

4/13

1 WORKERS' COMPENSATION APPEALS BOARD
2 STATE OF CALIFORNIA

4 BRANDON COSTA,

5 *Applicant,*

6 vs.

7 WOLSELEY INVESTMENTS, doing business
8 as FERGUSON ENTERPRISES, INC.;
9 LIBERTY MUTUAL INSURANCE COMPANY
10 for HELMSMAN MANAGEMENT SERVICES,
11 INC., on behalf of NEW HAMPSHIRE
12 INSURANCE COMPANY,

13 *Defendants.*

Case No. ADJ8298527
(Stockton District Office)

ORDER DENYING
PETITION FOR
RECONSIDERATION

14 We have considered the allegations of the Petition for Reconsideration and the contents of the
15 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
16 review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we
17 will deny reconsideration.

18 We have given the WCJ's credibility determination great weight because the WCJ had the
19 opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970)
20 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there
21 is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility
22 determination. (*Id.*)

23 / / /
24 / / /
25 / / /
26 / / /
27 / / /

1 For the foregoing reasons,

2 **IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

3
4 **WORKERS' COMPENSATION APPEALS BOARD**

5
6 

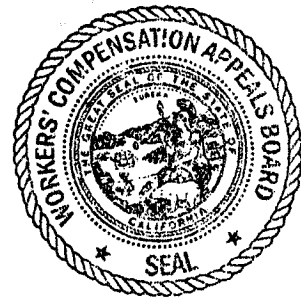
7 **MARGUERITE SWEENEY**

8
9
10 **I CONCUR,**

11 

12 **FRANK M. BRASS**

13 **CONCURRING, BUT NOT SIGNING**



14 **DEIDRA E. LOWE**

15 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

16
17 **MAR 30 2015**


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

20 **BOEHM & ASSOCIATES**
21 **BRADFORD & BARTHEL, LLP**
22 **BRANDON COSTA**
23 **DIGNITY HEALTH/ST. JOSEPH'S MEDICAL CENTER**
24 **EDD**
25 **HELMSMAN MANAGEMENT**
26 **JACKSON LEWIS**
27 **JUAN VERA**
SAN JOAQUIN COUNTY DEPT. OF CHILD SUPPORT SERVICES

Received by

APR 01 2015

sry


Bradford Barthelemy San Jose
COSTA, Brandon

1 Michael P. Burns, Esq. State Bar No.: 239863
LAW OFFICES OF
2 Bradford & Barthel, LLP
BRADFORD BARTHEL SAN JOSE
3 2841 Junction Avenue, Suite 114
San Jose, California 95134
4 Telephone: (408) 392-8202
Facsimile: (408) 392-0903

5 Attorneys for Defendants
6 Liberty Mutual Insurance Company administering for Helmsman Management
Services, Inc. on behalf of New Hampshire Insurance Company
7

8 **WORKERS' COMPENSATION APPEALS BOARD**

9 **STATE OF CALIFORNIA**

10 BRANDON COSTA,

11 Applicant,

12 vs.

13 WOLSELEY INVESTMENTS DBA
FERGUSON ENTERPRISES, INC. and
LIBERTY MUTUAL INSURANCE
14 COMPANY ADMINISTERING FOR
HELMSMAN MANAGEMENT
15 SERVICES, INC. ON BEHALF OF NEW
HAMPSHIRE INSURANCE COMPANY,

16 Defendants.

Case No. ADJ8298527

**DEFENDANT LIBERTY MUTUAL'S
ANSWER TO APPLICANT'S PETITION
FOR RECONSIDERATION**

17
18 **I. INTRODUCTION**

19 Comes now defendant, Liberty Mutual Insurance Company administering for
20 Helmsman Management Services Inc. on behalf of New Hampshire Insurance Company, by
21 and through its attorneys of record, Bradford & Barthel, LLP, with this Answer to Applicant's
22 Petition for Reconsideration dated 2/19/2015.

23 The WCJ's decision denying temporary disability is correct and should be upheld. The
24 WCJ found that applicant requested and received Family and Medical Leave Act ("FMLA")
25 leave for a non-industrial injury. He was granted several extensions of this leave after it
26 expired (even though Ferguson was not obligated to do so). Applicant failed to provide work
27 status updates, including an update that was due by 8/1/12, which were necessary to continue
28 his leave and his employment. He was terminated on 9/4/2012 for job abandonment. Because

1 Ferguson had modified work, including sedentary work, available to applicant, TD is not
2 owed, either retroactively or prospectively.

3 **II. FACTS**

4 **A. Applicant Claims an Injury, Declines Treatment, and Is Discharged By the**
5 **Primary Treating Physician With No Industrial Injury.**

6 Applicant was employed by Ferguson Enterprises, Inc. as a receiving clerk. He claims
7 that he felt a “muscle spasm” in his back in October 2011. However, he continued working
8 and confirmed on 10/28/2011: “I decline treatment at this time.” (10/28/11 “Associate’s
9 Acknowledgement Treating Physician” [Defense Ex. A admitted on 11/04/14]).

10 Applicant was evaluated by Dr. Donald Rossman, who issued a Doctor’s First Report
11 on 3/29/2012. Dr. Rossman noted that applicant initially complained of a muscle spasm
12 underneath his left upper lower back. Since that time, he noticed an increase in spasms to his
13 left gluteal and left leg. Dr. Rossman noted that “compensability of this condition is to be
14 determined”, and continued regular work status. (03/29/12 Doctor’s First Report of Dr.
15 Rossman [Defense Ex. A admitted on 11/04/14]).

16 Applicant signed Ferguson’s “Worker’s Comp Reporting and Time Off Guidelines”
17 acknowledgment on 3/29/2012. (03/29/12 Worker’s Comp Reporting and Time Off
18 Guidelines form [Defense Ex. A admitted on 11/04/14]). This outlined the basic reporting
19 requirements for leaves of absence, including notification for private physicians: “If you have
20 a private doctor, you MUST give notice of all future follow up appointments, documentation
21 and scheduled changes in a timely manner to the Safety Coordinator, HR person or Shift
22 Manager.” It also advised: “All paperwork/documentation must be turned into the Safety
23 Coordinator, HR person or Shift Manager immediately after each appointment!! NO
24 EXCEPTIONS!”

25 On 4/2/2012, Dr. Rossman evaluated applicant again. (04/02/12 Dr. Rossman PR-2
26 form [Defense Ex. A admitted on 11/04/14]). Applicant complained of pain in his left
27 underarm, left gluteal, and left leg. The physical examination revealed that the lumbar spine
28 was non-tender to palpation, no muscle spasms, and limited range of motion. Neurological

1 examination was normal, except for left leg pain. Dr. Rossman reviewed Dr. Alegre's notes,
2 which did not show industrial injury. He also noted that "patient gave history of initial pain
3 [in the] lower left scapular area and then developed low back and lower extremity pain 2
4 weeks later." Dr. Rossman further noted: "Do not consider his low back complaints industrial
5 at this time given the chronology and lack of injury history. Patient understands this
6 explanation and will pursue his evaluation with Dr. Alegre." He concluded: "Based on the
7 available information, **this does NOT appear to be a work-related condition.**" (Emphasis
8 added.)

9 **B. Applicant Requests FMLA Leave for a Non-Industrial Condition.**

10 On 4/26/2012, applicant requested a leave of absence from his Ferguson under the
11 Family and Medical Leave Act (FMLA), beginning 4/25/2012. (04/2612 Request for Leave of
12 Absence Form form signed by Ms. DeBord but not by applicant [Defense Ex. A admitted on
13 11/04/14])¹. Under the section entitled, "Reason for leave", the box "no" is checked when
14 asked whether the condition was related to a worker's compensation illness or injury.

15 **C. Ferguson Extends Applicant's Leave, But Applicant Fails to Submit**
16 **Medical Documentation Supporting His Leave.**

17 Under the FMLA, applicant was entitled to 12 weeks of unpaid leave (which,
18 consistent with the FMLA and workers' compensation law, would have run concurrently with
19 any absence under workers' compensation law). Since he began his leave on 4/25/2012, this
20 leave only lasted through July 17, 2012. Ferguson provided applicant with an Eligibility
21 Notice, Designation Notice, Fitness for Duty Certification, and Leave of Absence Policy.
22 (05/03/12 Letter Addressed to The Applicant with Six Pages of Attachments [Defense Ex. A
23 admitted on 11/04/14]).

24 Ferguson told applicant: "Please ensure that you keep your supervisor advised of any
25 changes in your work status or your leave period." (05/03/12 Letter Addressed to The
26

27 ¹ As Ms. DeBord correctly testified, there is no legal requirement that an employee sign such a request form.
28 Indeed, as is often the case where the employer is first placed on notice that an employee is eligible for leave
while the employee is already absent from the workplace, the employee typically does not sign the form.

1 Applicant with Six Pages of Attachments, p. 1, para. 3 [Defense Ex. A admitted on 11/04/14]).
2 It also advised: “The timely submission of the completed Fitness for Duty Certification upon
3 your release to work will be required in order for Ferguson to evaluate your return to work.”
4 (Id., p. 1, para. 4).

5 Applicant was also advised: “While on leave, you will be required to furnish us with
6 periodic reports of your status and intent to return to work immediately upon any change in
7 your status or every _____. (Indicate interval of periodic reports, as appropriate).” (05/03/12
8 Letter Addressed to The Applicant with Six Pages of Attachments, p. 3, para. 4 [Defense Ex.
9 A admitted on 11/04/14]).

10 Applicant provided Ferguson with a doctor’s note dated 6/7/2012, indicating that his
11 leave would last through August 1, 2012—past his maximum allowable FMLA leave.
12 Ferguson nevertheless extended applicant’s leave, and instructed applicant: “Please ensure that
13 you keep your supervisor advised of any changes in your work status or your leave period.”
14 (07/24/12 Letter to Applicant [Defense Ex. A admitted on 11/04/14]).

15 However, on August 2, 2012, applicant did not return to work. Ferguson sent applicant
16 a letter on 8/7/2012 reminding him that (1) his FMLA leave was already exhausted, (2) there
17 was no guarantee his leave would be extended and his job kept secure, and (3) that Ferguson
18 needed an updated Certification of Health Care “**no later than August 17, 2012**. Failure to
19 return the completed Certification of Health Care form to me within the required period **may**
20 **result in a loss of your leave rights.**” (08/07/12 Letter to Applicant; emphasis added
21 [Defense Ex. A admitted on 11/04/14]). The letter enclosed a Certification of Health Care.

22 Gina DeBord, Ferguson’s Human Resources Operations Manager, testified that she
23 never received a facsimile containing a medical report extending applicant’s leave, and
24 between 8/7/2012 and applicant’s termination on 9/4/2012, Ferguson did not receive the
25 requested medical records or Certification of Health Care. Ferguson was forced to move
26 forward with filling applicant’s position, effective 9/4/2012. (Minutes of Hearing and
27 Summary of Evidence, 11/04/14, p. 7:1-3; 09/04/12 Letter to Applicant [Defense Ex. A
28 admitted on 11/04/14]).

1 Applicant admitted at trial that he had no evidence supporting his claim that he faxed a
2 doctor's report to Ferguson on 8/1/2014. (Minutes of Hearing and Summary of Evidence,
3 11/04/14, p. 6:7-9). In fact, he presented no evidence that he submitted any of the required
4 documentation supporting his leave to Ferguson after June 2012.

5 If applicant had not abandoned his job by failing to provide documentation supporting
6 his leave, he would have been accommodated by Ferguson. Ms. DeBord further testified that
7 Ferguson provides modified duty to all levels of work restrictions. (Minutes of Hearing and
8 Summary of Evidence, 11/04/14, p. 7:5-6). In fact, two employees with similar work
9 restrictions to applicant were being accommodated as of the time of trial.

10 **III. ARGUMENT**

11 After receiving Dr. Rossman's report that clearly and unambiguously stated that
12 applicant did not have any industrially-related injury, neither Ferguson nor its insurer, Liberty,
13 had any obligation to pay TD benefits. Applicant then requested and accepted FMLA leave
14 for a nonindustrial injury. He accepted FMLA benefits for over four months, without ever
15 questioning his leave.

16 As the WCJ noted in his Opinion, Ferguson clearly communicated its need for medical
17 reports. This need was communicated to applicant in its letters dated 4/26/12, 5/3/12, 7/24/12,
18 and 8/7/12. It also informed applicant of his obligation to provide prompt work status reports
19 in its Notice of Eligibility and Rights and Responsibilities form. At trial, applicant admitted
20 that he received this correspondence from defendant and understood that he had to submit his
21 work status reports to Ferguson. (Minutes of Hearing and Summary of Evidence, 11/04/14, p.
22 5:52; p. 6:1).

23 Even though it was not obligated to provide any FMLA leave after 7/17/2012,
24 Ferguson nevertheless extended applicant's leave, contingent upon providing work status
25 reports. After he failed to submit a report in July 2012, Ferguson gave applicant a final
26 opportunity to provide a report by 8/1/12. While applicant testified he faxed this to defendant,
27 he offered nothing to corroborate this claim. (Minutes of Hearing and Summary of Evidence,
28 11/04/14, p. 6:7-9). Ms. DeBord testified that Ferguson did not receive any such report, via

1 fax or otherwise. (Id. at p. 6:50-52—p. 7:1-3). The WCJ, in weighing credibility, correctly
2 found Ms. DeBord credible. This credibility is amplified in light of applicant’s failure to
3 produce any confirmation that he faxed his reports as required.

4 Applicant is incorrect in his criticism of Ferguson. The employer granted applicant’s
5 request for nonindustrial leave, and even extended his leave while simultaneously keeping his
6 job secure for four months. Ferguson attempted to obtain work status reports (08/07/12 Letter
7 to Applicant; emphasis added [Defense Ex. A admitted on 11/04/14]) but, having received
8 none, was forced to move forward with terminating applicant.

9 Applicant is also incorrect in arguing that the FMLA somehow “supplanted”
10 Applicant’s rights under the Workers’ Compensation law. The FMLA is not somehow
11 contrary to Workers’ Compensation law. Rather, the FMLA’s purpose is to provide a benefit
12 to employees by permitting them to take time off from work for medical and other qualifying
13 reasons while protecting their ability to return to work. 29 C.F.R., § 825.101. Where an
14 employee needs time off work for an industrial injury, the employee will be entitled to the
15 protections of both laws concurrently. 29 C.F.R., § 825.702(d)(2) (“An employee may be on a
16 workers’ compensation absence due to an on-the-job injury or illness which also qualifies as a
17 serious health condition under FMLA. The workers’ compensation absence and FMLA leave
18 may run concurrently”); see also 29 C.F.R., § 825.701(a) (“If leave qualifies for FMLA
19 leave and leave under State law, the leave used counts against the employee’s entitlement
20 under both laws. . . .”). Moreover, Applicant was not terminated because of his FMLA
21 leave—he was terminated because he failed to communicate any intent to return to work.

22 Applicant is also incorrect in arguing that his success at the Unemployment Insurance
23 Appeals Board somehow effects this Board’s decision. The standard at the UIAB is whether
24 applicant should be denied unemployment benefits because of misconduct (Unemployment
25 Ins. Code, § 1256) or willful neglect (22 CCR § 1256-38(a)). It is important to note that the
26 UIAB did not find that applicant had not abandoned his job; rather, that decision turned on
27 whether job abandonment, in and of itself, is “misconduct” sufficient to justify a denial of
28 unemployment benefits.

1 Unlike unemployment, "temporary disability is intended as a substitute for lost wages
2 during a period of transitory incapacity to work." (Signature Fruit Co. v. Workers' Comp.
3 Appeals Bd. (2006) 142 Cal.App.4th 790, 795). "[I]t would be illogical to award an employee
4 temporary disability as a wage replacement where it is undisputed that there otherwise would
5 not be a wage to replace." (Id. at p. 802).

6 A similar denial of TD was upheld in Haile v. Workers' Comp. Appeals Bd., 77
7 Cal.Comp.Cases 832 (2012, Writ Denied). There, applicant, who was working modified duty,
8 requested a non-industrial leave of absence. The employer, who had been accommodating her
9 work restrictions, denied the leave request, but applicant elected to take a leave of absence
10 anyway. Applicant was terminated for job abandonment, and the employer testified that they
11 would have continued to accommodate applicant, had she not abandoned her job.

12 The WCJ denied TD, and the WCAB adopted the judge's report and recommendation.
13 In doing so, it rejected applicant's argument that a termination must be for "willful
14 misconduct" in order to bar TD. The WCJ and WCAB held that this would be an "absurd"
15 result "and would force the WCAB to improperly interfere with legitimate exercise of
16 managerial discretion." (Haile v. Workers' Comp. Appeals Bd., 77 Cal.Comp.Cases 835
17 (2012, Writ Denied)).

18 Such is the case here. Ferguson granted applicant an unpaid leave of absence after Dr.
19 Rossman concluded that his complaints were non-industrial. The decision to terminate
20 applicant after he failed to furnish work status reports, coupled with Ferguson's policy of
21 accommodating its employees, defeats applicant's claim for TD.

22 **IV. CONCLUSION**

23 Applicant was granted an unpaid leave of absence after Dr. Rossman concluded that his
24 complaints were non-industrial. Ferguson accommodates work restrictions for industrial
25 injuries, but applicant ceased employment after he was terminated. Where an employee's
26 physician concludes that an alleged injury is nonindustrial, the employer, in granting FMLA
27 leave, is well within its rights to terminate an employee who fails to provide requested work
28


1 status reports. Moreover, the clear and un rebutted facts at trial show that Ferguson
2 accommodates employees with work restrictions, including sedentary restrictions..

3 The Order of the WCJ should not be disturbed or overturned.

4 Dated: March 5, 2015

Respectfully submitted,

5 **Bradford & Barthel, LLP**

6
7 By: 
8 MICHAEL P. BURNS
Attorneys for Defendants

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION


STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I have read the foregoing DEFENDANT LIBERTY MUTUAL'S ANSWER TO APPLICANT'S PETITION FOR RECONSIDERATION and know its contents.

I am an attorney for a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2015, at San Jose, California.



MICHAEL P. BURNS
Attorneys for Defendants

1 BRADFORD BARTHEL SAN JOSE
Asheley Alexander
2 EAMS Firm Manager
aalexander@bradfordbarthel.com
3 (559) 442-3602

4
5 **PROOF OF SERVICE**
(C.C.P Section 1013a, 2015.5)

6 STATE OF CALIFORNIA)
7) ss.

8 COUNTY OF SANTA CLARA)

9 **RE: BRANDON COSTA VS. FERGUSON ENTERPRISES**
10 **Claim No.: WC608-A25046**
Our File No.: 0178.058079

11 I, Lynn Baker, am a citizen of the United States and am employed in the county of the
12 aforesaid; I am over the age of 18 years and not a party to the within action; my business
13 address is 2841 Junction Avenue, Suite 114, San Jose, California 95134.

14 On March 5, 2015, I served the within document(s) described as:

15 **DEFENDANT LIBERTY MUTUAL'S ANSWER TO APPLICANT'S PETITION FOR**
16 **RECONSIDERATION**

17 on the interested parties in this action as stated on the attached mailing list.

- 18 (ORIGINAL) Filed Electronically via EAMS.
- 19 (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope
20 addressed as set forth on the attached mailing list. I placed each such envelope for
21 collection and mailing following ordinary business practices. I am readily familiar
22 with this Firm's practice for collection and processing of correspondence for mailing.
23 Under that practice, the correspondence would be deposited with the United States
Postal Service on that same day, with postage thereon fully prepaid at San Jose,
California, in the ordinary course of business. I am aware that on motion of the party
served, service is presumed invalid if postal cancellation date or postage meter date is
more than one day after date of deposit for mailing in affidavit.

24 I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

25 Executed on March 5, 2015, at San Jose, California.

26 Lynn Baker
27 (Type or print name) (Signature)

SERVICE LIST

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Liberty Mutual Insurance Company
Post Office Box 989000
West Sacramento, California 95798

Brandon Costa
24 Hollywood Avenue
Tracy, California 95376

State of California
Employment Development Department
Post Office Box 201006
Stockton, California 95201

San Joaquin County Department of Child
Services
Post Office Box 50
Stockton, California 95201

Boehm & Associates
1321 Harbor Bay Parkway, Suite 250
Alameda, California 94502

Law Office of Juan J. Vera
5637 N. Pershing Avenue, Suite A6
Stockton, California 95207

Wolseley Investments dba Ferguson
Enterprises, Inc.
Attn: HR/Human Resources – Personal &
Confidential
805 Cavanaugh Avenue
Stockton, California 95203

Dignity Health St. Joseph's Medical Center
Post Office Box 213008
Stockton, California 95213

Jackson Lewis Sacramento
801 K Street, Suite 2300
Sacramento, California 95814

Helmsman Management Rocklin
Post Office Box 779008
Rocklin, California 95677