

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOSE LUIS ROSALES (deceased), *Applicant*

vs.

**OAK KNOLL FARMING CORP; OAK RIVER INS. CO.; PREFERRED EMPLOYERS,
*Defendants***

**Adjudication Number: ADJ12961519
Oakland District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicant Maria Elena Rosales (Maria), wife of decedent Jose Luis Rosales, and applicant Jacqueline Rosales (Jacqueline), decedent's daughter, seek reconsideration of the July 19, 2024 Findings, Award and Order, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that Jacqueline was a total dependent of applicant and entitled to a death benefit of \$250,000.00, and Maria was a partial dependent of applicant and entitled to a death benefit of \$780.00.

Jacqueline and Maria contend that (1) Maria should be presumptively a total dependent and even if she is not considered a total dependent, the combined death benefits awarded should be \$290,000.00; (2) the WCJ did not consider all the evidence when finding that Maria is entitled to \$780.00 in death benefits; and (3) the WCJ erred in not considering COLA/SAWW in her award of temporary disability.

We have received an answer from defendant Preferred Employers Ins. Co. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration and amend Finding no. 9 to defer the issue of Maria's entitlement to a death

benefit, but otherwise affirm the July 19, 2024 Findings, Award and Order, and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

As the WCJ stated in her Report,

By a timely and verified Petition for Reconsideration (Petition), applicant seeks reconsideration of my July 19, 2024 Findings, Award and Order, wherein I found, among other things, that the February 6, 2020 death of Jose Luis Rosales was caused by his employment with Oak Knoll Farming during the cumulative trauma period ending May 18, 2017. I further found that Jacqueline Rosales Avalos is a total dependent of Jose Luis Rosales at the time of death, entitling her to a death benefit of \$250,000.00, and that Maria Elena Avalos Estrada is a partial dependent of Jose Luis Rosales at the time of his death, entitling her to a death benefit of \$780.00. I also awarded temporary disability payable to Maria Elena Avalos Estrada from October 18, 2019 through February 6, 2020 at the rate of \$443.71, less a 15% attorney's fee.

Applicant contends: (1) the widow, Maria Elena Avalos Estrada, should have been considered a total dependent, despite earning over the statutorily defined \$30,000.00 limit for such a determination because of "the value of money in 2006 as opposed to 2020"; (2) even if the widow is not considered a total dependent, bills submitted into evidence support a finding of greater partial dependency than awarded at trial; (3) my decision should have contained a reference to the Cost of Living Adjustment (COLA) pursuant to Labor Code section 4659. Defendant filed an Answer, disputing applicant's contentions. (Report, pp. 1-2.)

DISCUSSION

I.

Former Labor Code¹ section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

¹ All statutory references are to the Labor Code unless otherwise indicated.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on September 4, 2024 and 60 days from the date of transmission is November 3, 2024. The next business day that is 60 days from the date of transmission is Monday, November 4, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, November 4, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on September 4, 2024, and the case was transmitted to the Appeals Board on September 4, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 4, 2024.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

We agree with the WCJ that Maria is not a presumptively total dependent of decedent. Labor Code, section 3501(b) provides:

(b) A spouse to whom a deceased employee is married at the time of death shall be conclusively presumed to be wholly dependent for support upon the deceased employee if the surviving spouse earned thirty thousand dollars (\$30,000) or less in the twelve months immediately preceding the death. (§ 3501(b).)

The parties do not dispute that Maria's earning in the twelve months preceding decedent's death was \$32,923.41, roughly \$3,000.00 more than the \$30,000.00 threshold from section 3501(b). While we sympathize with Maria's contention about inflation, we agree with the WCJ that "this is an argument that must be addressed to the legislature." (Report, p. 2.)

Maria, therefore, must prove her dependency status via section 3502, which provides:

In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee. (§ 3502.)

In calculating the extent of dependency, the "nature and degree of dependency is determined as of the date of the employee's injury which results in death, not as of the date of death. (*Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (1982) 31 Cal.3d 715, 722 [47 Cal.Comp.Cases 500] citing § 3502 and 2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. rev. 1981), § 15.02[2], pp. 15-5 - 15-6.) "Commencing with the entire earnings of the decedent, the computation of allowances for actual support should include those fixed expenses which are an integral and reasonable part of the standard of living enjoyed by the community." (*Ibid.*) "By way of illustration, we note that expenses incurred for indebtedness and maintenance of the community residence or transportation expenses for the benefit of the community and the spouse may readily be recognized as 'actual support' to the survivor. Food, clothing, or incidental expenses incurred for the decedent's own personal use, however, cannot reasonably be considered as part of 'the amount annually devoted to the support of the partial dependent.'" (*Ibid.*)

We therefore conclude that the appropriate method for determining partial dependency when both surviving and deceased spouses were employed is to require that the survivor establish the actual "amount annually devoted to" his

or her support from the earnings of the decedent. Expenses related to the standard of living of the community are relevant. Expenses which are personal to the decedent are not. (*Id.* at p. 723.)

The WCJ reviewed receipts in the record and determined that only Applicant's Exhibits 27 and 32 show decedent's payment of household bills in the amounts of \$120.00 and \$70.00, respectively. The WCJ then multiplied \$190.00, the total amount of these payments, by four in accordance with section 4702(a)(2) to calculate the amount of Maria's death benefit.³ Maria contends that the WCJ did not consider all the evidence in the record. The WCJ correctly stated that the other evidence in the record is lacking, either in not showing a payment by decedent or involving a time frame outside the time of decedent's date of injury. (§ 3502.) We further note the lack of testimonial and written evidence to show the amount annually devoted from decedent's earnings to support Maria, including those fixed expenses which are an integral and reasonable part of the standard of living enjoyed by the community. We therefore grant reconsideration and return this matter to the trial level to develop the record on the issue of Maria's dependency on decedent. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) While pending at the trial level, we encourage the parties to attempt an informal settlement of dispute of this issue.

Maria's contention that she and Jacqueline are entitled to a total of \$290,000.00 in death benefits lacks merit. Section 4702(a)(2) provides:

(a) Except as otherwise provided in this section and Sections 4553, 4554, 4557, and 4558, and notwithstanding any amount of compensation paid or otherwise owing to the surviving dependent, personal representative, heir, or other person entitled to a deceased employee's accrued and unpaid compensation, the death benefit in cases of total dependency shall be as follows:

...

(2) In the case of one total dependent and one or more partial dependents . . . for injuries occurring on or after January 1, 2006, two hundred fifty thousand dollars (\$250,000), plus four times the amount annually devoted to the support of the

³ We note that $\$190.00 \times 4 = \760.00 , not \$780.00 (Finding no. 9.)

partial dependents, but not more than the following: . . . for injuries occurring on or after January 1, 2006, two hundred ninety thousand dollars (\$290,000).

(§ 4702(a)(2).)

The \$290,000.00 figure is a maximum figure in death benefits when there is one total dependent and one or more partial dependents. (*Davis v. Harrison & Nichols Trucking* (ADJ4195124 February 27, 2012) [2012 Cal. Wrk. Comp. P.D. LEXIS 120].)⁴ It is not an entitlement to that amount. Maria must still prove her entitlement to death benefits pursuant to section 3502. Additionally, section 4703 places a limit of \$25,000.00 that a partial dependent may recover as death benefits. [“If there is any person wholly dependent for support upon a deceased employee, that person shall receive a full death benefit as set forth in Section 4702 for one total dependent, and any additional partial dependents shall receive a death benefit as set forth in subdivision (b) of Section 4702 to a maximum aggregate amount of twenty-five thousand dollars (\$25,000).”]

As to applicants’ contention regarding COLA/SAWW, there is no statutory provision to increase her temporary disability award due to inflation. Section 4453 provides increases to the minimum and maximum average weekly earnings but decedent’s earnings are neither at a minimum or maximum of the average weekly earnings set by the statute.

Accordingly, we grant reconsideration and amend Finding no. 9 to defer the issue of Maria’s entitlement to a death benefit, but otherwise affirm the July 19, 2024 Findings, Award and Order, and return this matter to the trial level for further proceedings consistent with this Opinion. We encourage the parties to attempt an informal settlement of dispute while at the district level.

For the foregoing reasons,

IT IS ORDERED that applicants’ Petition for Reconsideration of the July 19, 2024 Findings, Award and Order is **GRANTED**.

⁴ Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers’ compensation judges (see *Gee v. Workers' Compensation Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal. Comp. Cases 236]), but the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive (see *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 19, 2024 Findings, Award and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows and that the matter is **RETURNED** to the trial level for further proceedings.

FINDINGS OF FACT

...

9) The issue of Maria Elena Avalos Estrada's entitlement to a death benefit is deferred.

...

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 1, 2024

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

**MARIA ELENA ROSALES
LAW OFFICE OF CHRISTINA LOPEZ
MCCLELLAN & CORREN**

LSM/oo

*I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this
date. o.o*