

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

OYUKI MORALES, *Applicant*

vs.

**PENNANT FOODS CORPORATION DBA WENDY'S OLD-FASHIONED
HAMBURGERS; ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ2492589 (LBO 0378665)
Long Beach District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award & Orders ("FA&O") issued by the workers' compensation administrative law judge (WCJ) on June 7, 2022, wherein the WCJ found in relevant part that applicant sustained injury to her right wrist, neck, right shoulder, neurological system (complex regional pain syndrome), psyche, and gastrointestinal system; that applicant was entitled to temporary disability benefits from November 14, 2005 to August 23, 2006; that applicant was permanent and stationary on January 18, 2007; that applicant's injury caused permanent disability of 100%; and that applicant is entitled to an award without apportionment. In relevant part, the WCJ awarded temporary disability indemnity benefits from November 14, 2005 to August 23, 2006; and payment of permanent disability indemnity benefits beginning on January 18, 2007.

We received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Removal (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 stated in the Report, which we adopt and incorporate with the exception of the section titled Gastrointestinal System (Report, p. 6), and for the reasons stated below, we amend the FA&O (Finding of Fact, Nos. 2 and 9, and

the Award) to reflect that applicant suffered injury in the form of gastritis and to find that payment of permanent and total disability indemnity payments to applicant should commence within 14 days of last date of payment of temporary disability indemnity of August 23, 2006. (See Lab. Code, §§ 4650, 4656; *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal.Wrk.Comp. LEXIS 69] (Appeals Board en banc) (*Brower*).)

FACTS

Applicant, while employed during the period of March 30, 2005, to March 30, 2006, as an assistant manager at a fast food restaurant, sustained injury arising out of and in the course of employment to various body parts. Defendant paid temporary disability indemnity benefits at \$542.34 per week from November 14, 2005, to March 20, 2006; permanent disability indemnity benefits at \$220 per week from November 14, 2005, to March 20, 2006; and permanent disability indemnity benefits of \$253 per week from April 12, 2012, to August 1, 2013. (10/21/21 Minutes of Hearing (MOH), Stipulation no. 3.)

After a two-day trial, the WCJ found in relevant part that applicant had met her burden to prove that she injured her gastrointestinal system as a result of the continuous trauma injury (FA&O, Finding of Fact (“FF”) no. 2); that applicant met her burden to prove entitlement to temporary disability benefits for the period from November 14, 2005, to August 23, 2006 (FA&O, FF no. 5); that the permanent and stationary date is January 18, 2007 (FA&O, FF no. 7); that applicant successfully rebutted the Permanent Disability Rating Schedule (PDRS) based upon the vocational reporting of Enrique Vega (FA&O, FF no. 8); that applicant’s injury caused permanent disability of 100%, entitling applicant to a weekly rate of \$463.50 per week, and the Cost of Living Increase per Labor Code Section 4659(c)¹ (FA&O, FF no. 9); and that applicant is entitled to an award without apportionment. (FA&O, FF no. 10.)

In relevant part, the WCJ awarded applicant temporary total disability benefits for the period from November 14, 2005, to August 23, 2006, less credit for benefits paid by defendant and by EDD and permanent and total disability of 100% beginning on January 18, 2007.

The WCJ explained in the Opinion on Decision (“OOD”) that the applicant testified that she experienced stomach and gastrointestinal issues and that Dr. Marcher found that applicant suffered from gastritis. (OOD, p. 5.) The WCJ further explained that while both the applicant’s

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

vocational expert, Enrique Vega, and the defendant’s vocational expert, John C. Meyers, provided a comprehensive analysis, Vega was more reliable because “he takes into account the totality of the [a]pplicant’s situation” regarding permanent disability. (OOD, pp. 9-10.)

DISCUSSION

Permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Lab. Code, § 4660.1). To rebut a scheduled permanent disability rating, an injured worker must establish that their future earning capacity is less than that anticipated by the scheduled rating. The court in *Ogilvie v. Workers’ Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] addressed the issue of “[w]hat showing is required by an employee who contests a scheduled rating on the basis that the employee’s diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?” (*Id.* at p. 1266.) The primary method for rebutting the scheduled rating is based upon a determination that the injured worker is “not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.” (*Id.* at p. 1277.) The employee’s diminished future earnings must be directly attributable to the employee’s work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee’s lack of education. (*Id.* at p. 1275.)

In *Contra Costa County v. Workers’ Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119], the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach... It is this individualized assessment of whether industrial factors preclude the employee’s rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule.

(*Id.* at p. 758.)

In *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeal held that

in cases other than those enumerated under section 4662(a), a determination of permanent total disability shall be made on the facts of the case in accordance with “percentages of permanent disability.” That is, the provisions in section 4660 for rating the percentages of permanent disability pursuant to the Guides and the Permanent Disability Rating Schedule (PDRS) must still be utilized. (*Id.* at pp. 1688-1690.) The Court further concluded that there was no basis for concluding that section 4662(b) provides a second independent path to permanent total disability findings separate from section 4660. (*Id.* at p. 1692.) The Court noted, however, that the scheduled rating is not absolute, and it is permissible to depart from the scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Id.* at pp. 1684-1686, 1689-1690; see also *Ogilvie v. Worker’s Comp. Appeals Bd.*, *supra*, 197 Cal.App.4th at pp. 1266-1276; *Contra Costa County v. Worker’s Comp. Appeals Bd. (Dahl)*, *supra*, 240 Cal.App.4th at pp. 755-761; *Leboeuf v. Worker’s Comp. Appeals Bd.* (1983) 34 Cal.3rd 234, 243-246 [48 Cal.Comp.Cases 587].)

We will not disturb the WCJ’s findings regarding permanent disability of 100% and that applicant is entitled to an award without apportionment. However, we will amend Finding of Fact number two to change “gastrointestinal system” to “injury in the form of gastritis” in accordance with the evidence presented. Additionally, we will amend Finding of Fact number nine and the award to comply with *Brower v. David Jones Construction*, *supra*, 79 Cal.Comp.Cases 550.

I.

In the report of January 18, 2016, PQME Dr. Stanley Majcher reported that applicant suffered specifically from gastritis. (Ex. X20, pp. 3-4.) The WCJ acknowledged that Dr. Majcher found that applicant suffered from gastritis. (OOD, p. 5; Report, p. 6.) The WCJ then determined that gastritis is not a body part and therefore concluded that the injury was to the gastrointestinal system. (Report, p. 6.) However, the correct finding is that there was injury in the form of gastritis. Thus, we will amend the Findings of Fact to conform with the evidence presented.

II.

Further, we will amend the award to conform with *Brower*.

Section 4656, subdivision (c) states in relevant part that:

- (1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

(Lab. Code, § 4656(c)(1)-(2).)

Section 4650, subdivision (b) states that:

(1.) If 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). When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid.

(2.) [W]hen an award of permanent disability indemnity is made, the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, **whichever is earlier**.

(Lab. Code, § 4650(b)(2), emphasis added.)

In 2014, the Appeals Board issued an en banc decision addressing post-SB 899 injuries. (*Brower, supra*, 79 Cal.Comp.Cases 550.) In *Brower*, the Appeals Board held that an applicant is entitled to receive permanent disability payments, including permanent total disability payments when a defendant stops paying temporary disability pursuant to section 4656(c) before an applicant becomes permanent and stationary. (*Id.* at p. 552.) “[I]f a defendant paid permanent partial disability payments to an applicant who becomes permanently totally disabled, the defendant must retroactively adjust the permanent disability payments to the correct rate.” (*Id.* at p. 562.) The Appeals Board also held that cost of living adjustments (“COLAs”) begin on the first day in January after an injured worker becomes entitled to receive permanent total disability indemnity. (*Id.* at pp. 562-563, citing *Baker v. Workers’ Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].)

Therefore, here the date that permanent disability begins must be changed in accordance with *Brower*. The WCJ found that applicant was entitled to temporary disability benefits from November 14, 2005, to August 23, 2006, and that the permanent and stationary date is January 18,

2007. (FA&O, FF nos. 5, 7). The WCJ awarded applicant temporary total disability for the period of November 14, 2005, to August 23, 2006, and permanent disability of 100%, payable at the starting rate of \$463.50 per week beginning on January 18, 2007 (FA&O, Award, p. 4.) However, the award allows a gap between the payment of the temporary and permanent disability benefits, and we will amend Finding of Fact number 9 and section b of the award accordingly to find that applicant is entitled to permanent and total indemnity payments commencing within 14 days of August 23, 2006, and that the COLA will commence beginning on January 1, 2007.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award & Orders issued on June 7, 2022, by a workers' compensation administrative law judge is **AFFIRMED**, except it is **AMENDED** as follows:

Findings of Fact

...

2. Applicant has met her burden to prove that she injured her neck, right shoulder, neurological system (complex regional pain syndrome), psyche, and injury in the form of gastritis as a result of the continuous trauma injury.

...

9. Applicant's injury caused permanent disability of 100%, entitling applicant to a weekly rate of \$463.50 per week commencing within 14 days of last date for which temporary disability indemnity was paid of August 23, 2006. Applicant is entitled to the Cost of Living Increase per Labor Code section 4659(c), beginning on January 1, 2007.

Award

b. Permanent disability of 100%, payable at the starting rate of \$463.50 per week beginning within 14 days of August 23, 2006, to be adjusted by the parties with jurisdiction to the WCJ in the event of a dispute, with the rate increasing as required by statute per Labor Code Section 4659 (c) beginning on January 1, 2007, and continuing for life, less attorney's fees of 15% to be commuted from the side of the award which is deferred pending the parties meeting and conferring and consulting with the DEU to determine the final amount and held in trust by defendant pending further order of this court or a written fee split agreement between current and prior Applicant's attorney, less any permanent disability advances paid to date, less \$1,000.00 to defendant for reimbursement by applicant for the fees associated with the two missed Panel Qualified Medical Examinations, and less \$1,000.00 for applicant's reimbursement of the Labor Code 4903 lien to the Dordulian Law Group for the cost of living expense lien.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 27, 2022

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

SERVICE LIST

**OYUKI MORALES
NORDANYAN LAW
GOLDMAN, MAGDALIN & KRIKES**

JMR/pc

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