



## **Does an Employer have Liability for Temporary Total Disability Benefits When an Injured Worker who is Undocumented Cannot Return to Modified Work Due to Their Inability to Be Legally Employed Based on Applicable Federal Law?**

In a recent Appeals Board panel decision in *Flores v. Westside Accurate Courier Services and SCIF* 2021 Cal.Wrk.Comp. P.D. LEXIS 191, the Board held in an admitted injury case that where an applicant could not legally be employed due to her undocumented status but was able to perform modified work, the employer was not liable for TTD benefits since if it rehired the applicant the employer would be in violation of applicable federal law.

This is an issue that employers and claims administrators face frequently and for good reason are often confused as to how to handle this situation. The attached case has an excellent discussion of the controlling case law including the California Supreme Court's decision in *Salas v. Sierra Chemical Co.* (2014) 59 Cal. 4<sup>th</sup> 425, 79 Cal.Comp.Cases 782 and *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); and *Peralta v. Party Concepts* (2016) 2016 Cal.Wrk.Comp. P.D. LEXIS 100 (Appeals Board panel decision).

**The Facts:** Applicant while employed as a driver suffered an admitted specific injury on 8/23/18 related to an auto accident. TTD benefits were paid for a short period of time in February of 2019. Applicant was released to modified work which the employer could not accommodate due to the fact that when applicant tried to return to work after the injury she was offered a promotion and in connection with the promotion the employer had to reverify her employment eligibility status. In doing so, the employer found out that based on applicant's immigration status she was not eligible for employment in the USA. When applicant was advised of this fact she was offered the choice of being fired or resigning. She chose to resign.

**The Issues:** The WCAB indicated that on Reconsideration the applicant failed to address the critical issue in the case that being "whether defendant is liable for temporary disability benefits after it learned that applicant could not be legally employed." At trial the issue submitted for decision was framed as follows:

Where the injury is admitted, where the medical reports state that applicant can only do modified duty and modified duty is not available so that applicant is temporarily [sic] disabled, and where the employer

discovered that the applicant is ineligible to work after the time of the date of injury and where applicant resigned after being told that she could not continue her employment, is applicant entitled to temporary disability?

**The WCAB's Decision:** The WCAB denied applicant's Petition for Reconsideration finding that the employer was not liable for TTD benefits after it learned the applicant could not be legally employed in the USA because she was undocumented.

Defendant could only offer applicant modified work if it re-hired applicant, which, based on the Supreme Court ruling in *Salas*, would be a violation of federal law. Complying with the federal law that prohibits an employer from employing an injured worker does not make the employer liable for benefits claimed by the injured worker.

The circumstances in this matter are analogous to those where we have held that an injured employee who is terminated from his or her employment for good cause is not entitled to temporary disability benefits. (*Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal.Wrk.Comp. P.D. LEXIS 100 (Appeals Board panel decision).) Here, whether applicant resigned or was "constructively discharged," defendant cannot legally employ applicant and in turn cannot be liable for benefits incurred after it learned that applicant could not be employed. Applicant's inability to work is not the result of defendant's conduct; it is because applicant cannot legally be employed. Thus defendant is not liable for, and applicant is not entitled to, temporary disability indemnity benefits for any period of disability caused by her injury, after July 25, 2019.

In similar situations, employers should proceed with caution given that the Appeals Board's decision in this case is very fact specific. In this case you have an applicant whether she resigned or was constructively discharged, who is not entitled to TTD benefits even though she was certified for modified work. The employer could not legally rehire and employ the applicant after learning she was not eligible for employment due to her being undocumented without being in express violation of federal law.