U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CORY LOBATO and U.S. POSTAL SERVICE,
POST OFFICE, Reno, NV

*Docket No. 01-2085; Submitted on the Record;*
*Issued September 16, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant is entitled to continuation of pay for any lost time from work after the July 5, 2000 employment injury.

The Office of Workers' Compensation Programs accepted appellant's claim for middle and lower back muscle spasms resulting from a traumatic injury which occurred on July 5, 2000. Appellant missed work on July 7 and 8, 2000 and from July 10 through 18, 2000. He reported to work on July 19, 2000 and on July 20, 2000 was placed on an "emergency off duty status without pay" due to misconduct consisting of attempting to obtain financial gains to which he was not entitled. Appellant's treating physician, Dr. Paul W. Rork, a Board-certified family practitioner, released appellant to full-time, unrestricted work on July 25, 2000.

In a duty status report dated July 7, 2000, Dr. Rebecca J. Rezeai, a Board-certified family practitioner, stated that appellant could return to work with sitting, standing, lifting and kneeling restrictions.

In a duty status report dated July 10, 2000, Dr. Rork indicated that appellant was totally disabled for two weeks and should return to work on July 24, 2000.

In an investigative memorandum dated July 20, 2000, the postal inspector, Donald Obritsch, stated that, on July 16, 2000, surveillance was conducted on appellant, and he was observed driving his pickup truck and leaning, twisting, bending, squatting and reaching while he was at his residence. Mr. Obritsch stated that during an interview he had with appellant and Analyst Fulsom on July 19, 2000, appellant sat, stood, crossed his legs, squatted, leaned and twisted to the right to consult with his union steward with no apparent difficulty.

In a memorandum of the July 19, 2000 interview between Dr. Rork and Mr. Obritsch dated July 20, 2000, Mr. Obritsch stated that Dr. Rork watched the videotape which showed appellant violating his medical restrictions and Dr. Rork agreed that the videotape showed that appellant's activities were inconsistent with his medical restrictions.

In a memorandum dated August 14, 2000, the employing establishment's injury compensation specialist, Cindy Munsterman, stated that on July 7, 2000 Dr. Rezeai released appellant to limited duty, and on July 17, 2000, Dr. Rork stated that appellant could work six hours a day effective July 10, 2000. She stated that a written limited-duty job offer was faxed to Dr. Rork on July 17, 2000, and Dr. Rork approved the job offer and returned his response by facsimile on July 18, 2000.

By letter dated October 2, 2000, the Office informed appellant that he was medically certified as temporarily totally disabled from July 10 through July 24, 2000 and was entitled to continuation of pay for that period. The Office stated that appellant was released to full-time unrestricted work effective July 25, 2000 and therefore was not entitled to benefits as of that date.

By decision dated October 4, 2000, the Office denied the claim, stating that appellant was not entitled to continuation of pay because he was capable of working at the employing establishment as of July 6, 2000.

By letter dated October 17, 2000, appellant requested an oral hearing before an Office hearing representative which was held on April 24, 2001. Appellant's legal representative stated that the videotape of surveillance by the employing establishment on July 16, 2000 did not show that appellant violated his restrictions. Appellant stated that, when Dr. Rork took him off temporary total disability, he was prescribed medication and told to drive "within a safe distance." Appellant denied that the videotape showed him violating his restrictions. Appellant stated that he drove an ATV from the front of his yard to the side of his yard so a hose could reach it.

Appellant testified that, from July 10 to 9, 2000, he suffered pain and discomfort, had stiffness and tenderness in his lower back early in the morning, and it would be "knotted and harder to move around." He stated that going through physical therapy made him feel more tender.

Appellant's legal representative stated that the Office contacted Dr. Rork on July 14, asking him to review the limited-duty job offer, that appellant was placed on total disability on July 10, 2000, that Dr. Rork modified the temporary total disability status to a six-hour workday without examining appellant, and that neither Dr. Rork nor the Office informed appellant of the change in his disability status. Appellant stated that his supervisor, Pat Chavez, called him at home on July 18, telling him to come in the next day, which he did, and the work he performed that day was modified. Appellant said he underwent an investigative interview on July 19 and then the postmaster, Doug Hval, asked him to go home, although appellant did not know why. Appellant stated that the next day he was "called in and placed on emergency off duty status." Appellant stated that he did not recall speaking to Ms. Munsterman about Dr. Rork releasing him to a six-hour day. Appellant stated that he did not know that he was released to return to work until Ms. Chavez told him on July 18, 2000 and appellant wondered how Dr. Rork could release him without seeing him. Appellant also described his accident.

Appellant submitted additional evidence. In a report dated July 10, 2000, Dr. Rork diagnosed mid to low back pain and no evidence of radiculopathy. He noted that the x-rays

showed degenerative changes in the thoracic spine. Dr. Rork prescribed physical therapy, two weeks off from work and medication.

By letter dated July 13, 2000, the employing establishment informed Dr. Rork that they could accommodate virtually any restriction with the exception of total bedrest. Dr. Rork signed the form on July 17, 2000 and indicated that appellant could answer telephones, complete various types of paperwork and perform data input.

In a report dated July 31, 2000, Dr. Rork stated that he first treated appellant on July 10, 2000 and found that he had muscle stiffness and tenderness in the middle to lower thoracic and lumbar area and that x-rays showed some degenerative changes in the lower thoracic area. He stated that he prescribed physical therapy and asked appellant to abstain from work. Dr. Rork stated that he found that the employing establishment had a limited-work program and appellant "was cleared" for light duty. He stated that the employing establishment investigators informed that they felt appellant was participating in activities beyond what he had prescribed, and he agreed that some of appellant's activities, particularly his stooping and standing and free range of motion "did appear to be beyond what [he] believed [appellant] was capable of doing." Dr. Rork stated, however, that he did not prescribe bedrest and that, with physical therapy treatment three times a week, appellant was free to drive and go about his normal routine of daily living. He stated that the medication he prescribed could "potentially" compromise appellant's ability to operate large and heavy equipment and appellant's driving should be kept to a minimum. Dr. Rork stated that the medication had "masked the normal pain sensation, giving him a somewhat greater range of motion." He stated that it was appropriate that appellant was currently performing full-time duty.

By decision dated June 19, 2001 and finalized on June 22, 2001, the Office hearing representative affirmed the Office's October 4, 2000 decision.

The Board finds that the Office erroneously determined that appellant was not entitled to continuation of pay.

Section 20 C.F.R. § 10.205 provides in pertinent part that to be eligible for continuation of pay, a person must: "(1) [h]ave a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) [f]ile Form CA-1 within 30 days of the date of the injury…; and (3) [b]egin losing time from work due to the traumatic injury within 45 days of the injury."[1] Section 20 C.F.R. § 10.222 provides that an employer may terminate continuation of pay which has already begun when "[m]edical evidence from the treating physician shows that the employee is not totally disabled, and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician."[2] 20. C.F.R. § 10.507 provides that the employer must make any job offer in writing, and a verbal job offer is valid only if the employer provides the job offer to the employee in writing within two business days of the verbal job offer.[3] The offer must include a

[1] 20 C.F.R. § 10.205 (a)(1)-(3).

[2] 20 C.F.R. § 10.222(a)(3); *see Kenneth R. Ketter*, 50 ECAB 518 (1999).

[3] 20 C.F.R. § 10.507(c).

description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer.[4]

In this case, the record evidence establishes that appellant missed work on July 7 and 8, and from July 10 through July 18, 2000. He reported to work on July 19, 2000, and on July 20, 2000 was placed on emergency off duty status without pay. Appellant's treating physician, Dr. Rork prescribed two weeks off work on July 10, 2000. Subsequently, in response to the employing establishment's sending him a written job description stating that limited duty was available to appellant, Dr. Rork faxed back his approval of the job on July 18, 2000. The record does not establish, however, that the employing establishment made a job offer to appellant in writing at any time. Absent evidence that a written job offer was made to appellant advising him that a modified job was available as required by the Act, appellant is entitled to continuation of pay for the appropriate dates he missed work from July 7 through July 24, 2000.

The decision dated June 19, 2001 and finalized on July 22, 2001 and the October 4, 2000 decision of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
September 16, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[4] 20 C.F.R. § 10.507(d).