WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WARREN BROWER, ***Applicant,*** **vs.** **DAVID JONES CONSTRUCTION; STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ802221 (SJO 0258870)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

The Workers' Compensation Appeals Board (Appeals Board) previously granted defendant's and applicant's Petitions for Reconsideration of the February 1, 2013 Findings and Award to further study the factual and legal issues. Thereafter, to secure uniformity of decision in the future, the Chairwoman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1]

In the February 1, 2013 Findings and Award, the workers' compensation administrative law judge (WCJ) found that applicant's admitted December 20, 2005 injury to his low back, psyche and right knee caused temporary total disability from December 20, 2005 through October 6, 2011 and caused permanent total disability (100%). Although under Labor Code section 4656(c)(1)[2] applicant's entitlement to temporary total disability indemnity payments ceased on December 20, 2007 (i.e., after 104 weeks of payment), the WCJ awarded permanent total disability indemnity commencing

[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044] (*Ochoa*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

[2] All further statutory references are to the Labor Code.

October 6, 2011, which was when applicant became permanent and stationary.[3] Accordingly, the WCJ's award resulted in a nearly four year gap between the last payment of temporary total disability indemnity and the first payment of permanent total disability indemnity. The WCJ also ordered defendant to reimburse applicant $600.00 for a medical-legal report from his treating physician, Dr. Russell.

Applicant contends that his permanent total disability payments should have commenced as of December 21, 2007 and not October 6, 2011, arguing that pursuant to section 4650(b), permanent total disability payments should commence on the day after the last payment of temporary total disability. Applicant also contends he is entitled to annual cost of living adjustments (COLAs) commencing on January 1, 2008 pursuant to section 4659.

Defendant contends that applicant did not sustain 100% permanent disability, arguing that the award is based on speculation rather than substantial medical evidence and that applicant is vocationally feasible and therefore not permanently totally disabled under *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]. Defendant also contends the WCJ erred in ordering defendant to reimburse applicant $600 for Dr. Russell's medical-legal report, arguing that applicant should not be allowed to obtain a medical-legal report from a treating physician when there is an agreed medical evaluator (AME) in the relevant specialty.

Based on our review of the relevant statutes, regulations, and case law, we hold:

(1) When a defendant stops paying temporary disability indemnity pursuant to section 4656(c) before an injured worker is determined to be permanent and stationary, the defendant shall commence paying permanent disability indemnity based on a reasonable estimate of the injured worker's ultimate level of permanent disability.

(2) When an injured worker who is receiving permanent partial 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

[3] Defendant was entitled to stop paying temporary disability indemnity on December 20, 2007, but continued paying temporary disability indemnity through January 31, 2008.

temporary disability indemnity terminated.

(3) COLAs begin on the first day in January after an injured worker becomes entitled to receive permanent disability indemnity pursuant to sections 4650(b)(1) or (b)(2).

For the reasons set forth below, we will also affirm the WCJ's determinations that applicant is permanently totally disabled and entitled to medical-legal costs for Dr. Russell's report.

I. BACKGROUND

While employed as an ironworker foreman on December 20, 2005, applicant sustained an industrial injury to his low back, left knee, and psyche.

Applicant was evaluated by agreed medical evaluator (AME) Fredric Newton, M.D. in the field of neurology. After his initial evaluation, Dr. Newton reported: "This patient suffered a major lumbar spinal injury, far more significant than those routinely seen in the workers' compensation patient population. He literally blew out his L3-4 disc, resulting in a complete myelographic block with compression of the cauda equina." (Exh. QQ, September 23, 2006 report, p. 7.)

Pursuant to section 4656(c)(1), applicant was entitled to 104 weeks of total temporary disability indemnity, ending on December 20, 2007. However, defendant continued paying applicant total temporary disability indemnity at $675.65 per week until January 31, 2008 when defendant began advancing permanent disability at $270 per week, the statutory maximum weekly permanent disability indemnity rate for a 2005 injury causing permanent disability from 70 through 99¾%. Applicant requested that permanent disability advances be paid at the permanent total disability indemnity rate, arguing that although he was not yet permanent and stationary, the medical reporting indicated that he would be 100%.

After a May 7, 2008 trial, the WCJ issued a decision wherein he found that it was "premature to determine the extent of Applicant's permanent disability." In his Opinion on Decision, the WCJ indicated that the applicant had not yet reached maximum medical improvement.

Applicant sought reconsideration of the May 7, 2008 Findings and Order. We denied reconsideration on July 29, 2008.

In his initial permanent and stationary report, Dr. Newton reported: "Applicant underwent three decompressive procedures on his spine. He remains at risk for further disc herniation." (Exh. LL, November 14, 2008 report, p. 13.) Applicant developed an altered gait and injured his right knee as a compensable consequence of his back injury. (*Ibid*.) Dr. Newton opined: "The patient would not be able to return to work as an ironworker. Whether he could return to the open labor market in any fashion is open to serious question. He has been found disabled on a neuromusculoskeletal basis alone. Added to this would be disability from his knee and the residuals of a Major Depressive Disorder. Also, he requires chronic narcotic usage. When all of this is considered in concert, it seems to me that he would best be considered permanently and totally disabled." (*Id.* at p. 14.)

Subsequently, Dr. Newton more definitely opined that applicant could not return to work in any capacity. "The combination of his spinal problems, knee problems, and psychiatric problems would render him permanently and totally disabled." (Exh. KK, May 7, 2009 report, p. 4.) While Dr. Newton would defer to a vocational expert regarding earning capacity, he stated: "I am fully capable of offering opinions on work capacity from a medical perspective. This, of course, does not take into account the 'three-prong test' of vocational experts. Nevertheless, it is something I am called upon to do routinely in workers' compensation cases. After all, if I am describing impairment, I am no less able to indicate that that impairment may be sufficient to preclude employment." (Exh. DD, June 13, 2012 report, p. 4.)

Dr. Newton reiterated his opinion that applicant is permanently totally disabled in numerous reports. (Exh. FF, April 11, 2012 report, p. 4; Exh. EE, May 14, 2012 report, p. 2; Exh. DD, June 13, 2012 report, p. 4; Exh. CC, July 23, 2012 report, p. 3.)

The parties selected Robert Perez, Ph.D., as the AME in psychology. After initially finding the applicant to be temporarily totally disabled, Dr. Perez opined that applicant reached permanent and stationary status on July 23, 2009 and that applicant had 0% whole person impairment as a result of his psychiatric injury. (Exh. SS, July 23, 2009 report, p. 12.) At his deposition, Dr. Perez explained: "I'm hard pressed to imagine a work environment that this gentleman would be able to do. But in essence if he was placed in an environment where he has the pressure to perform, to put out, give an output for eight hours a day, to the extent his pain burden increases, to the extent the stress increases, I would

assume that my current very positive statements about his psychological status, psychiatric status very well could be out the window." (Exh. VV, February 11, 2011 deposition, p. 14:17-14:25.)

Applicant's treating psychologist, Peter R. Russell, Ph.D., disagreed with Dr. Perez' assessment of applicant's whole person impairment.

> "After reading Dr. Perez's report from 09/03/10, I do not believe that a GAF rating of 75 is consistent with my ongoing observations of Mr. Brower and his ability to function. Apparently Dr. Perez appeared to be rating only his mood and anxiety conditions and how Mr. Brower was on the day that he saw him on 09/03/10. However, on one occasion Dr. Perez described Mr. Brower as walking with no difficulty although Mr. Brower had a brace on his right leg and was constantly using a cane. I do not believe that Dr. Perez has adequately addressed the psychological diagnosis of Chronic Pain Disorder, associated with psychological factors and medical conditions. This is a very important area to address when describing an individual's disability. As I stated earlier, there is a definite interaction effect between patients' mood and their pain and also between their pain and their mood. Mr. Brower is currently taking Cymbalta which has the effect of not only improving and stabilizing mood but also has an effect on neuropathic pain. Another important effect of Cymbalta is that because it is effective as a dual reuptake inhibitor, it also improves the patient's mood and therefore he is better able to tolerate some level of pain. Unfortunately, Mr. Brower is in a situation where if he attempts to do too much physical activity related to his activities of daily living, both his pain and his mood symptoms will become more severe which occur on a regular basis.
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> "Based on my continuous treatment of Mr. Brower and my opportunity to observe him on a longitudinal basis and especially considering the diagnosis of Chronic Pain Disorder, associated with psychological factors and general medical conditions, it is my opinion that a more accurate GAF would be 41 reflecting serious impairment in ability to perform activities of daily living, multiple vegetative disturbances such as fatigue and insomnia, and ongoing moderate to severe pain levels in spite of analgesic medication and Cymbalta. The patient also depending on his presentation at any given time could have a lower GAF when his pain becomes overwhelming. For example, there are times when he needs to lie down and have bed rest nearly a complete day when his pain becomes overwhelming. Therefore I believe that a GAF of 41 would reflect Mr. Brower on one of his better days." (Exh. 1, July 1, 2012 report, p. 4.)

The parties selected Charles Borgia, M.D., as the AME in orthopedic surgery to evaluate applicant's knee injury. Dr. Borgia's December 14, 2011 report found that applicant's knee injury

caused 12% whole person impairment and reached maximum medical improvement on October 14, 2011. (Exh. AA, December 14, 2011 report, pp. 7-8.)

In addition to the medical reporting in this case, applicant offered a report from vocational expert Scott Simon. Mr. Simon, after reviewing applicant's work restrictions, opined that applicant had lost 100% of his future earning capacity. (Exh. 4, July 17, 2012 report, p. 26.) Defendant's vocational expert, Ira Cohen, opined that applicant could be retrained to perform a sedentary occupation. (Exh. A, September 24, 2012 report, p. 29.)

At trial on December 10, 2012, the parties submitted the issues of permanent disability, the date on which permanent total disability indemnity should commence, the start date of COLAs, attorney's fees, and reimbursement of medical-legal expenses. The parties deferred the issues of injured body parts, vocational rehabilitation expenses, and self-procured home health care reimbursement. (Minutes of Hearing and Summary of Evidence, December 10, 2012, pp. 3-4.)

The WCJ awarded permanent total disability "based upon the AME reports of Dr. Newton (particularly Joint Exhibits CC, DD, and EE) and upon the reports of the treating psychologist, Dr. Russell (particularly Applicant's Exhibits 1 and 2)." (Report and Recommendation on Petition for Reconsideration , p. 3.)

As mentioned above, the WCJ awarded permanent total disability indemnity commencing on October 6, 2011, which the WCJ implicitly found to be applicant's permanent and stationary date.[4] The WCJ interpreted our July 29, 2008 decision to preclude an award of permanent disability indemnity prior to permanent and stationary status. (Report, p. 8.)

II. DEFENDANT'S PETITION

As a preliminary matter, we affirm the WCJ's finding of permanent total disability and his allowance of costs associated with Dr. Russell's medical-legal report.

It is, of course, well settled that all decisions by the WCAB must be supported by substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310];

[4] It appears that the permanent and stationary date should actually be October 14, 2011 based on Dr. Borgia's December 14, 2011 report. (Exh. AA, p. 7.) However, neither party is disputing the implicit October 6, 2011 permanent and stationary date.

LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion does not constitute substantial evidence if it is based upon surmise, speculation, conjecture or guess, based upon facts no longer germane, based upon incorrect legal theory, or based upon an inadequate medical history and/or examination. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Where the reports of one or more physicians constitute substantial evidence, the WCAB may rely on those reports even if other physicians disagree with their conclusions. (*Jones v. Workers' Comp. Appeals Bd.* (1986) 68 Cal.2d 476, 479 [33 Cal.Comp.Cases 221].)

In this case, the opinion of Dr. Newton, the AME in neurology, that applicant is permanently totally disabled is substantial evidence and would, by itself, be sufficient to support the WCJ's decision. Furthermore, Dr. Newton's conclusion is supported by the reporting of applicant's treating psychologist Dr. Russell, who opined that applicant's GAF score was 41 "reflecting serious impairment in ability to perform activities of daily living, multiple vegetative disturbances such as fatigue and insomnia, and ongoing moderate to severe pain levels in spite of analgesic medication and Cymbalta." (Exh. 1, July 1, 2012 report, p. 4.) The WCJ correctly relied on the medical evidence as well as the considered report of applicant's vocational expert Scott Simon to find permanent total disability.

With respect to defendant's contention that it should not be required to reimburse applicant's costs for Dr. Russell's report, defendant offered no legal authority for the proposition that applicant was not entitled to request a medical-legal report from his treating psychologist. (Defendant's Petition for Reconsideration, p. 8.) Moreover, a medical-legal expense is ordinarily allowable if it is capable of proving or disproving a contested claim, if the expense was reasonably necessary at the time incurred, and if the cost incurred was reasonable. (§§ 4620 et seq., 5307.6.) The mere fact that the parties had agreed to an AME in a particular specialty does not mean that a party cannot reasonably obtain a comprehensive medical-legal report from a treating physician in the same or similar specialty. We recognize that the WCAB will ordinarily follow the opinion of an AME because it is presumed the AME was chosen by the parties because of his or her expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Nevertheless, it is the WCAB,

and not the AME, that is the ultimate trier-of-fact. (See *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419].) Therefore, the WCAB is not bound by the opinion of an AME; rather, its only obligation is to give consideration to the AME's opinion (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323] (*Austin*)) and the WCAB may decline to follow an AME's opinion if it finds the opinion to be unpersuasive. (E.g., *Rodriguez v. Workers' Comp. Appeals Bd.* (1994) 21 Cal.App.4th 1747, 1758-1759 [59 Cal.Comp.Cases 14].) Accordingly, we affirm the WCJ's award of the medical-legal expense.

III. APPLICANT'S PETITION

A. STATUTES AFFECTING TIMING OF DISABILITY PAYMENTS

The provisions of a statute "must [be] consider[ed] in the context of … the statutory scheme of which it is a part" and "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286]; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1] ("The words of the statute must be construed in context … and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.").)

The Labor Code sections that are relevant here are 4650, 4656, 4659, and 4661 which are all part of Article 3, "Disability Payments."

Before 1949, section 4661 provided that an injured worker was not entitled to both permanent and temporary disability benefits, but only to the greater of the two. (*Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd.* (*Lopez*) (1996) 14 Cal.4th 76, 88 [61 Cal.Comp.Cases 1360].) Prior to 1949,

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section 4650 addressed the timing of either temporary or permanent disability payments.[5]

In 1949, sections 4650 and 4661 were amended. Since 1949, section 4661 has provided that: "Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation for any permanent disability sustained by him in addition to any payment received by such injured employee for temporary disability." Since 1949, section 4650 has provided for the coordination of temporary and permanent disability payments.[6] In 2004, in Senate Bill 899 (SB 899), the Legislature made sweeping changes to the entire workers' compensation system, including adding a 104-week cap on temporary disability indemnity for injuries occurring on or after April 19, 2004. (Stats. 2004, ch. 34; § 4656(c).) As amended, section 4650(b) [now, § 4650(b)(1)] states:

> "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. 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

[5] From 1929 to 1947, section 4650 stated: "If an injury causes temporary disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injured employee leaves work as a result of the injury. If the injury causes permanent disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injury." In 1947, the section was amended to add "becomes permanent" to the last sentence. In 1949, the section was amended to read as follows: "If an injury causes temporary disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injured employee leaves work as a result of the injury; provided, that in case the injury causes disability of more than 49 days, the disability payment shall be made from the first day the injured employee leaves work as a result of the injury. If the injury causes permanent disability, a disability payment shall be made for one week in advance as wages on the fourth day after the injury becomes permanent or the date of last payment for temporary disability, whichever date first occurs."

[6] After minor revisions in 1959, 1971, and 1973, section 4650 was repealed and replaced for injuries occurring on or after January 1, 1990. The 1990 revision included subsection (b) which stated: "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. Where the extent of permanent disability cannot be determined at the date of last payment of temporary disability indemnity, 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." Senate Bill No. 899 (2003-2004 Reg. Sess.) amended section 4650 to require that permanent disability commence "[w]hen the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656."

> been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid."

Effective January 1, 2013, the Legislature amended section 4650(b) to clarify that an employer is not required to commence permanent disability indemnity after the last payment of temporary disability if the employee has returned to work or been offered work at certain wage thresholds.[7] If the employee is eventually awarded permanent disability, "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*." (§ 4650(b)(2) [italics added].)

Prior to enacting SB 899, the Legislature amended section 4659 to provide that, for injuries occurring on or after January 1, 2003, permanent total disability indemnity payments are increased annually commencing January 1, 2004 in an amount equal to the percentage increase in the state average weekly wage. Section 4659(c) provides, in full:

> "For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension[8] or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the 'state average weekly wage' as compared to the prior year. For purposes of this subdivision, 'state average weekly wage' means the average weekly wage paid by employers to employees covered by unemployment insurance as

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[7] Effective January 1, 2013, Senate Bill 863 (Stats. 2012 ch. 363) amended subdivision (b) as follows:

"(b)(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 <u>indemnity, except as provided in paragraph (2)</u>. 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.

<u>(2) Prior to an award of permanent disability indemnity, a permanent disability indemnity payment shall not be required if the employer has offered the employee a position that pays at least 85 percent of the wages and compensation paid to the employee at the time of injury or if the employee is employed in a position that pays at least 100 percent of the wages and compensation paid to the employee at the time of injury, provided that when 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."</u>

(Underlining denotes amendment.)

[8] An applicant is entitled to a life pension if he or she sustains an injury that caused permanent disability from 70 through 99¾%. (§ 4659(a).)

> reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred."

In *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 438 [76 Cal.Comp.Cases 701] (*Baker*), the Supreme Court held "the Legislature intended that COLA be calculated and applied prospectively commencing on the January 1 following the date on which the injured worker first becomes entitled to receive, and actually begins receiving, such benefit payments… ."

B. WHEN A DEFENDANT STOPS PAYING TEMPORARY DISABILITY INDEMNITY PURSUANT TO SECTION 4656(c) BEFORE AN INJURED WORKER IS DETERMINED TO BE PERMANENT AND STATIONARY, THE DEFENDANT SHALL COMMENCE PAYING PERMANENT DISABILITY INDEMNITY BASED ON A REASONABLE ESTIMATE OF THE INJURED WORKER'S ULTIMATE LEVEL OF PERMANENT DISABILITY.

Permanent disability and temporary disability are separate and distinct benefits, designed to compensate for different losses. (See § 4661; *Lopez*, *supra,* 14 Cal.4th at p. 87; *Granado v. Workmen's Comp*. *Appeals Bd.* (1968) 69 Cal.2d 399, 405 [33 Cal.Comp.Cases 647].)

"Temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment." (*Ochoa*, *supra*, 142 Cal.App.4th at p. 801.)

In contrast, permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases. 565].) Although an applicant's level of permanent disability can only be determined after the applicant reaches maximum medical improvement, permanent disability may exist before maximum medical improvement occurs. (*Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (*Zavala*) (2008) 158 Cal.App.4th 705, 718 [73 Cal.Comp.Cases 6]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (*Cugini*) (2008) 159 Cal.App.4th 483, 496 [73 Cal.Comp.Cases 81].)

Prior to the passage of SB 899, the injured worker's entitlement to temporary disability indemnity terminated when the injured worker either became permanent and stationary or improved sufficiently to

return to work. (*County of Los Angeles* v. *Workers' Comp. Appeals Bd*. (*King*) (1980) 104 Cal.App.3d 933, 939 [45 Cal.Comp.Cases 248].) Historically, permanent disability benefits were not payable until the employee had reached permanent and stationary status. (*City of Martinez v. Workers' Comp. Appeals Bd.* (*Bonito*) (2000) 85 Cal.App.4th 601, 608-609 [65 Cal.Comp.Cases 1368]; *Kopitske v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 623, 630-631 [64 Cal.Comp.Cases 972]; *Austin*, *supra*, 16 Cal.App.4th at p. 235.)

SB 899 amended section 4656(c) [now, § 4656(c)(1)] to provide for a 104-week cap on temporary disability. Thus, injured workers like Mr. Brower could remain temporarily disabled after receiving 104 weeks of temporary disability payments and yet not be entitled to collect temporary disability indemnity. Concurrently, the Legislature also amended section 4650(b) [now, § 4650(b)(1)] to require that permanent disability commence "[w]hen the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656."

As amended by SB 899, section 4650 requires a defendant to pay permanent disability indemnity to an applicant who may be temporarily disabled. However, article XIV, section 4 of the California Constitution vests the Legislature with plenary power to create a complete system of workers' compensation (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810 [65 Cal.Comp.Cases 1402]; *Steele*, *supra*, 19 Cal.4th at p. 1189; see also *DuBois*, *supra*, 5 Cal.4th at p. 388 ("[t]he right to workers' compensation benefits is wholly statutory")) and, as a matter of policy, the Legislature has capped an applicant's entitlement to temporary disability indemnity benefits at 104 weeks, but preserved the transition from one species of benefit to another, thereby providing "an uninterrupted flow of timed benefits during the transition" from temporary disability indemnity to permanent disability indemnity. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1293–1294 [66 Cal.Comp.Cases 584].)

Because an applicant's level of permanent disability cannot be determined until the applicant reaches maximum medical improvement and is no longer temporarily disabled, a defendant paying permanent disability indemnity to a temporarily disabled applicant is required to pay a "reasonable estimate." (§ 4650(b).) Indeed, in this case, we affirmed the WCJ's May 7, 2008 decision that it was

premature to determine that applicant was permanently totally disabled.

C. WHEN THE INJURED WORKER 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.

Once "the amount of permanent disability indemnity due has been determined," defendant must continue to pay permanent disability indemnity "until that amount has been paid." (§ 4650(b)(1).)[9] For an applicant who is less than 100% disabled, the percentage of permanent disability corresponds to a fixed number of weeks of indemnity at a fixed dollar amount. (§ 4658.) An applicant who sustained at least 70% but less than 100% permanent disability is entitled to a life pension after payment of the number of weeks specified in section 4658 has been made. For example, if Mr. Brower had sustained 49% permanent disability as a result of his December 20, 2005 injury, he would be entitled to 264 weeks of indemnity at $220.00 per week or $58,080.00. If applicant had sustained 85% permanent disability, he would be entitled to 673.25 weeks of indemnity at $270.00 per week or $181,777.50 and a life pension thereafter. Unlike an applicant with a lesser degree of disability, a permanently totally disabled applicant is not entitled to a fixed amount, but is entitled to permanent disability indemnity payments at the temporary total disability rate for life. (§§ 4659(b), 4453(a).)

A consequence of advancing permanent disability indemnity to a temporarily disabled injured worker is that an employer's reasonable estimate may not match an injured worker's actual permanent disability. In cases such as this, where an applicant moves from being temporarily totally disabled to permanently totally disabled, the applicant's actual level of disability was and is total. The difference between temporarily and permanently disabled in this case is solely the difference between applicant's condition having the potential for improvement and permanent and stationary status.

An injured worker is "entitled to compensation for any permanent disability sustained by him in

[9] As explained above, a defendant is not required to pay pre-award permanent disability indemnity in certain circumstances, but, upon an award of permanent disability, "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." (§ 4650(b)(2).)

addition to any payment received by such injured employee for temporary disability." (§ 4661.) 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.[10] The indemnity payments made at the $270 per week rate did not adequately compensate applicant for the permanent disability sustained by him and accordingly must be adjusted retroactively to the permanent total disability rate.

D. COLAs BEGIN ON THE FIRST DAY IN JANUARY AFTER AN INJURED WORKER BECOMES ENTITLED TO RECEIVE PERMANENT DISABILITY INDEMNITY PURSUANT TO SECTIONS 4650(b)(1) OR (b)(2).

Section 4659(c) provides that for injuries occurring on or after January 1, 2003, life pension and total permanent disability indemnity payments shall be "increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the 'state average weekly wage' as compared to the prior year." In *Baker*, *supra,* 52 Cal.4th at p. 438, the Supreme Court stated: "[T]he Legislature intended that COLA's be calculated and applied prospectively commencing on the January 1 following the date on which the injured worker first becomes entitled to receive, and actually begins receiving, such benefit payments, i.e., the permanent and stationary date in the case of total permanent disability benefits." However, the *Baker* Court expressly excluded post-SB 899 injuries from its holding:

> medical condition is permanent and stationary. (See §§ 4650, subd. (b), 4656, subd. (c).) We express no view on that question, which is not presented under the facts of this case." (*Baker, supra,* 52 Cal.4th at p. 439, fn. 2.)

[10] This interpretation is consistent with the Legislature's recent amendment to section 4650 which explicitly provides for retroactive payment of permanent disability indemnity. Section 4650(b)(2) now provides that in cases where an applicant returns to work, the award of permanent disability indemnity 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." (§ 4650(b)(2).) While section 4650(b)(2) deals with a gap in permanent disability payments rather than payments made at the incorrect rate, the situations are analogous.

Considering the changes to section 4650 made by SB 899 and SB 863, permanent and stationary status is no longer required for an injured worker to be entitled to receive permanent disability indemnity. (§ 4650(b)(1), (b)(2).) A consequence of paying permanent disability advances before permanent and stationary status is that the date an injured worker becomes entitled to receive permanent disability indemnity may differ from the date an injured worker actually begins receiving permanent disability indemnity. In fact, with SB 863, the Legislature provided that, for some injured workers, permanent disability would not be due until an award and "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." (§ 4650(b)(2).)

Actual receipt of permanent total disability indemnity is dependent on a number of factors, including whether a case is denied, whether the applicant returns to work, whether a defendant begins issuing payments on the correct date and how quickly an applicant reaches permanent and stationary status. In some cases, actual receipt may be based on arbitrary factors or exigencies beyond the control of either applicant or defendant.

In contrast, the 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.

In this case, defendant overpaid temporary total disability indemnity from December 21, 2007 through January 31, 2008. Nevertheless, it ultimately owed applicant permanent total disability at the same weekly rate. Accordingly, we will exercise our discretion to allow defendant a credit for all indemnity benefits previously paid because the allowance of a credit of overpayment of temporary disability against liability for permanent total disability will not be disruptive of the purpose of the second benefit. (*Maples v. Workers' Comp. Appeals Bd*. (1980) 111 Cal.App.3d 827, 834, 836-837 [45 Cal.Comp.Cases 1106]; *Ryerson Concrete Co.* v. *Workmen's Comp. Appeals Bd*. (*Pena*) (1973) 34

Cal.App.3d 685, 689 [38 Cal.Comp.Cases 649].)

IV. CONCLUSION

The WCJ's decision that applicant is permanently totally disabled is well supported by the record and we affirm the WCJ's award of permanent total disability. We also affirm the $600 award of medical-legal expenses for Dr. Russell's report.

Pursuant to section 4650(b), applicant became entitled to receive permanent total disability on December 21, 2007. Pursuant to section 4659(c), applicant is entitled to COLAs commencing January 1, 2008. Because the commencement date of applicant's COLAs affects the value of applicant's permanent disability award, we will defer the issue of applicant's attorney's fee, with jurisdiction reserved at the trial level.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 1, 2013 Findings and Award is **RESCINDED** and the following is **SUBSTITUTED** in its place:

> 1. Warren Brower, while employed as ironworker foreman on December 20, 2005 at Oakdale, California by David Jones Construction, insured for workers' compensation liability by State Compensation Insurance Fund, sustained a specific injury arising out of and in the course of his employment to low back, psyche, and right knee. Applicant's claimed injury to his bilateral lower extremities, hypertension, low testosterone, gait and station, and genitourinary tract is deferred with jurisdiction reserved at the trial level.
>
> 2. Applicant's earnings at the time of injury were $1,013.48 per week, producing a temporary total disability rate of $675.65 per week and a permanent total disability indemnity rate of $675.65 per week.
>
> 3. Applicant's injury caused temporary total disability entitling applicant to temporary total disability indemnity at the rate of $675.65 per week for the period December 20, 2005 through December 20, 2007, which has been fully paid. Defendant is entitled to credit for all overpayments of temporary total disability indemnity against its liability for permanent total disability indemnity.

4. Applicant's injury caused permanent disability of 100%, entitling applicant to permanent total disability indemnity commencing December 21, 2007 at the rate of $675.65 per week and continuing for life, subject to annual cost of living adjustments pursuant to Labor Code section 4659(c), beginning January 1, 2008.

5. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

6. Applicant is entitled to reimbursement for self-procured medical treatment expense in an amount to be adjusted by the parties, or absent adjustment to be determined by a workers' compensation judge in supplemental proceedings on request of the parties.

7. Applicant is entitled to reimbursement for medical-legal expense in the amount of $600.00 for the reasonable expense of obtaining a report from Dr. Russell.

8. The reasonable value of the services of applicant's attorney is deferred, with jurisdiction reserved at the trial level.

AWARD

AWARD IS MADE in favor of **WARREN BROWER** against **STATE COMPENSATION INSURANCE FUND** of:

a. Permanent total disability indemnity at the rate of $675.65 per week beginning December 21, 2007 and continuing for the remainder of applicant's life, augmented by cost of living increases as provided by law commencing January 1, 2008, less credit to defendant for all sums paid on account thereof and less a reasonable attorney's fee against permanent disability pursuant to Finding of Fact number 8.

b. Further medical treatment reasonably required to cure or relieve from the effects of this injury.

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c. Medical-legal expense in the amount of $600.00 payable to applicant's attorney.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

/s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

5/21/2014

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

WARREN BROWER
BUTTS & JOHNSON
STATE COMPENSATION INSURANCE FUND

MWH/bgr