

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

**NANNETTE (NANETTE) CAIN, *Applicant***

**vs.**

**CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, legally  
uninsured, administered by STATE COMPENSATION INSURANCE FUND], *Defendants***

**Adjudication Number: ADJ16642926 (MF), ADJ16642919, ADJ16642843, ADJ10791190  
San Luis Obispo District Office**

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Applicant Nannette (Nanette) Cain seeks reconsideration of the September 15, 2023 Joint Findings of Fact and Orders, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant is not statutorily entitled to elect to receive temporary total disability (TTD) in lieu of industrial disability leave (IDL), (2) the issue of attempting to supplement IDL benefits with entitlement under TTD does not appear to be ripe as the applicant has not satisfied their administrative remedies or petitioned for appeal, and (3) the Workers' Compensation Appeals Board does not have jurisdiction over issues regarding supplementation of IDL benefits.

Applicant contends that she is entitled to the difference between the TTD rate and the IDL payment because the TTD rate produces a higher payment than IDL.

We have received an answer from defendant State Compensation Insurance Fund. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied with respect to ADJ16642926 (MF) and ADJ16642919 and dismissed with respect to ADJ16642843 and ADJ10791190.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, we deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that applicant Nannette (Nanette) Cain's Petition for Reconsideration of the September 15, 2023 Joint Findings of Fact and Orders is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 20, 2023**

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

**NANNETTE (NANETTE) CAIN  
WILLIAM A. HERRERAS  
STATE COMPENSATION INSURANCE FUND**

**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*

**REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

**I**  
**INTRODUCTION**

Applicant by and through their Attorney of Record, filed a timely and verified Petition for Reconsideration challenging the decision issued by WCJ John Durr on September 15, 2023 in ADJ16642926 (MF); ADJ16642919 alleging that:

1. That by the Order, Decision or Award made and filed by the Appeals Board or the Workers' Compensation Judge, the Appeals Board acted without or in excess of its powers.
2. That the evidence does not justify the findings of fact.
3. That the findings of fact do not support the Order, Decision or Award.

Based on the following facts and discussion it is recommended that the petition for reconsideration be denied in these two (2) cases.

The Applicant's petition also identifies cases ADJ16642843 and ADJ10791190, as no decision was issued in those cases, it is recommended that the Petition for Reconsideration be dismissed as to those two (2) cases.

**II**  
**FACTS**

The Applicant was employed during the relevant times by the California Department of Forestry and Fire Protection. It was stipulated to by the parties that the applicant sustained an admitted work injury on August 12, 2022 in ADJ16642926. It was further stipulated to by the parties that the applicant sustained an admitted work injury on February 24, 2022 in ADJ16642919. The nature and extent of both injuries remains in dispute. (MOH/SOE)

The Applicant was found to be temporary totally disabled (TTD) and as an employee of the State of California was placed on Industrial Disability Leave (IDL) beginning on August 25, 2022 (Exhibit D).

The Applicant's attorney filed for an expedited hearing based on the claim that the applicant was entitled to TTD benefits instead of IDL on May 3, 2023. Then a petition was filed on May 30, 2023 objecting to a requested consolidation of cases, an objection to improper/insufficient notice and a petition for reassignment. An Order issued on May 31, 2023 in response

to the said petition, setting the matter for a mandatory settlement conference on all of the above issues on June 28, 2023. At that MSC the matter was set for trial on August 10, 2023.

At the time of trial in ADJ16642926 (MF); ADJ16642919; following lengthy discussions with the parties, the specifically enumerated issues for trial were agreed to by the parties:

1. Board jurisdiction over this particular issue at this time.
2. Applicant's entitlement to Temporary Total Disability Benefits, either in lieu of Industrial Disability Leave payments or by supplementing industrial leave payments with total temporary disability benefits.

The matter was held open for 10 days and submitted for decision on August 20, 2023. The decision which issued on September 15, 2023 contained the following Findings of Fact:

1. The applicant is not statutorily entitled to elect to receive Temporary Total Disability (TTD) in lieu of Industrial Disability Leave (IDL).
2. The issue of attempting to supplement IDL benefits with the entitlement under TTD, does not appear to be ripe as the applicant has not satisfied their administrative remedies or petitioned for appeal.
3. The Worker's Compensation Appeals Board does not have jurisdiction over issues regarding supplementation of IDL benefits.

### **III** **DISCUSSION**

The Applicant in their Petition for Reconsideration raised two specific issues. These are not the two issues that went forward at trial but are a related amalgamation of those questions and will be addressed. These are the two (2) specific issues raised in the petition:

1. Where the maximum TD rate is \$1,539.71 [2021 W-2 \$246,536.00] produces a higher amount than the IDL, \$1,179.69, is SCIF liable for the difference between the TD rate and IDL or the maximum TD rate less credit for IDL payments?

SCIF is an administrator, the liability would be on the California Department of Forestry and Fire Protection. More importantly the question is posed as a false dichotomy because the correct choice is a third (3rd) option: That the employer is only liable for the amount of IDL benefits.

Government Code §19872(a) states that the disabled employee may not receive temporary disability indemnity or sick leave or annual leave with pay for any period for which he or she

receives industrial disability leave. The Applicant's petition relies upon two (2) cases the first of which is *State of California v. WCAB (Ellison)* (1996), 61 CCC 325. This Court of Appeal case provides an excellent discussion of the interaction and relationship between IDL and TD, in a case that stands for the ability of the WCAB to assess a penalty on those amounts that would have been payable as temporary disability indemnity. This was for an injury that caused a period of disability between April 27, 1992 and January 14, 1993. As they were not germane, due to the Date of Injury, this decision did not take into consideration the impacts of the Legislative Amendments made to the Government Code §19872 that went into effect on January 1, 1995. These amendments, in part, codified a changed relationship between IDL and TD.

In a later case, *Brooks v WCAB* (2008) 73 CCC 447, the Court of Appeal again provides an excellent analysis of the interaction between IDL and TD. The *Brooks* case was on the issue of whether IDL was counted as temporary disability for purposes of reaching the aggregate limitation on benefits pursuant to Labor Code §4656(c)(1). In that context it was felt that the removal of the "in lieu of" language from Government Code §19871, was a ministerial and not a substantive change as it relates to whether IDL constitutes a form of temporary disability. Subsequent to the *Brooks* case, 2 CCR §599.759; the regulation cited by the petitioner from the *Brooks* case, was amended on April 16, 2014, becoming operative on July 1, 2014, the part of the regulation "*unless it would result in an amount less than would be provided by TD*" (Emphasis in petition), was removed from the regulation and a new schema regarding the sources of and mechanics for supplementation was enacted.

Therefore, the question raised by the petitioner is moot. The statutory enabling language providing the ability to opt out of IDL and into TD is no longer part of the law. Additionally, although outside the purview of the WCAB, the regulation regarding supplementation of IDL no longer lists temporary disability as a potential source with which to supplement IDL benefits.

Additional note on this section: There has been no judicial finding as to entitlement for the maximum TD rate, a W-2, while a significant indicia, in of itself is not a sufficient basis for said finding. Should additional action be required subsequent to reconsideration, the issue of average weekly wage would remain at issue.

2. Does the WCAB have jurisdiction to award TD, less credit for IDL benefits, where subsequent legislative changes in the Government Code were merely "ministerial" to expedite the delivery of benefits to disabled state employees?

As indicated above, *Brooks supra.*, was on the issue of whether IDL was counted as temporary disability for purposes of reaching the aggregate limitation on benefits pursuant to Labor Code §4656(c)(1). In that context it was felt that the removal of the “in lieu of” language from Government Code §19871, was a ministerial and not a substantive change as it relates to whether IDL constitutes a form of temporary disability.

In *Brooks*, it was found that the Legislature made their determination based on a number of enumerated reasons, not the least of which was bringing the statutory basis of the IDL program in compliance with state employees’ collective bargaining agreements. In that decision, the Appeals Court also talked about the Legislature allowing for supplementation and also allowing the employee the benefit of staying on the employer’s payroll and continuing to receive their medical benefits.

The WCAB does have jurisdiction to award TD and often awards TD at the conclusion of IDL. Government Code §19872(a) places a limitation that the disabled employee may not receive temporary disability indemnity or sick leave or annual leave with pay for any period for which he or she receives industrial disability leave.

#### **IV** **RECOMMENDATION**

It is recommended that the Petition for Reconsideration ADJ16642843 and ADJ10791190, be dismissed as no decision was issued in those cases. It is further recommended that the Petition for Reconsideration in ADJ16642926 and ADJ16642919 be denied as the Awarding of Temporary Disability Indemnity while the applicant is receiving Industrial Disability Leave, or the supplementing Industrial Disability Leave with temporary disability indemnity, is prevented by the Government Code and the associated Title 2 Regulations.

Respectfully submitted,

Date: September 28, 2023

**JOHN E. DURR**  
Worker’s Compensation  
Administrative Law Judge