

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **ROBERT FNDKYAN,**

5 *Applicant,*

6 *vs.*

7 **OPUS ONE LABS; EMPLOYERS**
8 **COMPENSATION INSURANCE COMPANY,**

9 *Defendants.*

Case No. **ADJ10079944**
(Van Nuys District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

10
11 Applicant Robert Fndkylan seeks reconsideration of the Findings of Fact and Order issued by the
12 workers' compensation administrative law judge (WCJ) on December 14, 2018. The WCJ found, in
13 pertinent part, that applicant is not entitled to a Supplemental Job Displacement Voucher (SJDV) because
14 there is no evidence that a Physician's Return-to-Work and Voucher (Physician's RTW) form was sent to
15 or received by defendant.

16 Applicant contends that a Physician's RTW form is not required in this instance because
17 applicant was terminated for cause and that even if the form is required, the Qualified Medical
18 Evaluation Report (QME) by Theodore Georgis, Jr., M.D., substantially complied with the requirement
19 of the form because it communicated to the employer applicant's work capacity and vocational status.
20 Applicant further contends that it is defendant's burden to obtain the Physician's RTW form when
21 defendant has been apprised of applicant's permanent disability status because Labor Code section
22 4658.7(b) imposes on the defendant the obligation of offering regular, modified, or alternative work as an
23 exception to providing a SJDV.

24 We did not receive an Answer from defendant. We received a Report and Recommendation on
25 Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

26 We have considered the allegations of the Petition, Answer, and the contents of the WCJ's
27 Report. Based on our review of the record and, as discussed below, we grant reconsideration and amend

1 the Findings of Fact and Order to find that applicant is entitled to the SJDV. We otherwise affirm the
2 Findings of Fact and Order.

3 I.

4 The facts in this case are not disputed. As the WCJ states,

5
6 Robert Fndkyan, born August 31, 1984, while employed during the period
7 February 1, 2004 through August 12, 2014 as a Dental Lab Technician at
8 Agoura Hills, California, by Opus One Labs, whose workers'
9 compensation insurance carrier was Employers Compensation Insurance
10 Company, sustained injury arising out of and in the course of employment
11 to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders and
12 bilateral wrists.

13 Applicant's case resolved via a Joint Compromise & Release dated
14 December 14, 2016 with Joint Order Approving Compromise & Release
15 dated December 17, 2016. Applicant's entitlement to a SJDV was not
16 resolved in the C&R or Order. Thereafter, applicant demanded a
17 supplemental job displacement voucher, which was denied by the
18 defendant. The issue was submitted to the undersigned for decision, and
19 Findings & Order issued finding that applicant was not entitled to the
20 SJDV, based upon the fact that there was no evidence that a Physician's
21 Return-To-Work and Voucher form was sent to or received by the
22 defendant.

23 (WCJ's Report, pp. 1-2.)

24 On December 4, 2015, Dr. Georgis issued a QME report finding applicant permanent and
25 stationary and providing permanent disability impairment ratings for various body parts. (Joint Exhibit
26 X, Dr. Georgis's QME Report, pp. 28-30.) Dr. Georgis further opined that applicant should have the
27 following prophylactic work preclusions:

28 . . . for the cervical, thoracic, and lumbar spines: No very heavy lifting; or
29 repeated bending or stooping.

30 For the bilateral shoulders . . . : No repetitive at or above shoulder reaching
31 or work.

32 For the bilateral wrists . . . : No repetitive forceful gripping or grasping.
33 (Joint Exhibit X, Dr. Georgis's QME Report, p. 32.)

34 The parties went to trial on November 14, 2018 on the issue of applicant's entitlement to SJDV.
35 (Minutes of Hearing/Summary of Evidence, p. 2:16-17.)

36 Applicant filed the instant Petition on January 4, 2018. (Petition.) The WCJ issued his Report on

1 January 15, 2019.

2 **II.**

3 The sole issue here is whether applicant is entitled to a SJDV when a Physician's RTW form was
4 not sent to or received by defendant. The WCJ correctly points out that Labor Code section 4658.7(b)(1)
5 specifically provides that an employer's obligation to offer regular, modified, or alternative work in lieu
6 of a SJDV is to be made no later than 60 days after receipt of a medical report "in the form created by the
7 administrative director" finding that the disability from all conditions has become permanent and
8 stationary and has caused permanent partial disability. (Lab. Code, § 4658.7(b)(1); WCJ's Report, p. 2.)
9 This form is described as a "mandatory attachment" to a medical report and that informs the employer of
10 work capacities and restrictions relevant to regular, modified, or alternative work. (Lab. Code,
11 § 4658.7(h)(2); WCJ's Report, p. 3.)

12 The WCJ also correctly points out that AD Rule 10133.31(b) specifies that this form is identified
13 as the *Physician's Return-to-Work & Voucher Report (Form DWC-AD 10133.36)*. (Cal. Code of Regs.,
14 tit. 8, § 10133.31(b).)

15 It is undisputed here that applicant is industrially permanently disabled who is entitled to a SJDV
16 unless the employer offers regular, modified, or alternative work. It is also undisputed that a Physician's
17 RTW form was not sent to or received by the employer. (Petition, p. 4:22.) Further, it is undisputed that
18 defendant received the QME report, which informed defendant that applicant was permanent and
19 stationary, was industrially permanently disabled, and that informed of applicant's work capacities and
20 restrictions as a result of his industrial injury. (Joint Exhibit X, Dr. Georgis's QME Report, pp. 28-30,
21 32, 34.)

22 We are persuaded by applicant's contention here that, in this instance, defendant had the burden
23 to obtain a Physician's RTW form when defendant was apprised of applicant's permanent disability
24 status and work preclusions in the QME report. (Petition, p. 5:8-14.) The purpose of a Physician's RTW
25 form is to inform defendant that applicant has become permanent and stationary, the industrial injury
26 caused permanent partial disability, and of applicant's work capacities and restrictions. (Lab. Code,
27 § 4658.7(b)(1), (h)(2); Cal. Code of Regs., tit. 8, § 10133.31(b).) The QME report here provided this

1 information. (Joint Exhibit X, Dr. Georgis’s QME Report, pp. 28-30, 32, 34.) To conclude otherwise
2 would place form over substance. (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 321
3 [“A general principle of statutory construction is that courts do not place form over substance where
4 doing so defeats the objective of a statute, especially a statute designed to protect a public interest.
5 (citations omitted.) It is an ‘established principle of the law that the substance and not the mere form of
6 transactions constitutes the proper test for determining their real character. If this were not true it would
7 be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the
8 public. This the law does not permit.’ (citations omitted).”]; *Pulaski v. American Trucking Associations,*
9 *Inc.* (1999) 75 Cal.App.4th 1315, 1328 [64 Cal.Comp.Cases 1231, 1236] [“Substantial compliance, as the
10 phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every
11 reasonable objective of the statute. . . . Where there is compliance as to all matters of substance technical
12 deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations
13 omitted.)” (internal quotations omitted; emphasis in original).])

14 Accordingly, for these reasons, we grant reconsideration and amend the Findings of Fact and
15 Order to find that applicant is entitled to a SJDV. We otherwise affirm the Findings of Fact and Order.

16 For the foregoing reasons,

17 **IT IS ORDERED** that applicant Robert Fndkyan’s Petition for Reconsideration of the Findings
18 of Fact and Order issued by the workers’ compensation administrative law judge on December 14, 2018
19 is **GRANTED**.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

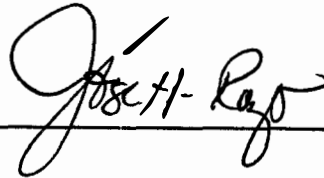
1 **IT IS FURTHER ORDERED** as the Decision After Reconsideration that the Findings of Fact
2 and Order issued by the workers' compensation administrative law judge on December 14, 2018 is
3 **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

4 FINDINGS OF FACT

5 ...

6 3. Nevertheless, applicant is entitled to a Supplemental Job Displacement
7 Voucher.

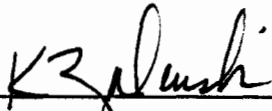
8 **WORKERS' COMPENSATION APPEALS BOARD**

9 

10
11 **JOSÉ H. RAZO**

12 **I CONCUR,**

13 **CHAIR**

14 

15 **KATHERINE ZALEWSKI**

16 

17 **MARGUERITE SWEENEY**



18
19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20
21 **FEB 28 2019**

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

24 **ROBERT FNDKYAN**
25 **LAWRENCE F. NELSON, JR. – LAW OFFICES OF MEGAN A. BRAUN**
26 **SUSAN E. PRICE – TOBIN LUCKS, LLP**
27 **EMPLOYERS COMP GLENDALE**

28 **LSM/abs**

