*Donovan*); *Casey v. Proctor* (1963) 59 Cal.2d 97 [28 Cal. Rptr. 307, 378 P.2d 579] (*Casey*); Civ. Code, § 1577.)

Hence, because defendant did not argue much less prove that the agreement was the result of mutual mistake, the agreement remains operative. And inasmuch as the agreement states that applicant is to work from January 1 to July 15 of each year, it reasonably identifies the season (and duration thereof) that applicant likely would have worked but for her injury. (*Jimenez, supra.*)

Accordingly, we discern no merit to defendant's contention that the evidence fails to establish that it hired applicant for the January 1, 2023 to July 15, 2023 season.

The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [180 Cal. Rptr. 427, 47 Cal.Comp.Cases 145, 154-155].) The term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining

whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered. (*In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729.) If an error or omission is the result of inadvertence, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. An error resulting from the inadvertent omission of matter from a decision is generally considered to be a clerical error rather than a judicial error. (*Morgan v. Board of Equalization* (1949) 89 Cal.App.2d 674, 682, 201 P.2d 859.)

Here, as stated in the Report, the WCJ found that the dates of applicant's seasonal employment were August 8, 2022 to November 14, 2022 and January 1, 2023 to July 15, 2023, but mistakenly omitted the numeral 8 in the finding thereon. (Report, p. 2.) Accordingly, we will amend the Findings of Fact and Award to correct this clerical error.

Accordingly, we will grant the Petition and, as our Decision After Reconsideration, affirm the Findings of Fact and Award, except that we will amend to find that the dates of applicant's seasonal employment were August 8, 2022 to November 14, 2022 and January 1, 2023 to July 15, 2023.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact and Award issued on May 22, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on May 22, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

* * *

3. It is found that the dates of applicant's seasonal employment were August 8, 2022 to November 14, 2022 and January 1, 2023 to July 15, 2023.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 21, 2023

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

**HERMELINDA OSORIO
LAW OFFICES OF JOSEPH LOUNSBURY
LAW OFFICES OF SCOTT A. WOOLLEY**

SRO/cs

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