

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

KEVIN SUH, *Applicant*

vs.

**METROPOLITAN STATE HOSPITAL;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ9017624, ADJ9017629
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board (“Board”) granted reconsideration to study the factual and legal issues.¹ This is the Board’s Decision After Reconsideration.

In the Opinion and Decision After Reconsideration of August 15, 2022, the Board rescinded the Joint Finding and Order issued by the Workers’ Compensation Administrative Law Judge (“WCJ”) on November 13, 2020. Therein the WCJ found that on March 15, 2013 (ADJ9017624) and during the period January 1, 2002 through March 15, 2013 (ADJ9017629), applicant sustained industrial injury “to body parts listed in the Stipulations with Request for Award dated February 7, 2017 and January 8, 2020,” and that applicant’s “life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability.” (Underscoring added.) Applicant sought reconsideration of the WCJ’s decision, ultimately resulting in the Board’s decision of August 15, 2022, wherein it was found in place of the WCJ’s decision that applicant’s life pension shall be accelerated by the commutation of permanent disability and lump sum payment of permanent disability. (Underscoring added.)

Defendant filed a timely petition for reconsideration of the Board’s Opinion and Decision After Reconsideration of August 15, 2022. Defendant contends that there is no legal basis to accelerate payment of life pension benefits before 785 weeks of permanent disability indemnity

¹ Deputy Commissioner Anne Schmitz signed the Opinion and Order Granting Petition for Reconsideration dated November 7, 2022. Deputy Commissioner Schmitz is not available to participate in this matter. A new panel member has been substituted in her place.

have run, that the Board erred in relying upon *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701] and *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550 [Appeals Board en banc] because the cases are distinguishable, that the Board's decision does not give effect to the mutual intent of the parties, that the Board is creating new law that is inconsistent with the existing statutory framework regarding commutation of periodic payments, that applicant is the trustee of the commuted periodic payments, that by accelerating life pension payments, the Board altered the prior Award of May 23, 2017 and failed to consider the issue of offset, and that an accelerated life pension creates a windfall of more than \$130,000.00 for applicant, a result that represents an absurd violation of the statutory scheme.

Applicant filed an answer.

Based on a re-review of the record and applicable law, including the prior opinion of the dissenting Board panelist, the present majority of the Board finds merit in defendant's petition for reconsideration. Therefore, the Board's decision of August 15, 2022 will be reversed and the WCJ's decision of November 13, 2020 will be reinstated and affirmed.

FACTUAL BACKGROUND

Although the factual background has not changed since the Board's prior decision of August 15, 2022, it is repeated here to address the relevant legal issues.

In the approved Stipulated Award dated February 7, 2017, the parties stipulated that on March 15, 2013 (ADJ9017624) and during the period January 1, 2002 through March 15, 2013 (ADJ9017629), applicant sustained industrial injury to his psyche, neurological and neurocognitive systems, hypertension, stroke, and platelet disorder, causing permanent disability of 85%, indemnity for which was payable beginning March 14, 2015 at the weekly rate of \$290.00 until the sum of \$195,242.50 would be paid (less credit for any such payments made), followed by a life pension "per Labor Code and case law." In the stipulations, applicant's attorney requested and was awarded a fee of \$41,648.15 based on "permanent disability \$195,242.50 x 15% [equals] \$29,286.37 off far end of award and present value of life pension of \$82,411.91 x 15% [equals] \$12,361.78 utilizing the uniform reduction method off side of life pension payments."

Applicant later filed a Petition for Commutation dated March 8, 2017, to which defendant objected. After an Expedited Hearing on May 23, 2017, wherein applicant testified that he needed funds to pay off credit cards and to buy a car for work, the WCJ ordered "commutation of applicant's permanent disability award herein...in the sum of \$34,577.81, from the far end of the

permanent disability award, payable within 20 days.” There was no mention of the life pension in the WCJ’s commutation order. Defendant sought reconsideration of the order. The Board denied reconsideration.

Applicant filed a timely Petition to Reopen on July 26, 2017, alleging his condition had worsened. The parties ultimately entered into a second, approved Stipulated Award on January 8, 2020. This second set of stipulations included the same dates of injuries, body parts and case numbers as the first Stipulated Award, but it was further stipulated that the injuries resulted in permanent disability of 92 percent, indemnity for which was payable beginning March 14, 2015 at the weekly rate of \$290.00 until the total sum of \$227,722.50 would be paid (less credit for any such payments made), followed by a life pension “reserved per terms of this agreement.” The stipulations included an additional fee for applicant’s attorney in the sum of \$4,872.00; they also incorporated an addendum that commuted all permanent disability indemnity (excluding the life pension) due under the award of 92%. In relevant part, the addendum provided that “(1) within 30 days, defendant shall pay applicant \$73,805.07...in a lump sum, which reflects the [difference between] sums paid under the prior 2/7/17 stipulation (85% PD) and the parties current [stipulation] (@92% PD).”²

In the addendum, the parties also stipulated that the “WCAB retains jurisdiction over all life pension issues,” and that “defendant shall pay [applicant’s attorney] \$4872.00 for attorney’s fees for increased PD only [within] 30 days. There will be no additional payment of [attorney’s fees] per this stipulation once the amount herein has issued on PD only. [Attorney’s fees] regarding [Life Pension] reserved.” The parties further stipulated: “As part of the consideration for this agreement, the parties agree that all residual PD payments shall be commuted/paid...in one lump sum of [\$73,805.07] excluding life pension benefits [...]”

Shortly after the WCJ’s approval of the Second Stipulated Award of January 8, 2020, a dispute arose over its interpretation and payment. The dispute proceeded to hearing on August 12, 2020. The issues were described as follows:

1. The commencement of life pension following commutation of PD.
2. Enforcement of terms of January 8, 2020 Stipulation with Request for Award.

² The addendum included the following calculations: 92% permanent disability indemnity worth \$227,722.50 (excluding life pension), less \$107,397.33 for permanent disability payments advanced through December 24, 2019 and payments made pursuant to the previous commutation of May 23, 2017, less \$41,648.10 paid pursuant to a prior stipulation dated February 17, 2017, less an attorney’s fee of \$4872.00 based on 15% of the difference between 85% and 92% permanent disability indemnity, leaving applicant with a lump sum of \$73,805.07.

After hearing, the WCJ issued the Joint Finding and Order of November 13, 2020, in which it was found, in relevant part, that applicant's life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability.

Applicant timely sought reconsideration of the Joint Finding and Order of November 13, 2020, in substance contending that Labor Code section 4659 mandates commencement of life pension benefits when permanent disability payments are exhausted. Defendant answered that the WCJ correctly decided the matter. The Appeals Board granted applicant's petition in order to further study the factual and legal issues. On August 15, 2022, the Board issued its Decision After Reconsideration, reversing the WCJ's decision of November 13, 2020. Defendant sought reconsideration of the Board's August 15, 2022 decision. Reconsideration was granted to further study the factual and legal issues. The Board has completed its study of the matter.

DISCUSSION

Pursuant to the Stipulated Award of January 8, 2020, applicant is entitled to a life pension because his permanent partial disability, at 92 percent, exceeds the 70 percent threshold for a life pension.

Labor Code section 4659(a) provides in relevant part:

If the permanent disability is at least 70 percent, but less than 100 percent, 1.5 percent of the average weekly earnings for each 1 percent of disability in excess of 60 percent is to be paid during the remainder of life, after payment for the maximum number of weeks specified in Section 4658 has been made. (Underscoring added.)

Legislative intent is generally determined from the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain, and all workers' compensation statutes are to be liberally construed in favor of the injured worker. (*County of Kern v. Workers' Comp. Appeals Bd.* (2011) 200 Cal.App.4th 509, 517 [76 Cal.Comp.Cases 1037], internal quotations and citations omitted.)

Further, the provisions of a statute "must [be] consider[ed] in the context of ... the statutory scheme of which it is a part" and "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286]; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1] ("The words of the statute must be construed in context...and statutes or

statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.”.)

In this case, section 4659(a) provides that a life pension “is to be paid during the remainder of life, after payment for the maximum number of weeks specified in Section 4658 has been made.”

In turn, section 4658(e) - applicable to the post-January 1, 2013 injury at issue here - provides that “[i]f the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed,” at sixteen as the “number of weeks for which two-thirds of average weekly earnings [is] allowed for each one percent of permanent disability within [the] percentage range” between 70 and 99.75 percent.

In order to harmonize sections 4658 and 4659, and considering their relevant clauses in the context of the statutory framework, we agree with defendant that the word “weeks” in the two statutes should be given its plain and ordinary meaning as a unit of time and not only a unit of payment.

In this case, as noted in footnote two *infra*, the parties stipulated on January 8, 2020 that by way of commutation, applicant would be paid 92% permanent disability indemnity worth \$227,722.50 (excluding life pension), less \$107,397.33 for permanent disability payments advanced through December 24, 2019 and payments made pursuant to the previous commutation of May 23, 2017, less \$41,648.10 paid pursuant to a prior stipulation dated February 17, 2017, less an attorney’s fee of \$4872.00 based on 15% of the difference between 85% and 92% permanent disability indemnity, leaving applicant with a lump sum of \$73,805.07.

Notwithstanding the parties’ repeated references to how payments were to be calculated, we are persuaded that the Legislature’s use of the word “weeks” in both sections 4658 and 4659 to mark the inception of a life pension, is controlling. This means that applicant is entitled to his life pension after expiration of the time during which the number of weeks of permanent partial disability otherwise would have been payable absent commutation. We therefore conclude that in the Joint Finding and Order of November 13, 2020, the WCJ correctly found that applicant’s “life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability.”

In addition, the reasoning of Commissioner Razo’s prior dissent remains sound, albeit with slight modification. The dissent stated that there is no basis to accelerate applicant’s life pension because the approved commutation order of January 8, 2020 included no such agreement, and

because by definition, a commuted award of permanent disability indemnity “accelerates” the weekly payments of indemnity and reduces them to a lump sum at present value, payable immediately to the applicant. (Lab. Code, §§ 5100, 5101(b).) The applicant receives the benefit of an early lump sum payment in exchange for relinquishing the right to weekly payments in the future. However, neither section 5100 nor 5101(b) includes any language suggesting that commutation of weekly payments results in an “acceleration” or in an advancement of the time when a life pension becomes payable. Therefore, a more apt description of the prior dissent’s position is that by definition, a commuted award of permanent disability indemnity accumulates the weekly payments of indemnity and reduces them to a lump sum at present value, payable immediately to the applicant.

Further, there is no evidence that applicant bargained for the additional benefit of having his life pension payments “accelerated.” The parties agreed in paragraph (3) of their stipulations that applicant is entitled to a life pension “reserved per terms of this agreement.” But the addendum purporting to memorialize this “reservation” only included the stipulations that “WCAB retains jurisdiction over all life pension issues,” that “attorney’s fees regarding life pension [are] reserved,” and that “all residual [permanent disability indemnity] *payments shall be commuted/paid...in one lump sum...excluding* life pension benefits [...]” (Italics added.) And without resolution of the life pension issue, the applicant risked a lengthy “hiatus” between receipt of the commuted lump sum and commencement of his life pension payments (a hiatus of about ten years, according to defendant).

The hiatus in the inception of a life pension now faced by applicant is an example of a reason why the WCAB has recognized since the start of the workers’ compensation system that the law’s policy is to pay compensation in installments, and that commutation is contrary to that policy. It has been held that the Board’s power and discretion to allow commutation of an award under Labor Code section 5100 must be exercised with great care (*Wilson v. Gallegher* (1914) 1 Ind. Acc. Comm. Pt. II 306, 308), upon a showing of immediate and necessary need for more money than periodic payments can provide, as with an applicant facing pressing or emergency debts. (*Hulse v. Workers’ Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 227 [41 Cal.Comp.Cases 691].)

Moreover, the policy favoring preservation of periodic payments is the reason why permanent disability indemnity awards are typically commuted “from the far end of the award” to

account for attorney's fees; this the same reason why there are "horizontal" commutations of life pensions in cases of permanent disability exceeding 70%. (2 *California Workers' Compensation Law & Practice* § 17:41(V) Attorney Fees: Manner of Allowance.)

It also bears repeating that an order for payment of an award in a lump sum is not the legal equivalent of a rescission, alteration, or amendment of an award under Labor Code section 5804. (*Norwich Union Indem. Co. v. Industrial Acci. Com.* (1934) 140 Cal.App. 36 [20 Ind. Acc. Comm. 261].) Thus, the commutation order of January 8, 2020 in this case did not amend the award of 92% permanent disability, which means that the life pension will not commence until the final weekly permanent disability indemnity payments otherwise would have been made. (See *Horton v. California* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 29 [life pension of emergency service volunteer commences following final permanent disability payments required by Labor Code sections 4353 and 4354].)

As further summarized in Commissioner Razo's prior dissent, the reason the commencement of the life pension has been called into question here is because applicant already received an extraordinary benefit – commutation – that is within the Board's discretion to grant under Labor Code section 5100. Consideration of Labor Code sections 4659(a) and 5100 together does not change the outcome. Under section 4659(a), permanent disability and life pension benefits are intended to compensate the injured worker for the long-term, residual effects of an industrial injury, compensable by periodic payments over time. (*Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].) Under section 5100, the Board has discretion to allow commutation upon a showing of *immediate* and pressing need for more money than periodic payments can provide. (*Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 227 [41 Cal.Comp.Cases 691].)

In the final analysis, we agree with the decision originally reached by the WCJ. Because sections 4658 and 4659(a) ordinarily mandate periodic payments over time, while section 5100 allows the Board to depart from that mandate only upon a showing of dire financial need, the January 8, 2020 commutation order did not bring forward in time the inception of applicant's life pension. Thus it is the Board's Decision After Reconsideration that the Joint Finding and Order issued by WCJ on November 13, 2020 should be reinstated and affirmed.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Opinion and Decision After Reconsideration of August 15, 2022 is **RESCINDED**, and that the Joint Finding and Order issued by the WCJ on November 13, 2020 is **REINSTATED AND AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT. (See attached Dissenting Opinion.)

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 4, 2024

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

**KEVIN SUH
LAW OFFICE OF THOMAS MARTIN
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

DISSENTING OPINION OF COMMISSIONER ZALEWSKI

Section 4659(a) states that a life pension “is to be paid during the remainder of life, after payment for the maximum number of weeks specified in Section 4658 has been made.” (Underscoring added.) In my view, the statutory word “payment” and the phrase “maximum number of weeks” are bound together and provide the key to correctly interpret the statute under the circumstances of this case. Therefore, I dissent.

The “plain and commonsense” meaning of the statutory language referenced above is that life pension payments begin after payment of all weeks of permanent disability indemnity due under an award exceeding 70%. This is so regardless of the number of weeks or “units of time” during which payments are required for permanent disability awards between 70 and 99.75 percent. The statutory language does not mention any exception for permanent disability indemnity paid out by virtue of commutation.

As discussed in the prior majority opinion, the statutory interpretation I endorse here is supported by *Baker v. Workers’ Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701] (“*Baker*”). In *Baker*, our Supreme Court held that “through the operative language of [Labor Code section 4659] subdivision (c), the Legislature intended that COLA’s be calculated and applied prospectively commencing on the January 1 following the date on which the injured worker first becomes entitled to receive, and actually begins receiving, such benefit payments, i.e., the permanent and stationary date in the case of total permanent disability benefits, and the date on which partial permanent disability benefits become exhausted in the case of life pension payments.” (52 Cal.4th at 439.)

In construing section 4659(c) in *Baker*, the Supreme Court explained the purpose of permanent disability and life pension benefits:

Permanent disability and life pension benefits are intended to compensate the injured worker for the long-term, residual effects of an industrial injury once the worker has attained maximum medical recovery. (*Department of Rehabilitation v. Workers’ Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1291 [135 Cal. Rptr. 2d 665, 70 P.3d 1076] (*Department of Rehabilitation*).) Total permanent disability benefits are weekly payments made for life to injured workers who are 100 percent disabled. (§ 4659, subd. (b).) They generally commence on the date the injured worker reaches a medically stable condition (permanent and stationary) because, at

that point, the full nature and extent of the worker's permanent disability, if any, can be determined. (*Department of Rehabilitation, supra*, 30 Cal.4th at p. 1292.) Life pensions *are a form of supplemental partial permanent disability benefit*, consisting of payments to a subclass of seriously injured workers, i.e., those whose "permanent disability is at least 70 percent, but less than 100 percent." (§ 4659, subd. (a).) *Life pension payments commence once the worker's partial permanent disability payments have been exhausted*, and thereafter continue weekly for life. (*Ibid.*)"

(*Baker*, 52 Cal.4th at 438, italics added.)

Throughout its opinion in *Baker*, the Supreme Court used the word "exhaustion" of permanent partial disability indemnity payments as the event that triggers the commencement of life pension payments. According to the Supreme Court, life pension payments should begin after "exhaustion" of permanent disability indemnity payments. The interpretation of section 4659(a) that life pension payments begin after payment of all weeks of permanent disability indemnity due under an award exceeding 70%, without exception for indemnity paid by virtue of commutation, is consistent with the Supreme Court's view that life pension payments commence once the worker's partial permanent disability payments have been "exhausted." This interpretation also is consistent with the Supreme Court's view that (1) life pension benefits are intended to compensate the injured worker for the long-term, residual effects of an industrial injury; and (2) life pensions are a form of *supplemental* partial permanent disability benefit, consisting of payments to a *subclass of seriously injured workers*.

The Appeals Board expressed a similar view in its en banc opinion in *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550. Although the Board did not specifically interpret section 4659(a), it did address the timing of permanent disability indemnity payments in relation to payment of temporary disability benefits. The Board held (1) when a defendant stops paying temporary disability indemnity pursuant to section 4656(c) before an injured worker is determined to be permanent and stationary, the defendant shall commence paying permanent disability indemnity based on a reasonable estimate of the injured worker's ultimate level of permanent disability; (2) when an injured worker who is receiving permanent partial disability payments pursuant to section 4650(b)(1) becomes permanent and stationary and is determined to be permanently totally disabled, the defendant shall pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability indemnity terminated;

and (3) COLAs begin on the first day in January after an injured worker becomes entitled to receive permanent disability indemnity pursuant to sections 4650(b)(1) or (b)(2).

I believe *Brower* is instructive because the Board noted by way of example that an applicant who sustains at least 70% but less than 100% permanent disability is entitled to a life pension *after payment of the number of weeks specified in section 4658 has been made.* (79 Cal.Comp.Cases at 561, italics added.) The Board did not mention any exception for permanent disability indemnity payments made pursuant to an order of commutation.

In its petition for reconsideration, defendant argues that absent commutation of the permanent disability indemnity part of applicant's 92% award, he would not begin receiving life pension payments until March 31, 2030. According to defendant, if life pension payments begin now applicant will receive a "windfall" because his life expectancy is relatively long. I do not find this argument to be persuasive. As discussed before, in *Baker* the Supreme Court remarked that life pensions are a form of *supplemental* permanent partial disability benefit, consisting of payments to a subclass of seriously injured workers. The applicant herein is within the subclass of seriously injured workers given solicitude by the Supreme Court. Accordingly, applicant's receipt of life pension benefits immediately following payment of the agreed-upon commutation of permanent partial disability indemnity is not properly characterized as a "windfall."

Finally, I note that it is within the WCAB's discretion to allow or disallow a request for commutation. (See Lab. Code, § 5100(a) [Board may consider applicant's ability to live without periodic indemnity payments in determining whether commutation is in applicant's best interest].) Here, the WCJ evidently agreed that applicant demonstrated an immediate and pressing need for more money than periodic payments could provide. (*Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 227 [41 Cal.Comp.Cases 691].) However, the parties' failure to agree on whether applicant's life pension payments would begin without a "hiatus," created an undue risk that one or the other party's interpretation of section 4659(a) would prevail. Under these circumstances, I am persuaded that defendant is in a better financial position than applicant to bear the consequences of an adverse interpretation of section 4659(a). (See *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689, 704 [74 Cal.Comp.Cases 419], citing *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 471 [209 Cal. Rptr. 463]; § 3202 [workers' compensation statutes pertaining to permanent disability "shall be liberally

construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment”].)

Defendant has failed to persuade me that the Board erred in overturning the WCJ’s prior decision that applicant’s life pension is not accelerated by the commutation and lump sum payment of permanent partial disability indemnity. I would affirm the Board’s Opinion and Decision After Reconsideration of August 15, 2022.



WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 4, 2024

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

**KEVIN SUH
LAW OFFICE OF THOMAS MARTIN
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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