

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JOSE PERALTA,**

5 *Applicant,*

6 **vs.**

7 **PARTY CONCEPTS; U. S. FIRE,**
8 **Administered by CRUM & FORSTER,**

9 *Defendants.*

Case Nos. **ADJ7103397; ADJ7103415**
(Los Angeles District Office)

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

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11 By timely filed and verified petition, Jose Peralta (applicant), seeks reconsideration of the
12 Findings, Award and Order (FAO) issued by a workers' compensation administrative law judge (WCJ)
13 on December 17, 2015. As relevant to the instant Petition for Reconsideration (Petition), the FAO found
14 that applicant, while employed as a parking maintenance worker on March 5, 2007 and January 5, 2009,
15 by Party Concepts, insured for workers' compensation purposes by U.S. Fire, administered by Crum &
16 Forster (defendant), sustained injuring arising out of and occurring in the course of his employment to his
17 low back, resulting in permanent disability of 18% and need for further medical treatment. The FAO
18 found that applicant is not entitled to temporary disability indemnity during the period from December
19 18, 2009 to and including October 28, 2012, based upon Dr. Kim's opinion that absent applicant's
20 termination following the January 5, 2009 injury, applicant would have been able to continue working
21 with modified duties. Finally, the FAO disallowed the lien claim of Employment Development
22 Department (EDD) for state disability payments made to applicant beginning March 23, 2009 to and
23 including March 22, 2010 at the rate of \$271.00 per week for a total payment of \$14,092.00, based on the
24 opinion of Dr. Kim that applicant would have been able to perform modified work following the January
25 5, 2009 industrial injury, but for his termination.

26 Applicant contends that the WCJ erred when he found that applicant is not entitled to temporary
27 disability indemnity for the period beginning December 18, 2009 through October 29, 2012, and

1 disallowed EDD's lien for state disability indemnity payments it made to applicant during the period
2 from March 22, 2009 through March 23, 2010.

3 The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report),
4 recommending that the Petition be denied. We have not received an Answer to the Petition from
5 defendant.

6 We have considered the allegations of the Petition, the WCJ's Report, and we have reviewed the
7 record in this matter. For the reasons set forth in the following discussion, we will grant applicant's
8 Petition and amend the FAO to find that applicant was temporarily totally disabled from January 6, 2009
9 to September 18, 2010, and that EDD is entitled to full reimbursement of its lien claim. Otherwise, we
10 will affirm the WCJ's decision.

11 **I. RELEVANT FACTUAL SUMMARY**

12 Applicant was employed by defendant as a parking maintenance worker. On March 5, 2007, he
13 sustained an admitted injury arising out of and occurring in the course of his employment to his back.
14 This injury is the subject of case number ADJ7103415. In addition to the accepted back injury, applicant
15 also claimed industrial injury to his legs, knees, neck, upper extremities and psyche as a result of the
16 March 5, 2007 industrial event.

17 On January 5, 2009, applicant sustained a second admitted low back injury arising out of and
18 occurring in the course of his employment with defendant. He also claimed to have sustained industrial
19 injury to his knees, neck, upper extremities and psyche as a result of the January 5, 2009 incident.

20 Applicant testified that he was fired two days after the January 5, 2009 incident, and terminated
21 by defendant on January 7, 2009. (Minutes of Hearing/Summary of Evidence (MOH/SOE, May 7, 2014,
22 p. 3: 9-17.)

23 Applicant began treating with US Health Works following the January 5, 2009 admitted back
24 injury, and was given work restrictions limiting his ability to lift, pull, stoop and bend. He later treated
25 with Dr. Boyarsky, who found periods of temporary total disability. (Exhibits 35-52; Exhibit 15.)

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1 EDD paid state disability indemnity to applicant during the period from March 23, 2009 through
2 March 22, 2010, at the rate of \$271.00 per week. On March 22, 2010, EDD filed its lien claim on
3 account to the payments made to applicant.

4 Dr. Donald Kim was selected as the orthopedic Qualified Medical Evaluator (QME). He
5 examined applicant and authored several reports. (Exhibits A, B, C, D, E, F, and G.)

6 A trial was held in these cases over applicant's objection on April 2, 2014 and continued to May
7 7, 2014. (Minutes of Hearing (MOH), April 2, 2014, p. 3: 11-12.) Applicant claimed entitlement to
8 temporary disability indemnity during the period from December 18, 2009 through October 28, 2012.
9 (MOH, April 2, 2014, p. 2: 21.22.) EDD claimed entitled to reimbursement from defendant in the
10 amount of \$ 14,092.00 on account of state disability indemnity benefits paid to applicant during the
11 period from March 23, 2009 to March 22, 2010, at the weekly rate of \$271.00. (*Id.*, at p. 3: 6-7.)

12 At the trial on May 7, 2014, applicant testified that following his January 5, 2009 injury,
13 defendant sent him to a clinic. X-rays were taken, he was given medication, and instructed to return to
14 the clinic. (MOH/SOE, May 7, 2014, p. 3: 11-15.) Later he transferred his care to a clinic closer to his
15 home. (*Id.*, at p. 3: 17-18.) Applicant also testified that he has not worked since he left the job with
16 defendant approximately January 7, 2009. (*Id.*, at p. 4: 21-22.) Additionally, applicant testified that he
17 injured his back in an automobile accident on July 6, 2010 when he was rear-ended by another vehicle.
18 (*Id.*, at p. 5: 20-23.) However, applicant only treated for the motor vehicle accident for approximately
19 one and one-half months following the event. (*Id.*, at p. 6: 24-25.)

20 On July 9, 2014, the WCJ issued a Findings & Order (F&O), finding that none of applicant's
21 treating doctors discussed the import of the motor vehicle accident, whereas QME Kim reviewed records
22 from the accident and apportions some disability to the motor vehicle accident. The WCJ concludes that
23 the record in these cases lacks substantial evidence, and orders the matter off calendar for further
24 development of the record.

25 Further proceedings are held on September 16, 2015, at which time the matters are submitted for
26 decision. (MOH, September 16, 2015, p. 1: 22-24.) On December 17, 2015, the FAO now before us
27 issued.

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II. DISCUSSION

We focus our attention on applicant's claim of entitlement to temporary disability indemnity as a result of his admitted back injury on January 5, 2009. (ADJ7103397.) Temporary disability indemnity is one of the benefits to which an industrially injured employee may be entitled. (Lab. Code, § 4653.) Temporary disability is an inability to work that is reasonably expected to be cured or materially improved with medical care. Temporary disability indemnity is intended to substitute for the injured employee's lost wages in order to maintain a steady stream of income during the healing period. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631].) (emphasis added.) Temporary disability indemnity is generally paid to the injured employee until his or her medical condition becomes permanent and stationary; that is, the employee has reached maximum medical improvement or his condition has been stationary for a reasonable period of time. (*Id.*, at p. 639.) Entitlement to temporary total disability indemnity is predicated on an inability to earn any income during the healing period of recovery from an industrial injury. (*Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254 [34 Cal.Comp.Cases 382].)

Applicant was seen by Alan Nayas, M.D. on January 6, 2009, who prepared a Doctor's First Report of Occupational Illness or Injury (Exhibit 35) on that date. Dr. Nayas diagnoses a back sprain, states that his findings are consistent with applicant's report of the injury, and places applicant on modified work of limited stopping and bending, no lifting, pushing or pulling more than 15 pounds. He instructs applicant to return to the clinic for further treatment the next day. Applicant returned to the clinic the following day, and his symptoms are not significantly improved. Chiropractic treatment is initiated, medications and a lumbar support are provided, and the restriction to modified work as previously noted remains in place. (Exhibit 37, Work Status Report, January 7, 2009.) The Work Status Report dated January 9, 2009 (Exhibit 38) makes identical findings and does not alter the modified work restrictions. By January 13, 2009, applicant's condition has worsened and a new medication is dispensed. The modified work limitations remain in place. (Exhibit 39, Work Status Report, January 13, 2009.) Applicant's condition is still not significantly improved as of January 16, 2009. The modified work restrictions remain in place and additional treatment is prescribed. (Exhibit 40, Work Status

1 Report, January 16, 2009.) Slower than expected improvement is noted in the January 23, 2009 Work
2 Status Report, and work restrictions remain in place except that the weight restriction is reduced to ten
3 pounds. (Exhibit 42, Work Status Report, January 23, 2009.)

4 Applicant remains under treatment with the same modified work restrictions in place through
5 March 12, 2009 (Exhibits 44, 45, 46, 47 and 48.) There are no medical reports in the evidentiary record
6 covering the period from March 13, 2009 to December 14, 2009. Exhibit 15 is the December 18, 2009
7 Initial Primary Treating Physician Evaluation and Report of I. Boyarsky, D.O. Dr. Boyarsky examined
8 applicant on December 15, 2009, and opines that applicant is temporarily totally disabled as a result of
9 the June 5, 2009 industrial injury. Dr. Boyarsky continues to certify applicant as temporarily totally
10 disabled (Exhibits 13, 14, 51, and 52) until October 7, 2010. In his report of that date, Dr. Boyarsky
11 opines that applicant has reached maximum medical improvement from the March 5, 2007 and January
12 5, 2009 injuries and is permanent and stationary for rating purposes. (Exhibit 12, pp. 30-31.)

13 QME Kim initially examined applicant on September 18, 2010. In his report dated September 30,
14 2010 (Exhibit A, p. 9), Dr. Kim declines to offer an opinion on applicant's disability status, pending an
15 opportunity to review medical records. Applicant's medical records were subsequently made available to
16 Dr. Kim. In his report dated November 28, 2010 (Exhibit B), Dr. Kim states, "[t]he applicant is felt to
17 have reached maximal medical improvement. The applicant was placed on modified duty following his
18 injury on January 5, 2009. Absent his termination, I would think it would be reasonable that the
19 applicant would have been temporarily partially disabled with limited lifting, bending and stooping."
20 (*Id.*, at p. 16.)

21 The WCJ relied on the opinions of Dr. Kim, as set forth in Exhibit B, in finding that applicant is
22 not entitled to temporary disability from December 18, 2009 to and including October 28, 2012, as well
23 as in finding that defendant has no liability to reimburse EDD on account of state disability payments
24 made to applicant from March 23, 2009 to and including March 22, 2010. We must reject the WCJ's
25 finding because defendant failed to sustain its burden of proof that applicant was terminated for cause.
26 (*Butterball Turkey Co. v. Workers' Comp. Appeals Bd.* (1999) 65 Cal.Comp.Cases 61 (writ den.).)
27 Although applicant testified that he was terminated following the industrial injury, there is no confirming

1 evidence from defendant to that effect. Further, there is no evidence that if applicant was "terminated,"
2 the termination was for misconduct. Nor is there any evidence that applicant was actually offered
3 modified work duties by defendant following his January 5, 2009 admitted industrial back injury.
4 Exhibit 33 purports to show that on January 6, 2009, defendant placed applicant on modified duties as a
5 cashier. We observe that Exhibit 33 is not signed by either defendant or applicant, nor is it formalized in
6 any manner. Consequently, it has little probative value. It appears to us from a close reading of Dr.
7 Kims' November 28, 2010 Report that Dr. Kim simply assumed that applicant was terminated for cause.
8 However, as previously discussed defendant did not carry its burden of proof on that issue.

9 The undisputed evidence presented here, as reviewed above, demonstrates that applicant was
10 temporarily totally disabled from January 6, 2009 to September 18, 2010, the date of the initial
11 evaluation by Dr. Kim. We will amend the FAO to find and award temporary total disability during this
12 period, with reimbursement to EDD for state disability indemnity benefits provided to applicant from
13 March 23, 2009 to March 22, 2010. In all other respects, we affirm the FAO.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Reconsideration of the December 17, 2015
3 Findings, Award and Order is **GRANTED**, and as our **Decision After Reconsideration**, we amend the
4 decision as follows:

5 **FINDINGS OF FACT**

- 6 10. The admitted January 5, 2009 injury to Applicant's low back caused
7 Applicant to be temporarily totally disabled from January 6, 2009 to and
8 including September 18, 2010, for which Applicant is entitled to temporary
9 total disability indemnity at the weekly rate of \$298.07, based on the
10 stipulation of the parties as set forth in the Minutes of Hearing, dated April 2,
11 2014.
- 12 15. Employment Development Department is entitled to reimbursement from
13 defendant in the total amount of \$14,092.00, for state disability indemnity
14 benefits it paid to applicant from March 23, 2009 to March 22, 2010, as set
15 forth in Finding of Fact number 14.

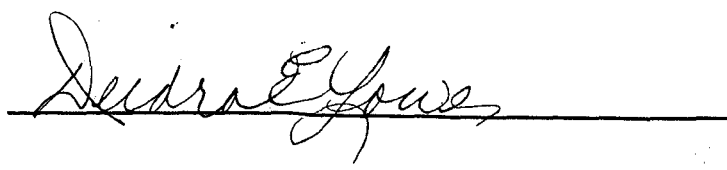
16 **AWARD**

17 **AWARD IS MADE** in favor of **JOSE PERALTA** and against **U.S. FIRE**
18 **INSURANCE** of:

- 19 (a) Temporary total disability indemnity, payable at the weekly rate of
20 \$298.07, commencing January 6, 2009, to and including September 18,
21 2010, with credit to defendant for all sums previously paid on account
22 thereof, and less payment to Employment Development Department in the
23 amount of \$14,092.00 for the period March 23, 2009 through March 22,
24 2010, in full satisfaction of its lien claim.
- 25 (b) In accordance with the rater's recommendation it is found that Applicant
26 is entitled to a permanent disability award of 18 percent, equivalent to 65.5
27 weeks of indemnity payable at the rate of \$230.00 per week, in the total
sum of \$15,065.00, payable forthwith, less credit for sums paid.
- (c) Based upon the medical report of Dr. Kim dated November 28, 2010, it is
found that Applicant is in need of further medical treatment to cure or
relieve from the effects of the injury.
- (d) Based on the WCAB Rules of Practice and Procedure, Section 10775, an
attorney fee is found to be \$2,250.00, payable forthwith.

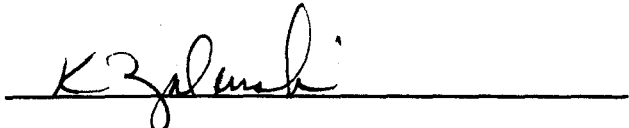
1 IT IS FURTHER ORDERED that in all other respects, the December 17, Findings, Award and
2 Orders is AFFIRMED.

4 WORKERS' COMPENSATION APPEALS BOARD

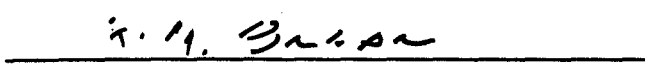
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6 _____

7 DEIDRA E. LOWE

8 I CONCUR,

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10 
11 _____

12 KATHERINE ZALEWSKI

13 
14 _____

15 FRANK M. BRASS



16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 MAR 04 2016

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

20 BRADFORD AND BARTHEL
21 CRUM & FORSTER
22 HINDEN & BRESLAVSKY
23 JOSE PERALTA



24 SVH/ara