



Significant Decision

No. 20-01

April 14, 2020

ANTHONY DENNIS V. DEPARTMENT OF CORRECTIONS / SCIF

**WCAB EN BANC DECISION
(ADJ 9346293)**

FILED: APRIL 13, 2020

(1) Title 8 California Code of Regulations section 10133.54 is invalid because the regulation usurps the Board's authority to adjudicate disputes over vouchers for supplemental job displacement benefits; (2) to avoid the obligation to provide the SJDB voucher, an employer must make a *bona fide* offer of regular, modified, or alternative work.

Significance: Exerting its power to invalidate a regulation enacted by the Administrative Director, the WCAB has reaffirmed the requirement that an offer of work must be legitimate in order for the employer to avoid its obligation to provide the SJDB voucher to a permanently disabled injured worker.

Facts: Mr. Dennis sustained injury in 2013 while working as an inmate laborer for the California Department of Corrections and Rehabilitation. Following his release from prison, he was medically released to work with residual permanent disability. The Department of Corrections sent him a Notice of Offer of Regular, Modified, or Alternative Work that stated, "subject to applicant verifying they are lawfully qualified to accept employment as an inmate laborer, you have voluntarily terminated your employment due to your release from prison and are no longer available for employment." Mr. Dennis disputed the validity of the offer to the AD by filing a Request for Dispute Resolution in accordance with 8 CCR §10133.54. The AD failed to issue a determination, resulting in the request being deemed denied by operation of law. Mr. Dennis appealed the AD's decision to the WCAB, but the WCJ denied the appeal because it was filed well beyond the 20-day deadline set forth in 8 CCR §10133.54(g).

Holding: In an en banc decision, the WCAB held that 8 CCR §10133.54 is invalid because it exceeds the statutory authority granting the AD power to adopt rules for proper administration of the SJDB program. In this case, the employer had failed to make a *bona fide* offer of employment and thus could not avoid the obligation to provide a voucher.

Discussion: The 4/12/2020 en banc decision is actually the third in a series of Appeals Board decisions on this issue in this case. The result has been unwavering, despite the intervening defense request for reconsideration and the submission of formal briefing from the Administrative Director. The en banc WCAB decision (*notably absent from the unanimous decision was Commissioner Juan Pedro Gaffney, described as "unavailable"*) falls into two distinct parts: (1) WCAB jurisdictional authority, and (2) the requirement of a good faith offer of work.

WCAB Authority: The WCAB has the power to invalidate a regulation, including a regulation promulgated by the AD. With only a few exceptions (*e.g.*, UR and IMR), adjudicatory power is vested in the WCAB and not the AD. The regulation vesting appellate review of SJDB voucher disputes is an invalid assertion of jurisdiction that exceeded the statutory authority granted to the AD in the Labor Code (specifically §4658.5(c) and §4658.7(h)).

In reviewing the statutory language, the Appeals Board determined that there was no legislative grant of authority to the AD to develop a decision-making process, particularly not one with the AD as the decision-maker. Because the AD had taken over an adjudicatory power normally reserved to the Appeals Board, 8 CCR §10133.54 is invalid in its entirety.

SJDB Voucher: To avoid the obligation to provide an SJDB voucher, an employer must offer regular, modified, or alternative work -- regardless of the employer's ability to make such an offer, and regardless of an employee's ability to accept. In order for an offer of employment to be *bona fide*, it must be genuine and made in good faith at the time conveyed. In simplistic terms, if it's not a "real" offer, then it doesn't count. Even if it is impossible for the employer to make an offer, the voucher is an obligation unless an exception is proven for an offer of regular, modified, or alternate work.

On the facts of this case, the Appeals Board rejected the defense argument that an employer is released from making a bona fide return to work offer and, at the same time, released from offering an SJDB voucher when events unrelated to the injury, *i.e.*, applicant's release from prison, prevent the applicant from accepting a return to work offer. "In this case, defendant could not and did not make a bona fide return to work offer. Thus, defendant is not exempt from providing a SJDB voucher."

From a practical standpoint, this en banc decision likely means that the procedural path for an injured worker to appeal the denial of an SJDB voucher will be directly to the WCAB at the trial level, by filing a Declaration of Readiness to Proceed.

ESL/