



CUBEDO V. LEEMAR ENTERPRISES, INC.; BENCHMARK INSURANCE
(ADJ7014822) (Panel Decision August 2011)

Provided by William E. Davis from the Santa Rosa Office

The applicant sustained an admitted industrial injury to her spine while employed as a cashier. The applicant changed treating physicians several times in the six months following her date of injury. Her new treating physician in a January 14, 2010 Doctor's First Report of Occupational Injury or Illness gave work restrictions and noted that the applicant would be considered temporarily totally disabled if the employer was unable to accommodate the restrictions

On January 14, 2010, defendant issued a Notice of Offer of Modified or Alternative Work (DWC-AD Form 10133.53) which the applicant accepted. The applicant testified in a February 8, 2010 deposition that she was an "undocumented worker". On March 1, 2010, defendant issued a Notice Regarding Light Duty that discussed the work restrictions provided by the primary treating physician and the January 14, 2010 return to work offer. The notice also contained the following language:

"Please note that this offer of modified duty is contingent upon your completion of a new I-9, and your employer's verification of that document."

At trial, the employer's President testified that the applicant was provided with modified duty until the claims adjuster contacted him to inform him that the applicant had testified in her deposition that she was an "undocumented worker". The applicant testified at trial that "[s]he is not a lawful resident of the United States" and that she wanted to go back to work but that the employer "would not offer her any work because they told her that she did not have documentation she was a legal resident". The WCJ found that the Applicant was entitled to temporary disability.

The Board overruled the WCJ and remanded the matter for further development of the record which was unclear as to the Applicant's disability status and whether the defendant made proper offers of modified duty.

The Board found that the TTD Award was not consistent with the Court of Appeals decision in *Del Taco v. WCAB* (2000) 79 Cal. App. 4th 1437, 65 CCC 342. In that case, an applicant was not entitled to vocational rehabilitation benefits where the applicant's immigration status is the sole reason for being unable to return to work. In the *Cubedo* case, the Board ruled that the applicant was not entitled to TTD because her undocumented status prevented her employer from offering her modified work. However, the Board also found that the applicant would be entitled to TTD if she could show that she was temporarily disabled because of medical reasons and noted that this must be supported by substantial medical evidence.

“With regard to temporary partial disability and pursuant to the holding in *Del Taco*, we believe that if a defendant made a legitimate offer of modified work that the applicant could not accept solely because of her residency status, defendant is not alternatively liable for temporary total disability benefits”.

NOTE: When the case returned to the trial level, the parties agreed to a compromise and release with the applicant receiving no TTD for the period of time she was unable to work due to her immigration status.