

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

TRK

JAMES JENSEN,

Case No. ADJ8068973

Applicant,

vs.

FINDINGS OF FACT

CITY OF BURBANK; Permissibly self-

Insured and self-administered,

Defendants.

The above entitled matter having been heard and regularly submitted, the Honorable Robert Sommer, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

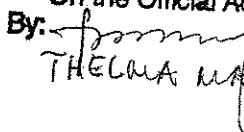
1. Applicant is not entitled to temporary disability benefits from June 13, 2015 to present and continuing.
2. There are no temporary disability benefits from which to allow an attorney's fee.

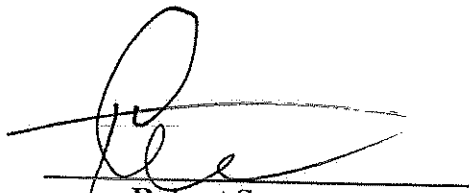
ORDER

THIS MATTER IS TAKEN OFF-CALENDAR

DATE: October 19, 2015

Served by mail on all parties as listed
On the Official Address Record.

By:  On: 10/19/15
THELMA MARTINEZ



Robert Sommer
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ8068973

JAMES JENSEN

-vs.-

CITY OF BURBANK,
Permissibly self-insured and
self-administered,

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

ROBERT SOMMER

DATE: October 19, 2015

OPINION ON DECISION

STIPULATED FACTS

James Jensen, born 10/27/79, while employed on 7/6/11, as a diesel mechanic, Occupational Group Number 470, at Burbank, California, by the City of Burbank, sustained injury arising out of and in the course of employment to his right wrist, right elbow, and claims to have sustained injury arising out of and in the course of employment to his psyche.

At the time of injury, the employer was permissibly self-insured and self-administered. At the time of injury, the employee's earnings were \$1,043.72 per week warranting indemnity rates of \$729.15 for temporary disability. The carrier employer has paid compensation as follows: temporary disability at the weekly rate of \$729.16 for the period of 12/2/14 through 6/12/15. Permanent disability was paid in the total amount of \$12,765 per the prior stipulation and award. There was a timely Petition for New and Further Disability.

Applicant is claiming temporary disability for the periods of 6/13/15 to present and continuing.

Admitted facts and issues were framed in the case and exhibits were received in evidence as set forth in the Minutes of Hearing and Summaries of Evidence dated, September 14, 2015, including but not limited to the reports of AME re-evaluation permanent and stationary status report of Steven Brouman, M.D., dated, May 9, 2012, Agreed medical examination report of Steven Brouman, M.D., dated, April 11, 2012, Primary treating physician's progress report, PR-2, from Los Angeles Orthopedic Institute, Domenick Sisto, M.D., dated, June 18, 2015, work restrictions by Domenick

Sisto, M.D., dated, June 18, 2015, Document of primary treating physician's progress report, PR-2, Los Angeles Orthopedic Institute Medical Group, Domenick Sisto, M.D., dated, December 11, 2014, Operative report from Star Point Surgery Center dated, December 2, 2014. Primary treating physician's report, PR-2, Los Angeles Orthopedic Institute, Domenick Sisto, M.D., dated, November 13, 2014, Los Angeles Orthopedic Institute initial orthopedic evaluation report, Domenick Sisto, M.D., dated, August 5, 2013, U.S. Health Works Medical Group dated April 17, 2015, City of Burbank notice regarding indemnity benefits payment termination dated, May 26, 2015, Administrative Procedure City of Burbank return to work policy dated, August 1, 2011. (*Applicant objected to Exhibit B as not having been served on the applicant by the defendant before the MSC.*) Payment listing dated, September 1, 2015, Los Angeles Orthopedic Institute work restrictions, Domenick Sisto, M.D., dated, June 18, 201

Defendant's witness, Ms. Pierce, testified that her position with the City of Burbank is a workers' compensation administrator and claims manager. She is familiar with the modified duty policy of the City of Burbank, and is involved with injured workers who have work restrictions. She stated the City encourages accommodations of work restrictions and estimates that 99% of the work restrictions are accommodated. She testified that she is familiar with the medical treatment rendered to Mr. Jensen and that he had carpal tunnel releases and elbow surgeries.

After each of his surgeries, the City accommodated his work restrictions. After settlement of Mr. Jensen's claim by stipulated award, he continued to work, but had increased problems with his wrist. Subsequently, applicant requested further surgery. Approximately one year later the city received a RFA from Dr. Sisto for additional surgery and this was authorized by Ms. Pierce.

While on temporary disability, Mr. Jensen received salary continuation, and after he resigned, he received temporary disability. Ms. Pierce found applicant a new PTP in Washington State with U.S. Health Works. In April 2015, Ms. Pierce received disability notices from U.S. Health Works, which placed Mr. Jensen on modified duties with work restrictions. She stated that that the City would have offered modified duties had Mr. Jensen not moved out of state; and it was the City's policy to cut-off temporary disability in these circumstances. After receiving the disability notices from U.S. Health Works, Ms. Pierce set an appointment with Dr. Sisto who confirmed that Mr. Jensen's status was "return to work with modified duties." Defendant continued temporary disability for two weeks when benefits were stopped.

Dr. Sisto's report stated that Mr. Jensen can return to modified work on June 19, 2015, with the following limitations or restrictions: "No lifting/carrying 20 pounds, no repetitive grasping of the right upper extremity, and no repetitive use of the right upper extremity." Ms. Pierce testified if Mr. Jensen had not resigned, the City would have accommodated the work restrictions listed in Dr. Sisto's 6/18/15 report.

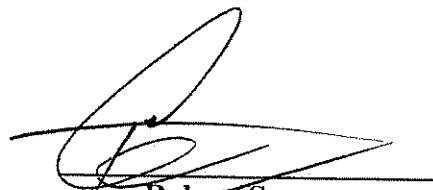
Subsequently, Ms. Pierce mailed applicant an explanation of benefits letter that stated that temporary disability payments were ending because the physician had released him to return to work with modified duty and the City of Burbank was unable to provide modified duty due to applicant residing in another state.

In the case of *Nulwala v. Cottage Hospital*, 2010 Cal. Wrk. Comp. P.D. LEXIS 374 the appeals board held that an applicant was not entitled to temporary disability when she resigned her employment because she was moving with her husband to another state. The applicant was offered modified alternative work after her injury. She was taken off work, but was released to return to work without restriction. The applicant did not return to work, and sent an email to the employer stating that she was moving with her husband and resigned her position.

Subsequently, the panel QME found applicant to be temporarily partially disabled with restrictions. Although the employer never offered modified alternative work after applicant's resignation, it asserted that it would have offered modified alternative work had the applicant not resigned. The Panel concluded that the applicant was not entitled to temporary disability benefits because absent the applicant's resignation the employer would have offered her modified work (Ibid.)

In the present case, Ms. Pierce, in her credible, un rebutted testimony stated that applicant was offered modified alternate work by the City of Burbank after each of his previous surgeries, and accommodated his work restrictions on both occasions. She went on to state that if Mr. Jensen had not resigned his position, the City would have accommodated the work restrictions listed in Dr. Sisto's 6/18/15 report. Under the facts of this case, a valid offer of modified work to an out-of-state employee, would be purely illusory. As such, applicant is not entitled to temporary disability for the periods of 6/13/15 to present and continuing.

DATE: October 19, 2015


Robert Sommer
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

10-19-2015

OFFICIAL ADDRESS RECORD

Case Number: ADJ8068973

POS – Findings of Fact; Opinion on Decision

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