

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

ROGERNALD JACKSON, *Applicant*

vs.

CITY OF OAKLAND, permissibly self-insured, *Defendants*

**Adjudication Number: ADJ3726460
Oakland District Office**

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

Applicant seeks reconsideration¹ of the May 13, 2025 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an Assistant to the Mayor/Chief of Staff on October 28, 1983, sustained industrial injury to his bilateral knees, low back, bilateral hips, bilateral lower extremities and psyche. The WCJ found that applicant sustained permanent and total disability, payable at 1983 rates and commencing March 11, 2017.

Applicant contends that his award should be payable at temporary disability rates available in 2017 commencing after the last payment of temporary disability on February 16, 1988.

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will deny applicant's petition insofar as it challenges the indemnity rates awarded but grant the petition insofar as it

¹ Commissioner Brass, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in his place.

challenges the date of commencement of permanent disability. We will amend the Award to reflect that applicant's entitlement to permanent and total disability indemnity began on February 17, 1988, and defer the issue of defendant's right to credit for sums previously paid as temporary disability against the present award of permanent and total disability.

FACTS

Applicant claimed injury to his bilateral knees and "other body parts" while employed as an Assistant to the Mayor/Chief of Staff by defendant City of Oakland on October 28, 1983. Applicant sustained a crush injury as between multiple motor vehicles.

Pursuant to defendant's printout of benefits, defendant issued payment on February 16, 1988 in the amount of \$13,651.00 to applicant for temporary total disability. The claim was not resolved at the time.

Applicant claimed additional temporary disability in 2015, and defendant paid additional benefits through March 13, 2017. (Ex. J, Printout of Benefits, dated March 26, 2025, at p. 2.)

On April 19, 2017, the parties proceeded to expedited trial on the issue of defendant's petition to terminate temporary disability benefits. The parties stipulated that applicant's earnings at the time of injury were \$707.30 per week, warranting a temporary disability indemnity rate of \$471.53, and that "[t]emporary disability indemnity was paid for all compensable periods through February 24, 2017." (Expedited Hearing Minutes of Hearing and Summary of Evidence, dated April 19, 2017, at p. 2:5.)

On April 20, 2017, the WCJ determined that applicant had not met his burden of rebutting the presumptions of Labor Code² section 4651.1 and ordered defendant's liability for temporary disability terminated one week following the filing of its petition on March 6, 2017. (Findings and Order, dated April 20, 2017, at p. 1.)

On April 23, 2025, the parties proceeded to trial on issues including parts of body injured, earnings, permanent disability, apportionment, occupational code, and attorney fees. The WCJ received in evidence medical, medical-legal, and vocational reporting, and heard testimony from applicant. The WCJ ordered the matter submitted the same day.

On May 13, 2025, the WCJ issued the F&A. Therein, the WCJ determined in relevant part that applicant sustained injury to the bilateral knees, low back, bilateral hips, bilateral lower

² All further references are to the Labor Code unless otherwise noted.

extremities and psyche, but not to the spine (cervical & thoracic), neck, abdominal/gastrointestinal or in the form of sleep disturbance. (Finding of Fact No. 2.) The WCJ found that applicant's weekly earnings at the time of injury were \$707.30, and that applicant became permanent and stationary on March 11, 2017. (Findings of Fact Nos. 4 & 5.) Based on the medical and vocational evidence, the WCJ determined applicant's disability to be both permanent and total. (Finding of Fact No. 6.) The WCJ awarded corresponding disability payable at the weekly rate of \$196.00, commencing March 11, 2017, less credit for paid periods after March 11, 2017, and less credit for attorney's fees of 15 percent. (Award, para. 1.) The WCJ's Opinion on Decision explained that notwithstanding applicant's earnings, section 4453(a)(1) limited applicant's indemnity rates to \$196.00 per week for permanent total disability. (Opinion on Decision, at p. 3.)

Applicant's Petition contends entitlement to total permanent disability payments from the last payment of temporary disability benefits on February 16, 1988 and further claims resumed benefits as of January 23, 2015. (Petition, at p. 3:4.) Applicant also contends his permanent disability rate should be \$471.53 per week based on stipulated earnings of \$707.30 per week. (*Id.* at p. 4:6.)

Defendant's Answer responds that there is no evidence that applicant was permanently and totally disabled as of 1988, and that applicant had gainful employment thereafter. (Answer, at p. 2:8.) Defendant also observes that permanent total disability is a distinct benefit from temporary total disability, and that the WCJ correctly awarded indemnity at rates available for applicant's date of injury. (*Id.* at p. 1:24.)

The WCJ's report observes that applicant is raising the commencement date of his permanent and total disability benefits for the first time in the petition for reconsideration. (Report, at p. 3.) The WCJ also observes that the rate for permanent total disability is limited to earnings of not more than \$294.00 per week. (*Id.* at p. 4.) Accordingly, the WCJ recommends we deny applicant's petition.

DISCUSSION

I.

Former 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. (Lab. Code, § 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.

(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 June 13, 2025, and 60 days from the date of transmission is August 12, 2025. This decision is issued by or on August 12, 2025, 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 June 13, 2025, and the case was transmitted to the Appeals Board on June 13, 2025. 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 June 13, 2025.

II.

We first address applicant's contention that his entitlement to permanent and total disability indemnity commenced with the last payment of temporary disability. (Petition, at p. 3:4.) Applicant asserts that pursuant to the printout of benefits, applicant was paid for temporary disability through February 16, 1988, and is therefore entitled to permanent disability commencing February 17, 1988. (*Id.* at p. 4:1.)

We agree. Section 4650(b)(1) provides in relevant part, "[i]f the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity, except as provided in paragraph (2)." Here, there is no dispute that applicant received temporary total disability indemnity through February 16, 1988, and the WCJ's determination that applicant sustained permanent and total disability results in a start date for permanent disability on the date following the cessation of temporary disability, or February 17, 1988.

Moreover, as we stated in *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, when an injured worker who is receiving permanent 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. (*Id.* at p. 552.)

We acknowledge the WCJ's concerns in the Report that the issue was not raised with particularity at trial and agree that best practice is for the parties to carefully identify the issues with specificity prior to submission of the matter for decision. Careful framing of the issues is an integral component to due process as it allows the parties to marshal evidence responsive to the issues and allows the WCJ to decide the issues after careful consideration of that evidence. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc).) Here, however, we conclude that the commencement date of indemnity is directly related to the issue of "permanent disability" as framed by the parties and is therefore an indispensable consideration that must be decided in the first instance.

We also recognize that defendant has advanced broken periods of temporary total disability indemnity since the date of injury that potentially overlap the permanent and total disability

indemnity awarded herein. We will therefore defer the issue of whether defendant is entitled to credit for overlapping periods of indemnity previously advanced pursuant to section 4909 and the considerations set forth in *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106]), with the parties to adjust the issue and jurisdiction reserved to the WCJ in the event of further dispute.

Applicant also challenges the WCJ's determination that applicant's weekly permanent and total disability rate is \$196.00. Applicant's Petition observes that the parties have stipulated to average weekly earnings of \$707.30, and that applicant's corresponding temporary total disability rate is \$471.53. (Petition, at p. 4:5.) Applicant avers, "awarding him, 42 years after the date of injury, a permanent disability rate of \$196.00 is unjust and not in line with the purpose of the California Workers' Compensation System." (*Id.* at p. 4:15.)

The WCJ's Report responds:

Pursuant to Labor Code §4659 (b), "If the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life." And according to Labor Code §4453 (a)(1),

(a) In computing average annual earnings for the purposes of temporary disability indemnity and permanent total disability indemnity only, the average weekly earnings shall be taken at:

(1) Not less than one hundred twenty-six dollars (\$126) nor more than two hundred ninety-four dollars (\$294), for injuries occurring on or after January 1, 1983.

As such, Applicant is only permitted to what is statutorily provided under Labor Code §4659 and §4453. That is the \$196.00 per week.

Applicant provides no binding case law authority in support of their position, but rather cites the dissent in the En Banc Appeals Board Decision of *Duncan v. Singer Co.* (1978), 43 Cal.Comp.Cases 467, while at the same time acknowledging that the majority opinion in *Duncan v. Singer Co.* found that Permanent Total Disability benefits were not affected by statutory changes and are to [be] paid according to the amounts permitted by the law in effect at the time of the injury. As summed up by the Appeals Board in *Duncan*, "Although we sympathize with the need of the permanent totally disabled applicant in the face of inflation, the Board is of the opinion that, in view of the clear language of the statutes, inclusion of such applicants within the scope of Labor Code § 4661.5 must be accomplished by an appropriate amendment to Labor Code § 4661.5. (*Duncan v. Singer Co.* (1978), 43 Cal. Comp. Cases 467, 470).

(Report, at pp. 4-5.)

We concur with the WCJ's analysis. It is well-established that the rate of permanent total disability indemnity payable to applicant is fixed pursuant to the law relating to temporary disability indemnity in effect at the time of the compensable injury and is not affected by subsequent statutory changes in that law. (*Duncan, supra*, 43 Cal.Comp.Cases at p. 470; see also *Tucker v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 643 [1979 Cal. Wrk. Comp. LEXIS 2637].) We also observe that insofar as *Duncan* was decided en banc, it is binding authority on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).) We thus find no good cause to disturb the WCJ's determination that applicant is entitled to permanent and total disability at the rates in effect at the time of his injury.

Accordingly, we will grant applicant's petition and amend the Award to reflect that applicant's entitlement to permanent and total disability indemnity began on February 17, 1988. We will defer the issue of defendant's right to credit for sums previously paid as temporary disability against the present award of permanent disability, subject to adjustment by the parties with jurisdiction reserved to the WCJ in the event of further dispute. We decline to disturb the WCJ's determination as to the correct weekly indemnity rates.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of May 13, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of May 13, 2025 is **AFFIRMED**, except that is **AMENDED** as follows:

AWARD

* * * * *

1. Permanent and total disability indemnity at a rate of \$196.00 per week beginning February 17, 1988 and paid every other week, less credit for indemnity paid for periods after said date and less credit for the attorney's fees allowed herein. The issue of credit for

overlapping periods of indemnity previously advanced, pursuant to Labor Code section 4909 and the considerations set forth in *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106]) is deferred, with the parties to adjust the issue and jurisdiction reserved to the WCJ in the event of further dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 12, 2025

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

**ROGERNOLD JACKSON
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
LAUGHLIN, FALBO, LEVY & MORESI**

SAR/abs

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