

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

**THOMAS GAUL, *Applicant***

**vs.**

**DEPARTMENT OF CORRECTIONS INMATE CLAIMS, legally uninsured and adjusted  
by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ1655822 (LBO 0397196), ADJ8188338  
Long Beach District Office**

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

Defendant Department of Correction Inmate Claims, by and through its adjusting agency State Compensation Insurance Fund, seeks reconsideration of the June 15, 2023 Joint Findings of Fact and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to 15% increase in permanent disability benefits after nine weeks of benefits in accordance with Labor Code, section 4658(d).<sup>1</sup>

Defendant contends that per *Scott v. Cal. Dep't of Corr.* (ADJ2736625 (OAK 0345167), ADJ6471430, April 26, 2010) [2010 Cal. Wrk. Comp. P.D. LEXIS 152], the increase in section 4658(d) does not apply to state prison inmates who sustained injury while incarcerated.

We have not received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we grant reconsideration in order to correct the June 15, 2023 Joint Findings of Fact and Award to state that applicant is entitled to 85.50 weeks of permanent disability benefits in ADJ8188338.

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<sup>1</sup> All statutory references are to the Labor Code unless otherwise indicated.

As the WCJ pointed out in his Report, defendant conveniently failed to address that in the Pre-trial Conference Statement as well as in trial, the parties stipulated to the increase found in section 4658(d) and improperly raised this issue for the first time in the Petition. (Pre-trial Conference Statement; Minutes of Hearing/Summary of Evidence (MOH/SOE) dated May 2, 2023, pp. 3:7-9, ¶ 7; 4:11-13, ¶7.)

Moreover, *Scott, supra*, 2010 Cal. Wrk. Comp. P.D. LEXIS 152, is a panel decision that is not binding. Panel decisions are not binding precedent (as are en banc decisions) on all other Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) Although the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive (see *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc)), we decline to do so.

Section 3370(a)(5) provides that in “determining temporary and permanent disability indemnity benefits for the inmate, the average weekly earnings shall be taken at not more than the minimum amount set forth in Section 4453.” Section 4453 provides that in “computing average annual earnings for purposes of permanent partial disability indemnity, except as provided in Section 4659<sup>2</sup>, the average weekly earnings shall be taken at: ... (6)(D) not less than one hundred ninety-five dollars (\$195), nor more than three hundred forty-five dollars (\$345), for injuries occurring on or after January 1, 2006.” (§ 4453(b)(6)(D).) Section 4658(d)(1) provides that for injuries occurring on or after January 1, 2005, a 25% permanent disability rating (ADJ1655822) is computed at two thirds of the average weekly earnings for 100.75 weeks and a 22% permanent disability rating (ADJ8188338) is computed at two thirds of the average weekly earnings for 85.50<sup>3</sup> weeks. (§ 4658(d)(1).) Two thirds of the minimum average weekly earning of \$195.00 is \$130.00.

Section 4658(d)(2) provides:

(2) If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability

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<sup>2</sup> Section 4659 computes average weekly earnings for total permanent disability, which is not the issue here, and is therefore not applicable. (§ 4659.)

<sup>3</sup> The June 15, 2023 Joint Findings of Fact and Award erroneously states 83.5 weeks. (Joint Findings of Fact and Award dated June 15, 2023, p. 3, ¶ 4.) We believe this is a typographical error.

payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.

Defendant contends that per *Scott, supra*, 2010 Cal. Wrk. Comp. P.D. LEXIS 152, the specific provision of section 3370(a)(5) prevails over the general provision of section 4658(d)(2). (Petition, p. 3:7-5:20.) We respectfully disagree. Section 3370(a)(5) restricts an inmate worker's average weekly earnings to the statutorily prescribed minimum amount set forth in section 4453. It does not restrict the amount of permanent disability benefits as computed in section 4658(d). Section 4658(d) computes the amount of permanent disability benefits by applying two-thirds of the average weekly earnings and then increasing it by 15% in certain circumstances or decreasing it by 15% in other circumstances. Here, defendant admits that it did not make a return to work offer to applicant in either injury, entitling applicant to the 15% increase. (Petition, p. 2:13-14, ¶ 3.)

Accordingly, we grant reconsideration and amend the June 15, 2023 Joint Findings of Fact and Award to state that applicant is entitled to 85.50 weeks of permanent disability benefits in ADJ8188338.

For the foregoing reasons,

**IT IS ORDERED** that defendant Department of Correction Inmate Claims' Petition for Reconsideration of the June 15, 2023 Joint Findings of Fact and Award is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 15, 2023 Joint Findings of Fact and Award is **AMENDED** as follows:

**Findings of Fact (ADJ8188338)**

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4. Applicant's injury caused permanent disability of 22%, entitling applicant to 85.50 weeks of disability indemnity payable at the rate of \$130.00 per week for the first nine (9) weeks and seventy-four and half (76.5) weeks at a rate of 149.50 due to the Labor Code 4658(d) increase in the total amount of \$12,606.75 less payments previously made and less applicant attorney fee.

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**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ NATALIE PALUGYAL, COMMISSIONER**

**JOSÉ H. RAZO, COMMISSIONER**  
**CONCURRING NOT SIGNING**



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

**September 5, 2023**

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

**THOMAS GAUL  
PERONA, LANGER, SERBIN, BECK & HARRISON  
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*

**JOINT REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I**  
**INTRODUCTION**

Dates of Injury: 04/01/2010 (ADJ8188338); 05/14/2007 (ADJ1655822)

Ages on DOIs: 67; 64

Parts of Body Injured: lumbar spine and left hip (ADJ8188338); cervical spine and lumbar spine (ADJ1655822)

Identity of Petitioner: Defense Counsel, Tran Meltzer

Timeliness: The petition was timely filed and served on July 7, 2023.

Verification: The petition was verified

Date of Findings of Fact and Order: June 15, 2023

Petitioners Contentions: Petitioner contends that the Labor Code §4658 (d) increase for permanent disability does not apply to inmate cases.

**II**  
**FACTS**

This matter was set for a Mandatory Settlement Conference (MSC) before the undersigned on March 13, 2023. Prior to the MSC, the parties filed a Pretrial Conference Statement (PTCS) and as the parties were unable to resolve the case, the undersigned set the matter for trial. At the trial on May 2, 2023, after it was determined that the matter would not be able to resolve, the undersigned reviewed the PTCS with the parties. At this time, the parties agreed to amend the original PTCS for both cases. In addition to other stipulations on case ADJ8188338, the parties stipulated to the following:

7. The medical report of Agreed Medical Examiner Michael Luciano, MD, dated 12/02/2021, rates 22 percent permanent disability after apportionment, or \$12,606.75 after the Labor Code 4658(d) increase. (Minutes of Hearing, page 4, lines 11-13)

In addition to other stipulations on case ADJ1655822, the parties stipulated to the following:

7. The medical report of Agreed Medical Examiner Michael Luciano, MD, dated 12/02/2021, rates 25 percent permanent disability after apportionment, or \$14,886.63 after the Labor Code 4658(d) increase. (Minutes of Hearing, page 3, lines 7-9)

Based on the above, the matter was submitted, a decision was served on June 15, 2023, and it is from this decision the Petition for Reconsideration is sought.

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

#### THE LABOR CODE §4658(d) INCREASE FOR PERMANENT DISABILITY DOES NOT APPLY TO INMATE CASES

Petitioner contends that the Labor Code §4658 (d) increase for permanent disability does not apply to inmate cases. Although Petitioner makes persuasive and correct arguments as to why the Labor Code §4658(d) increase does not apply to inmate cases, the fact remains that the amounts ordered by the undersigned were stipulated by the parties at the trial. The law is well established that the parties to a controversy may stipulate to the facts in a matter and the Appeals Board may thereupon make its findings and award based upon such stipulation. *Labor Code § 5702*. Stipulations are ordinarily entered into for the purpose of avoiding delay, trouble or expense and should be encouraged, as they serve to obviate the need for proof or to narrow the range of litigable issues. *County of Sacramento v. Workers' Comp. Appeals Bd (Weatherall)*, (2000) 77 Cal. App. 4th 1114, 1118-1120 [65 Cal. Comp. Cases 1].

While the Appeals Board has the discretion to reject factual stipulations, this does not validate capricious decision making and must not be done absent good cause. *Id.* at 1119. A poor outcome is not a reason to set aside a stipulation by counsel and does not sweep away the authority of said counsel to enter into the stipulation. *Id.* at 1121.

In the matter at hand, the undersigned went over the original PTCS and framed new stipulations prior to going on the record and there were no objections by the parties either at the time of submission or after the Minutes of Hearing and Order of Consolidation were served. A decision was rendered forty-four (44) days after submission and this is the first time that these two stipulations are "at issue." The parties were represented by competent counsel, who voluntarily entered into said stipulations with respect to the ratings of permanent disability of the medical

reports and their corresponding values. Thus, the undersigned sees no reason to set aside these stipulations and award the amounts agreed to by the parties.

**IV**  
**RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

DATE: July 20, 2023

**Simon Hovakimian**  
WORKERS' COMPENSATION JUDGE