

{A Petition for Writ of Mandate was filed by the California Highway Patrol on November, 2002}

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	SPB Case No. 00-3025
)	
JUDITH C. BECK)	BOARD DECISION
)	(Precedential)
From constructive medical termination)	
from the position of Janitor with the)	No. 02-02
Department of California Highway Patrol)	
at Mount Shasta)	February 7-8, 2002
_____)	

APPEARANCES: Colin McLeod, Labor Relations Representative, California State Employees Association, on behalf of appellant, Judith C. Beck; Marybelle D. Archibald, Deputy Attorney General, on behalf of respondent, Department of California Highway Patrol.

BEFORE: William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the proposed decision of the Administrative Law Judge (ALJ) to review whether the Department of California Highway Patrol (CHP) constructively medically terminated Judith C. Beck (appellant) when it failed to return her to work in response to her request, after she had been declared to be a “qualified injured worker” in her workers’ compensation action. In this Decision, the Board finds that appellant has shown that she was constructively medically terminated. The Board, therefore, orders CHP to return appellant to her janitor’s position and to pay her back salary, interest and benefits.

BACKGROUND

Employment History

Appellant was appointed as a janitor in the CHP Mount Shasta office on February 1, 1995. Her direct supervisor was Sgt. Clint Comer (Sgt. Comer) and her indirect supervisor and commander of the area office was Lt. Jon Lopey (Lt. Lopey). Appellant's job duties as a janitor included gardening, performing general maintenance, cleaning the building (inside and out), dumping trashcans, using a snow shovel and a motorized self-propelled snow blower, and cleaning patrol cars.

Appellant's Work Injury

Appellant injured her back at work on November 21, 1999 while assisting another janitor move heavy tables. Appellant filed a workers' compensation claim with respect to that injury. Appellant has not worked at CHP since she was injured.

On March 10, 2000, appellant was seen by her doctor, Daniel Bullock, M.D., (Dr. Bullock). Dr. Bullock provided appellant with a medical verification authorizing her to return to work on March 27, 2000 on a limited duty basis with the restriction that she could not lift over 25 pounds. Appellant presented the medical verification to Lt. Lopey and asked him to contact her after he reviewed it.

Because CHP requires that a doctor who authorizes an employee to return to work on a limited duty basis must complete a CHP form 443, Approval of Limited Duty Assignment, and Dr. Bullock had not submitted a completed form 443, upon Lt. Lopey's instructions, Sgt. Comer went to Dr. Bullock's office with a blank CHP form 443 and

appellant's duty statement and asked Dr. Bullock to determine whether appellant could perform the duties of her janitor's job.

On March 10, 2000, Dr. Bullock completed a "Primary Treating Physician's Progress Report" for appellant's workers' compensation claim and forwarded it to the State Compensation Insurance Fund (SCIF), which, in turn, forwarded it to CHP. Dr. Bullock's report stated in pertinent part:

Work Status: The patient is temporarily, totally disabled, but I am releasing her for return to work at modified duty with no lifting over 25 pounds as of the 27th of March.

We spent a prolonged period of time today discussing returning to work, modified duty, job retraining, and career opportunities, and her physical capabilities today. I do not expect her to return to full 100% function because of the severity of the apparent injury to the L4-5 disc. She understands this and her questions are answered.

* * *

ADDENDUM: Clint Comer, the Sergeant with the Highway Patrol, comes with her job description later in the afternoon. Her job description requires constant and repetitive heavy mopping, vehicle washing, lifting and carrying of less than 25 pounds, in the 15 to 20 pound range, but he is concerned regarding the constancy and repetitive nature of this heavy pushing, pulling, and lifting/carrying activity.

I advised him that that may indeed exceed limitations that she has at present, and even in two weeks, so I will reassess her in three weeks, and at that time make a determination as whether she will have a reasonable prognosis of returning to that work duty.

On or about March 27, 2000, appellant received a letter from Sgt. Comer, on behalf of Lt. Lopey, which stated:

"Today I received a telephone call from Ms. Joyce Tucker representing State Compensation Insurance Fund (SCIF). Ms. Tucker stated that SCIF has received and reviewed Doctor Daniel Bullock's medical reports regarding

your job related injury which occurred on November 21, 1999. Based on the medical reports submitted I regret to inform you SCIF has determined that you are a Qualified Injured Worker.¹

As such, the SCIF vocational unit will be in contact with you to provide further assistance as appropriate. Should you have any questions regarding this matter, contact me or Sergeant Clint Comer . . ."

On April 25, 2000, appellant completed a "Vocational Rehabilitation Reply Form," which was sent to her by SCIF to determine her desire for vocational rehabilitation services. On her completed form, appellant stated that she wanted vocational rehabilitation services, but could not start immediately because her injury was not classified as permanent and stationary and she was trying to return to work. She stated that she expected to participate in vocational rehabilitation on August 1, 2000.

When appellant discovered that Sgt. Comer had visited Dr. Bullock, she believed that Dr. Bullock had "written her off" in regard to her ability to return to work as a janitor. She changed doctors and designated Dr. Scott Durbin (Dr. Durbin), a chiropractor, as her treating physician. Appellant's first visit with Dr. Durbin was on May 9, 2000.

Appellant was seen by Dr. Durbin again on June 6, 2000. Dr. Durbin's treatment notes for that examination stated:

"06-06-2000 The patient was reexamined today and findings reveal that she is able to do most household and yard activities and probably could perform

¹ Labor Code § 4635 defines a "Qualified Injured Worker" as an employee who meets both requirements:

"(1) The employee's expected permanent disability as a result of the injury, whether or not combined with the effects of a prior injury or disability, if any, permanently precludes, or is likely to preclude, the employee from engaging in his or her usual occupation or the position in which he or she was engaged at the time of injury, hereafter referred to as 'medical eligibility.'
(2) The employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services, hereafter referred to as 'vocational feasibility.'"

gardening and custodial functions, but is unable to lift anything over fifty pounds, which would be required if she were to return to work. Therefore, in my opinion, the patient has reached maximum medical improvement, is now permanent and stationary² and should be evaluated by a qualified medical examiner for disability. The patient states that she would prefer to return to work, but realizes that she is not able to do some of the heavy lifting from time to time that would be required by the job. I encouraged her to seek other employment that would be less hazardous to her low back, to continue to exercise, and return for supportive care on an as needed basis."

As a result of her workers' compensation claim, appellant received Industrial Disability Leave (IDL) payments from November 26, 1999 to June 6, 2000, while she was off work. Effective June 6, 2000, when Dr. Durbin declared her to be "permanent and stationary," her IDL payments ceased.

After June 6, 2000, appellant began using her leave credits. She exhausted those leave credits on August 7, 2000. She was placed on dock or "temporarily off payroll" status as of August 8, 2000.

Appellant started working for J.C. Penney's jewelry department in Medford, Oregon, as a salesperson a maximum of 25 hours a week at a pay of \$6.50 an hour.

On or about August 18, 2000, Lt. Chadd, the acting commander of the Mount Shasta Area office while Lt. Lopey was on temporary leave, sent a memorandum to appellant entitled, "Qualified Injured Worker." The memorandum, in relevant part, stated:

On March 27, 2000, the Mount Shasta CHP Area received information by Ms. Joyce Tucker of the State Compensation Insurance Fund (SCIF) regarding your work status as a janitor. Specifically, your physician, Doctor Daniel Bullock, submitted a medical report relating to your job-related injury.

² According to CHP Disability and Retirement Unit Program Coordinator Helen Dodson, the term "permanent and stationary" refers to that point when an injured worker reaches a plateau where she is not getting any better, but is also not getting any worse.

The report indicated that your injury was so severe as to preclude you from performing the full range of duties as a janitor. As a result, Lieutenant Jon Lopey advised you via memorandum dated March 27, 2000, that you were determined to be a "Qualified Injured Worker."

In the memorandum, you were advised that the SCIF Vocational Rehabilitation Unit would be in contact with you. You initiated vocational rehabilitation; however, you have since discontinued your participation in the program. Upon discontinuing the program, you have not been accruing work credits.

On July 21, 2000, you gave verbal authorization to Ms. Cheryl Davis-Silva of the Department's Personnel Services section to use all leave credits in order to receive pay warrants through the July pay period. At that time, Ms. Davis-Silva informed you of your leave balances. As of four hours into the workshift on August 7, 2000, you have exhausted all leave credits and have been placed on dock status. This means you will not receive further compensation following August 7, 2000. Let me take this opportunity to outline options that may be available and may not be limited to:

- If you are interested in another position with the Department, for which you are qualified, you may consider a transfer. You may also consider transferring to another position with a different state agency. If you elect this option, it will be necessary for you to identify an available position for which you are qualified. The Department can provide you assistance in identifying an alternative position.
- You may continue your participation in Vocational Rehabilitation (VR) plan as offered to you by SCIF. During your participation in a VR plan, you may be eligible to receive a weekly maintenance allowance from SCIF. For additional information, it is recommended that you contact SCIF.
- You may apply for a disability retirement

Throughout your tenure with this command, your performance as a janitor has met or exceeded all expectations. Unfortunately, your current medical condition precludes you from continuing to serve in the position. This decision does not in any way represent any disciplinary action being taken against you.

The memorandum provided appellant with the phone numbers of the SCIF claims representative and the CHP Disability and Retirement Section Program Coordinator Helen

Dodson (Dodson). The memorandum also stated that Lt. Lopey would be willing to address any of appellant's concerns. A copy of the memorandum was sent to appellant's representative.

After receiving the memorandum, appellant telephoned Lt. Chadd and told him that she was ready, willing and able to return to work. Lt. Chadd responded that he was only the "acting" commander of the area office.

On September 25, 2000, appellant wrote Lt. Lopey:

I understand you don't want me to return to work and are concerned that I may re-injure my back per your phone conversation with my union representative Colin McLeod.

I'm asking you to return me to work. I've worked very hard to strengthen my back through therapy and the gym. I feel great and I'm ready to return to my employment.

Lt. Lopey responded to appellant's request to return to work by a letter dated September 27, 2000, in which he stated that he could not return appellant to work because her two treating physicians had concluded that her injury "preclude[d her] from performing all of the critical tasks required of [her] position as janitor." Lt. Lopey also notified appellant that she was scheduled to attend an Agreed Medical Examiner (AME) appointment on December 13, 2000 and that, after CHP received the AME's report, a final determination would be made regarding her employment status. As Lt. Lopey explained to appellant, "As you have been advised in the past, a medical determination must be made to determine whether you can safely perform the full-range of your duties and responsibilities as the Area's janitor, which includes all critical job tasks for your position." Lt. Lopey also stated that, "Since I know it is a hardship for you to wait for a determination

in your case, I have asked SCIF to explore the feasibility of accelerating the AME appointment date, to enable you to be examined at an earlier date, thus expediting the medical and administrative review process.”

On November 1 and/or 3, 2000, Lt. Lopey contacted appellant. Appellant told Lt. Lopey that she was ready, willing and able to return to work as a janitor. After consulting with SCIF and Dodson, Lt. Lopey denied appellant’s request to return to work.

On November 7, 2000, Dr. Durbin sent Lt. Lopey a letter, which included some of his treatment notes on appellant. The letter stated, in relevant part:

As her primary treating physician, I have informed her workers compensation carrier that she will not reach pre-injury work status and has become permanent and stationary with a permanent partial disability. This disability precludes her from heavy lifting as described in the 10/06/2000 treatment notes. The patient may pursue any other career or means of employment that does not include any of these activities. It is my goal to allow the patient to learn to effectively live with her limitations, while at the same time seek gainful employment.

Dr. Durbin’s October 6, 2000 treatment note read:

10-06-2000 The patient has requested from me a more complete detailed description of her work capacity and work preclusions. With regard to lifting, I don't believe she should lift greater than 50 pounds close to her body, no greater than 20 pounds at 12 inches away from her body, and no more than 10 pounds at arms length. She can sweep, dust and use a snow blower, but can not lift the snow blower, and has to be careful lifting a full mop bucket. She also should be able to do repetitive bending, squatting, and reaching. She also has to avoid any sitting positions that would jar and compress her spine, like riding lawnmower, all terrain vehicles, or back road vehicle, and golf carts.

On November 17, 2000, SCIF wrote appellant and, again, offered her vocational rehabilitation benefits. Because she wanted to return to her job at CHP as a janitor, appellant refused the offer of vocational rehabilitation.

On December 13, 2000, appellant was scheduled to attend an AME examination for permanent disability rating purposes in her workers' compensation action. Because her attorney and SCIF could not agree upon a mutually acceptable AME, her examination was rescheduled to January 24, 2001.

Dodson stated that CHP did not take any steps to place appellant in another position in CHP or to evaluate her skills to determine whether she was qualified for another position because that is what occurs during the vocational rehabilitation process through the workers' compensation system. Dodson stated that vocational rehabilitation was purely a voluntary program in which an injured worker could choose to participate. Dodson also stated that CHP did not send appellant to a fitness for duty examination because it was expecting to rely upon the examination that was going to be conducted by the AME in appellant's workers' compensation action. Dodson also expressed some concern as to whether the CHP had the authority to medically demote appellant under Government Code § 19253.5(c) while her workers' compensation case was proceeding. Dodson testified that CHP did not file an application for disability retirement on behalf of appellant pursuant to Government Code § 19253.5(i) because appellant was able to perform the work of positions other than janitor.

Appellant testified that she could perform her job as a janitor with the restrictions imposed by Dr. Durbin. She stated that she could not lift heavy tables or boxes, and that,

if she were required to lift a heavy box, she would remove the contents and lift them separately in order to avoid reinjuring her back. She testified that she could maneuver a ladder and a snow blower and that her janitorial job at CHP did not require her to drive a lawnmower, all terrain vehicle or golf cart. She stated that she would not lift a mop bucket that was full, but, instead, would only fill her mop bucket halfway, which was her practice prior to her injury. She also stated that she could lift a 15 pound box and place it on a shelf. She admitted that, as a result of her injury, she will have to be careful how she lifts things for the rest of her life. She stated that she has not applied for disability retirement because she wants her job back.

Lt. Lopey testified that it would be "infrequent" that a janitor would have to lift 50 pounds or more, and that other CHP employees might be available to assist appellant if her job duties required her to lift that much weight. Lt. Lopey also testified that it was "rare" that there would be 50 pounds of trash in a trash can that appellant would be required to lift.

Procedural History

Appellant's appeal from constructive medical termination was filed with the Board on September 17, 2000.³ The ALJ held an evidentiary hearing and issued a proposed decision in this matter. The Board rejected that proposed decision at its meeting on July 10-11, 2001 and determined to decide this matter itself.

³ CHP objected to the timeliness of appellant's appeal before the ALJ. The ALJ denied that objection. CHP has not renewed that objection on appeal. The Board, therefore, assumes that CHP has waived that objection.

The Board has reviewed the record in this matter, including the transcript, exhibits and written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

ISSUE

The following issue is before the Board for consideration:

Did CHP constructively medically terminate appellant when it failed to return her to her position as a janitor in response to her request?

DISCUSSION

Constructive Medical Termination

In C [REDACTED] M [REDACTED] (M [REDACTED]),⁴ the Board found that

A “constructive medical termination” arises when an appointing power, for asserted medical reasons, refuses⁵ to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work.

In S [REDACTED] A [REDACTED], the Board found that, in order to establish a constructive medical termination, an employee must show that: (1) the appointing power refused to allow the employee to work for asserted medical reasons; (2) the employee asserted to the appointing power that s/he was ready, willing and able to work under circumstances

⁴ (1993) SPB Dec. No. 93-08, p. 6..

⁵ “The appointing power's "refusal" to allow the employee to work may be outright or may consist of an offer of reinstatement conditioned upon the employee undergoing various medical examinations or tests.”

that indicated that s/he, in all good faith, wished to return to work and perform the duties of his/her job; and (3) s/he had a legal right to return to work.⁶

Appellant has clearly shown that CHP refused to allow her to work as a janitor for asserted medical reasons and that she asserted to CHP that she was ready, willing and able to return to work under circumstances that indicated that she, in all good faith, wanted to continue working as a janitor.

The question for Board determination in this case is whether appellant has shown that she has a legal right to work. In A [REDACTED] - [REDACTED],⁷ the Board found that an employee had a legal right to return to work when the employee's treating physician released him to return to work by a release that contained restrictions that could be reasonably accommodated by his appointing power. In this case, appellant did not provide to CHP a release from her doctor that authorized her to return to her janitor's position with or without restrictions.

While Dr. Bullock, on March 10, 2000, initially released appellant to return to work on March 27, 2000 on a limited duty basis with the restriction that she could not lift over 25 pounds, after he was informed of the extent and scope of her janitorial duties, he withdrew that release and stated that he would "reassess her in three weeks, and at that time make a determination as whether she will have a reasonable prognosis of returning to that work duty."

⁶ (1999) SPB Dec. No. 99-04, pp. 18-19.

⁷ (2000) SPB Dec. No. 00-01.

Appellant's subsequent treating chiropractor, Dr. Durbin, also did not release her to return to her janitorial duties. Instead, he stated that appellant could "pursue any other career or means of employment that does not include any of these activities. It is my goal to allow the patient to learn to effectively live with her limitations, while at the same time seek gainful employment."

Although neither of appellant's doctors released her to return to her janitor's job, appellant herself requested that she be allowed to return to that job. The question that must be answered, therefore, is whether, in the absence of a doctor's release, appellant's own request to return to her janitor's job was sufficient to establish a legal return right as that term is used in constructive medical termination actions.

In M [REDACTED],⁸ we stated that, after the Public Employees Retirement System (PERS) had denied an application for disability retirement with respect to an employee, the appointing power was required to return the employee to work upon the employee's request and could not require that the employee first obtain a medical release. As the Board explained:

once PERS had denied M [REDACTED] disability retirement, and once M [REDACTED] requested reinstatement, the Department became obligated to reinstate M [REDACTED] to her position as a Youth Counselor immediately or to put her on paid status as a Youth Counselor pending an appeal of the PERS determination. There is nothing in the record to indicate the Department appealed the PERS determination. If the Department had reason to believe that M [REDACTED] was not medically fit for the performance of her duties as a Youth Counselor based on a medical development not considered by PERS in its evaluation of the application for disability retirement, the Department had the option to refer M [REDACTED], immediately upon reinstating her, for a medical examination pursuant to Government Code section 19253.5(a).

⁸ SPB Dec. No. 93-08 at p. 8-9.

The Department did not have the option, however, of delaying reinstatement to paid status pending production of additional proof of fitness for duty.

In M, the Board viewed PERS's denial of disability retirement as tantamount to a medical determination that the employee was able to return to work such that no further proof of fitness for duty was necessary prior to reinstatement. In this case, there was no medical determination by either PERS or a doctor that appellant was fit to return to her janitor's job.

CHP asserts that it had no legal obligation to return appellant to work until she had first obtained a doctor's release authorizing her to return to her job as a janitor. Although appellant did not have a medical release, she still had permanent civil service status. As the California Supreme Court made clear in Skelly v. State Personnel Board (Skelly)⁹, a permanent civil service employee has a property interest in continued employment; before an appointing power may deprive an employee of this property interest, it must first comply with procedural due process requirements.¹⁰ Until an appointing power complies with those requirements, a permanent civil service employee retains a property right in his or her job.

Appellant, as a permanent civil service employee, has a property interest in her civil service janitor's job. Given her property interest, appellant has a right to return to her job upon request. If CHP wishes to deny appellant her property right to that job for medical

⁹ (1975) 15 Cal.3d 194.

¹⁰ 15 Cal.3d at pp. 206-207.

reasons, it first must comply with applicable due process requirements by following the procedures set forth in Government Code § 19253.5 and Board Rule 52.3.¹¹

To be consistent with the Skelly requirements, the Board finds that, in order for an employee to prove that he or she has been subjected to a constructive medical termination, the employee must show that: (1) s/he asserted to his/her appointing power that s/he was ready, willing and able to work under circumstances that indicated that s/he, in all good faith, wished to return to work and perform the essential functions of her/his job with or without a reasonable accommodation; (2) the appointing power refused to allow him/her to work in his/her position for asserted medical reasons, but did not comply with the procedural due process requirements set forth in Government Code § 19253.5 and

¹¹ Title 2, California Code of Regulations § 52.3, which provides:

(a) At least five working days before the effective date of a proposed adverse action, rejection during the probationary period, or non-punitive termination, demotion, or transfer under Government Code section 19585, the appointing power, as defined in Government Code Section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action. At least 15 calendar days before the effective date of a medical termination, demotion, or transfer under Government Code section 19253.5 or an application for disability retirement filed pursuant to Government Code section 19253.5(i)(1), the appointing power or an authorized representative of the appointing power shall give the employee written notice of the proposed action. The notice shall include:

- (1) the reasons for such action,
 - (2) a copy of the charges for adverse action,
 - (3) a copy of all materials upon which the action is based,
 - (4) notice of the employee's right to be represented in proceedings under this section, and
 - (5) notice of the employee's right to respond to the person specified in subsection (b).
- (b) The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power in which case the appointing power may respond to the employee or designate another person to respond.
- (c) The procedure specified in this section shall apply only to the final notice of proposed action.

Board Rule 52.3; and (3) s/he has a vested interest in his/her position that has never been legally terminated either through resignation or other appropriate means in compliance with Skelly's due process requirements.

There is no indication in the record of this appeal that CHP made any attempt to comply with the procedural due process requirements of Government Code § 19253.5 and Board Rule 52.3 before denying appellant the right to return to her job. By memorandum dated August 18, 2000, CHP informed appellant that, because her doctor's report indicated that her injury was so severe as to preclude her from performing the full range of duties as a janitor, she had been declared to be a "qualified injured worker." The memorandum outlined the following three options as being available to her in light of her qualified injured worker status: (1) she could request a transfer to another position for which she was qualified within CHP or another department; (2) she could continue vocational rehabilitation; or (3) she could apply for disability retirement. The memorandum also informed her that she had exhausted all her leave credits and was, therefore, being placed on dock status.

On September 25, 2000, appellant asked CHP to allow her to return to work in her position as a janitor. In her request, appellant asserted that she had worked very hard to strengthen her back and was ready to return to her employment. She did not ask for light duty, nor did she condition her return upon CHP first making significant changes to her janitorial duties.¹² Although appellant had not been released to return to work by her doctors, at that time of her request, her work restrictions were not extensive: she was

precluded from lifting more than 50 pounds close to her body, more than 20 pounds at 12 inches away from her body, and more than 10 pounds at arms' length. She also had to avoid any sitting positions that would jar and compress her spine when she rode a lawnmower or similar vehicle.

On September 27, 2001, CHP notified appellant that she could not return to work because her two treating physicians had concluded that her injury precluded her from performing all the critical tasks required of her position as a janitor and that, after she had been evaluated by the AME in her workers' compensation action and CHP had received the AME's report, it would make a final determination as to her employment status.

As the Board made clear in [REDACTED],¹³ an appointing power has separate and distinct legal obligations under the California Fair Employment and Housing Act (FEHA),¹⁴ the federal Americans with Disabilities Act (ADA)¹⁵ and the Civil Service Act,¹⁶ independent of the workers' compensation laws.

When CHP received appellant's request to return to work, it was obligated to return appellant to her janitor's job. If CHP was not certain as to whether appellant could perform all the essential functions of that job given her restrictions, it should have initiated an interactive process with her to determine whether she needed a reasonable

¹² Contrast, S [REDACTED] A [REDACTED] (1999) SPB Dec. 99-04.

¹³ SPB Dec. No. 00-01, at p. 29.

¹⁴ Government Code § 12940 et seq.

¹⁵ 42 U.S.C. § 12101 et seq.

¹⁶ Government Code § 18500 et seq.

accommodation to perform those functions.¹⁷ As part of that interactive process, CHP should have: (1) analyzed appellant's janitor's job to determine its purpose and essential functions; (2) consulted with appellant to ascertain her job-related limitations and how those limitations could be overcome with a reasonable accommodation; (3) in consultation with appellant, identified potential accommodations and assessed the effectiveness that those accommodations would have in enabling appellant to perform the essential functions of her position; and (4) taking into consideration appellant's preference, selected and implemented an accommodation that was most appropriate for both CHP and appellant.¹⁸

From the record, it appears that CHP did not undertake any of these steps. First, the evidence does not establish that CHP ever analyzed appellant's janitor's job to determine its purpose and essential functions. While Sgt. Comer may have provided appellant's duty statement to Dr. Bullock to review when determining whether appellant was fit to return to work, CHP did not, during the course of the evidentiary hearing before the ALJ, submit any documentation to show that it had conducted an essential functions analysis of appellant's janitor's job to determine whether and to what extent heavy lifting and other duties were essential functions of that job. Neither is there any indication in the record to show that, at any point, CHP attempted to consult with appellant to determine whether she had any job-related limitations and whether she might require a reasonable accommodation in order to overcome those limitations.

¹⁷ See, D. H. (2001) SPB Dec. No. 01-01, pp. 26-27.

¹⁸ T. G. (2001) SPB Dec. No. 01-03, p. 12. (The respondent in G. filed a petition for writ of mandate to challenge the Board's decision in that case. The trial court denied that writ; the respondent has filed an appeal with the Fifth District Court of Appeal.)

CHP asserts that, because appellant was determined to be a qualified injured worker in her workers' compensation action, the only avenue available for her if she wanted to return to work was through the vocational rehabilitation process. CHP misunderstands its obligations under the law.

As the Board has stated, in reviewing matters involving disability and reasonable accommodation, the Board will look to the Equal Opportunity Employment Commission (EEOC) for guidance, to the extent that guidance is not inconsistent with California law.¹⁹ In its EEOC Enforcement Guidance: Workers' Compensation and the ADA (WC Enforcement Guidance),²⁰ in response to the question of whether an employer could satisfy its reasonable accommodations obligations by placing an employee with a disability-related occupational injury in a workers' compensation vocational rehabilitation program, the EEOC answered:

No. An employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury. An employee's rights under the ADA are separate from his/her entitlements under a workers' compensation law. The ADA requires employers to accommodate an employee in his/her current position through job restructuring or some other modification, absent undue hardship. If it would impose an undue hardship to accommodate an employee in his/her current position, then the ADA requires that an employer reassign the employee to a vacant position s/he can perform, absent undue hardship. (Footnotes omitted.)

¹⁹ Id. at p. 9.

²⁰ EEOC's WC Enforcement Guidance can be found on EEOC's website at <http://www.eeoc.gov/docs/workcomp.html>.

In a footnote, the EEOC stated that:

...the ADA does not prohibit an employer and an employee from choosing vocational rehabilitation as an alternative to accommodating the employee in his/her current position, if both parties voluntarily agree that vocational rehabilitation is preferable.

Vocational rehabilitation was just one of the options available to appellant.²¹ While appellant could have agreed to take advantage of that option, she was not required to do so. Appellant was also not required to pursue a transfer, the other option offered by CHP, if she believed that she could perform the essential functions of her job with a reasonable accommodation. When appellant sought to return to work, CHP should have returned her to her job and initiated an interactive process to review with her all the options available and to determine whether and to what extent she might need a reasonable accommodation to perform the essential functions of her janitor's job.

CHP's August 18, 2000 memorandum did not adequately apprise appellant of all her options. It failed to notify her of her option of returning to her existing position if she could perform the essential functions with a reasonable accommodation.²² It also incorrectly informed her that she could not return to her janitor's position because her doctor reported that she could not perform "the full range" of janitorial duties. Even if

²¹ The Board notes that Labor Code § 4644 provides that an employer may meet its vocational rehabilitation obligations under the workers' compensation laws by offering an occupationally injured employee modified or alternative work that has essential functions that the employee is capable of performing.

²² The Board has posted on its website at <http://www.spb.ca.gov/spblaw/options.doc> a sample options letter created by a Disability Task Force comprised of representatives from a number of state departments and employee unions, which more fully advises employees with disabilities of the options available to them. Departments are free to use the sample options letter and to modify it to fit their particular circumstances.

appellant may not have been fully recovered from her back injury and could not perform the full range of her janitorial duties, CHP was obligated to consider whether she could return to work as a janitor with a reasonable accommodation. As the Ninth Circuit stated in McGregor v. National Railroad Passenger Corporation (Amtrak),²³

McGregor alleges that Amtrak officials repeatedly told her that she could not return to work or bid on any other position until she was "100% healed," and that such a policy is a *per se* violation of the ADA. McGregor is correct in noting that "100% healed" policies are *per se* violations of the ADA. A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is "100% healed" from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.

CHP further asserts that it could not make a determination as to returning appellant to work until after she was evaluated by a doctor, and that it could not have unilaterally sent her for a fitness for duty examination while it was negotiating with her workers' compensation counsel as to a mutually acceptable AME. CHP has not, however, submitted any information to show that the workers' compensation laws prevented it from invoking Government Code § 19253.5(a), which permits an appointing power to require an employee to submit to a medical examination by a physician designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position.

As the Board made clear in [REDACTED],²⁴ an appointing power must comply with its independent legal obligations under the FEHA, ADA and the Civil Service Act, and cannot

²³ (9th Cir. 1999) 187 F.3d 1113, 1116.

²⁴ SPB Dec. No. 00-01, at p. 29.

rely solely upon the workers' compensation process to resolve an occupationally-injured employee's work return rights. In accordance with Government Code § 19253.5, it would have been appropriate for CHP, as part of its interactive process with appellant, to require that she be medically evaluated in order to determine her functional limitations and whether she might need a reasonable accommodation to perform the essential functions of her janitor's job.²⁵ It was not, however, appropriate for CHP to delay appellant's return to work until after she had been evaluated by the AME for purposes of her workers' compensation action. If CHP was concerned that it might subject itself to liability under the workers' compensation laws by sending appellant to a fitness for duty examination while it was engaged in negotiations as to a mutually acceptable AME, as part of the interactive process, CHP could have notified appellant, her representative, and her workers' compensation counsel of its desire to send appellant for a fitness for duty examination and attempted to work out interactively any issues they may have expressed. CHP could not, however, legally deny appellant's return to work request pending a determination by an

²⁵ As EEOC said in its Enforcement Guidance: Disability-related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA) in response to a question as to whether an employer could make disability-related inquiries or require a medical examination when an employee who has been on leave for a medical condition seeks to return to work:

Yes. If an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability-related inquiries or require the employee to submit to a medical examination. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. Usually, inquiries or examinations related to the specific medical condition for which the employee took leave will be all that is warranted. The employer may not use the employee's leave as a justification for making far-ranging disability-related inquiries or requiring an unrelated medical examination.

EEOC's Guidance can be found on its website at <http://www.eeoc.gov/docs/guidance-inquiries.html>.

AME in appellant's workers' compensation action without complying with Government Code § 19253.5 and Board Rule 52.3.

CONCLUSION

CHP was obligated to return appellant to work as a janitor upon her request. If CHP was concerned that appellant could not perform all the essential functions of that position, it should have entered into an interactive process with her to determine whether she needed a reasonable accommodation to perform those functions. As part of that interactive process, CHP could have sent appellant for a fitness for duty examination to determine her functional limitations and whether those limitations could be overcome with a reasonable accommodation. By denying appellant's request to return to work without following the procedures set forth in Government Code § 19253.5 and Board Rule 52.3, CHP constructively medically terminated her.

CHP is ordered to return appellant to her position as a janitor and to pay her any backpay, interest and benefits, if any, to which she may be entitled from September 25, 2000 to the date she is reinstated, minus any salary and benefits she may have received from other sources during that time.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The appeal of Judith C. Beck from constructive medical termination is granted.
2. The Department of California Highway Patrol shall reinstate Judith C. Beck to the position of Janitor and shall pay her all back salary, interest and benefits, if any, that

would have accrued to her had she not been constructively medically terminated from September 25, 2000 to the date she is reinstated, minus any salary and benefits she may have received from other sources during that period;

3. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon the written request of either party in the event that the parties are unable to agree as to the back salary, interest and benefits due Judith C. Beck.
4. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD²⁶

William Elkins, Vice President
Florence Bos, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 7-8, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[Beck-dec]

²⁶ President Ron Alvarado did not participate in this decision.