

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

KATHERINE BEARD, *Applicant*

vs.

**WALMART ASSOCIATES, INC. and AMERICAN HOME ASSURANCE, administered
by YORK RISK SERVICES GROUP, INC., *Defendants***

Adjudication Number: ADJ1974387

Marina Del Rey District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on April 23, 2019, wherein the WCJ found in pertinent part that based on the parties' stipulations, the permanent and stationary date is February 26, 2014, and ordered that, "Defendant pay all monetary benefits owed to Applicant in accordance with the permanent and stationary date of February 26, 2014." (Findings, p. 2.)

Applicant contends that she should be paid permanent disability indemnity benefits at the rate of \$408.07 per week as of September 13, 2006, and that COLA (Cost-Of-Living Adjustment) increases should be calculated as of January 1, 2007, or in the alternative, January 1, 2008.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the Findings except that we will amend the Findings to find that the date that applicant initially received permanent disability indemnity benefits controls the calculations of monetary benefits owed to applicant, and that applicant's COLAs are to commence as of January 1, 2007; based thereon the Order will be amended to order that defendant retroactively adjust the permanent

disability payments made as of September 13, 2006, and continuing thereafter, to the rate of \$407.66 per week, and pay applicant the benefits owed at the adjusted rate, with credit for permanent disability indemnity benefits previously paid.

BACKGROUND

Applicant claimed injury to her spine, left wrist, right wrist, bilateral ankles, and psyche, and in the form of sleep disorder, HTN (hypertension), GERD (gastroesophageal reflux disease), cardiomyopathy, and a stroke, while employed by defendant as a department manager on March 28, 2006.

Defendant paid applicant permanent partial disability indemnity benefits at the rate of \$230.00 per week, for the period from September 13, 2006, through October 15, 2008, and from February 18, 2010, through September 21, 2013. (See Def. Exh. AA, pp.3 – 23.) Defendant paid one day of temporary disability indemnity, in the amount of \$101.20, for November 8, 2007. The one day of temporary disability benefits was paid because applicant attended a medical-legal evaluation on November 8, 2007, at the request of defendant. (Report, p.2.)

The parties proceeded to trial on September 21, 2017. They stipulated that on March 28, 2006, applicant sustained an industrial injury to her spine, left wrist, and psyche, and in the form of sleep disorder, HTN, GERD, cardiomyopathy, and a stroke; and that applicant claimed injury to her bilateral ankles and right wrist. The parties also stipulated that defendant paid applicant permanent disability indemnity at the rate of \$230.00 per week starting September 14, 2006, “and continuing.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 21, 2017, p. 2.) The matter was continued and was submitted for decision as of July 17, 2018.

On July 23, 2018, the WCJ issued a Findings and Award wherein the WCJ found in part, that applicant sustained injury arising out of in the course of employment on March 28, 2006, to her bilateral ankles, and right wrist in addition to the body parts agreed upon by the parties (spine, left wrist, and psyche and in the form of sleep disorder, HTN, GERD, cardiomyopathy, and a stroke). The WCJ also found that as a result of the injury, applicant was permanently totally (100%) disabled and that her earnings at the time of injury (including earnings from defendant and from concurrent employment) were \$612.10 per week. Applicant filed a Petition to Correct Clerical Errors and the WCJ issued an Order that corrected the clerical errors. The July 23, 2018, Findings and Award was not otherwise disputed.

On August 6, 2018, defendant paid applicant permanent total disability indemnity at the rate of \$353.29 per week, for the period from January 1, 2011, to August 6, 2018, and then paid weekly benefits from August 7, 2018, through November 7, 2018. (See Def. Exh. AA, pp. 1 – 3.)

The parties again proceeded to trial on March 4, 2019. They stipulated that, “The permanent and stationary date is February 26, 2014, based on the stipulations” and the issues submitted for decision included, “Date of first payment of permanent disability for purposes of calculating state average weekly wage starting date per Labor Code Section 4659.” (MOH/SOE, March 4, 2019, p. 2.)

DISCUSSION

In the Report, the WCJ discusses the issue of whether the permanent and stationary date is November 8, 2007, based on the temporary disability benefit payment for that date.¹ As noted above, applicant was paid \$101.20 of temporary disability indemnity for the day that she attended a medical-legal evaluation. However, the California Supreme Court has explained that:

...[T]his specific statutory benefit [Labor Code section 4600(e)(1)] is not a broad obligation to pay TDI [temporary disability indemnity] to replace an employee's wages for time away from work while pursuing medical treatment for a permanent and stationary injury. Rather, this benefit is in the nature of a medical-legal benefit, reimbursing the employee for his time when requested to submit to a medical examination to resolve a compensation claim.

(Department Of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher) (2003) 30 Cal. 4th 1281, 1294 - 1295 [68 Cal.Comp.Cases 831].)

Also, the Third District Court of Appeals subsequently held that:

...[T]he benefit provided in section 4600, subdivision (e)(1) clearly is not a temporary disability benefit that triggers the cap under section 4656. It is a medical-legal benefit intended to permit the injured worker to recover costs associated with resolving a claim.

(Meeks Building Center v. Workers' Comp. Appeals Bd. (Najjar) (2012) 207 Cal.App.4th 219, 226 [77 Cal.Comp.Cases 615].)

¹ We note that although applicant made that argument in the January 16, 2019 Trial Brief, that issue is not raised or discussed in applicant's Petition. However, to clarify the basis for our decision explained herein, it is appropriate that we address that issue as raised by the WCJ.

Clearly, the indemnity paid to applicant because she attended a medical-legal evaluation does not constitute a temporary disability indemnity payment that would require the payment of permanent disability indemnity pursuant to Labor Code section 4650(b)(1).

In the Petition, applicant contends that she is entitled to permanent disability indemnity benefits at the rate of \$408.07 per week, starting September 13, 2006. Regarding the retroactive adjustment of permanent partial disability indemnity to permanent total disability indemnity rate, the Appeals Board has held that:

Construing sections 4650 and 4661 together, if 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.
(*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 562 (Appeals Board en banc).)

Here, there is no dispute that defendant first paid applicant permanent disability benefits, pertaining to the March 28, 2006, injury, commencing September 13, 2006, at the rate of \$230.00 per week. There is also no dispute that applicant is permanently totally disabled as a result of her March 28, 2006, industrial injury. It must be noted that the permanent partial disability payments received by applicant, were not paid at the rate that would ultimately compensate her for the 100% permanent disability she sustained as a result of the March 28, 2006, injury. Thus, the initial rate must be adjusted retroactively to the proper permanent disability rate, so that applicant will receive benefits to which she is entitled as a result of the permanent total disability caused by the March 28, 2006, injury. (*Ibid*, at 562.)

Regarding the proper rate of the permanent disability benefits, as noted, the July 23, 2018, Findings and Award included a finding that applicant's earnings at the time of the injury were \$612.10 per week. Pursuant to the provisions of the Labor Code, the indemnity rate for a permanently totally (100%) disabled injured worker is to equal "two-thirds" of the injured worker's average weekly earnings at the time of the injury. (See Lab. Code, §§ 4659(b), 4453(a)(10), and 4658(d)(1).) As we stated earlier, the Finding that applicant's earnings were \$612.10 per week was not disputed. It therefore is a final decision (Cal. Code Regs., tit. 8, § 10330; previously § 10348, on the date of injury) and is the appropriate basis for determining applicant's total disability indemnity rate. Based thereon, the permanent disability rate is \$407.66 per week.

As to applicant's argument that the parties' stipulation identifying February 28, 2014, as the permanent and stationary date was not correct, we first note that applicant did not show good cause for disregarding the stipulation. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) However, as explained above, under the circumstances of this matter, defendant must retroactively adjust the permanent disability payments to the correct rate. (*Brower v. David Jones Construction, supra.*) So, the issue of the permanent and stationary date is moot.

Finally, in our *Brower* decision we also stated:

[T]he date on which an injured worker becomes entitled to receive permanent disability indemnity is fixed by sections 4650(b)(1) and 4650(b)(2). This provides the most uniform and fair date from which to calculate an applicant's COLAs. Accordingly, we hold that an injured worker's COLAs commence on the January 1 after the injured worker became entitled to receive permanent disability indemnity without regard to the indemnity rate or whether the employer actually paid permanent disability. (*Brower v. David Jones Construction, supra*, at 563; see also Lab. Code, § 4659(c).)

Thus, since applicant first received permanent disability benefits on September 13, 2006, her COLAs commence as of January 1, 2007.

Accordingly, we affirm the Findings except that we amend the Findings to find that the date applicant initially received permanent disability indemnity benefits controls the calculations of monetary benefits owed to applicant, and based thereon applicant's COLAs are to commence as of January 1, 2007; the Order is amended to order that defendant retroactively adjust the permanent disability payments made as of September 13, 2006, and continuing thereafter, to the rate of \$407.66 per week, and pay applicant benefits owed at the adjusted rate, with credit for permanent disability indemnity benefits previously paid.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 23, 2019, Findings of Fact is **AFFIRMED**, except that it is **AMENDED** as follows:

* * *

FINDINGS OF FACT

- 1. September 13, 2006, the date applicant initially received permanent disability indemnity benefits, controls the calculations of monetary benefits owed to applicant.
- 2. Applicant’s Cost-Of-Living Adjustments shall commence as of January 1, 2007.

ORDERS

IT IS ORDERED that defendant retroactively adjust the permanent disability payments made as of September 13, 2006, and continuing thereafter, to the rate of \$407.66 per week, and pay applicant benefits owed at the adjusted rate, with credit for permanent disability indemnity benefits previously paid.

IT IS FURTHER ORDERED that defendant adjust the permanent disability payments to include Cost-Of-Living Adjustments as of January 1, 2007.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 19, 2023

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

**KATHERINE BEARD
PENNINGTON & TRODDEN
ALBERT & MACKENZIE**

TLH/mc

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