

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

ANGEL JIMEMEZ, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPARTMENT OF CALIFORNIA HIGHWAY PATROL,
legally uninsured, STATE COMPENSATION INSURANCE FUND/STATE CONTRACT
SERVICES, *Defendants***

**Adjudication Number: ADJ11168233
San Luis Obispo District Office**

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

Defendant State of California, Department of California Highway Patrol, legally uninsured, by and through its adjusting agent State Compensation Insurance Fund, seeks reconsideration of the February 10, 2023 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant is entitled to a Supplemental Job Displacement Benefit (SJDB) voucher when it failed to offer regular, modified, or alternative work following the receipt of the September 13, 2018 report of David W. Baum, M.D.

Defendant contends that applicant is not entitled to a SJDB voucher because applicant did not suffer permanent partial disability but rather suffered permanent total disability.

We received an answer from applicant Angel Jimenez. 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we grant reconsideration, rescind the February 10, 2023 Findings and Award, and return this matter to the trial level for further development of the record consistent with this Opinion.

FACTS

On September 13, 2018, Dr. Baum issued a report that states:

Stroke

This patient's impairment for stroke cannot be rated by a traditional impairment. By analogy to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 343, section 13.8, table 13-22, Mr. Jimenez has a class 4 whole person impairment for stroke ratable at 55%.

Hypertensive cardiovascular disease

In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 66, section 4.1, table 4-2, Mr. Jimenez has a class 4 whole person impairment for hypertensive heart disease ratable at 50%.

The combined values chart on pages 604 and 605 of the AMA Guides must be utilized in this case. This patient's stroke and heart disease both arise from hypertension; hence, there is sufficient overlap to utilize the combined values chart. According to the combined values chart, the **combined whole person impairment for hypertension and stroke is 78% whole person impairment.** (Dr. Baum's report dated September 13, 2018, p. 31; emphasis in the original.)

Dr. Baum's report was addressed to both applicant and defendant and defendant does not appear to dispute that it received this report in a timely manner.

On January 26, 2021, over two years later, the parties entered into a Stipulations with Request for Award for permanent total disability. (Stipulations with Request for Award.) The WCJ issued an Award pursuant to the Stipulations with Request for Award on February 9, 2021. (Award.)

On April 18, 2022, applicant filed a Request for Dispute Resolution Before Administrative Director. (Applicant Exhibit 3, Request for Dispute Resolution Before Administrative Director.) Applicant argued:

In this case, Defendant has refused to provide Applicant with a Supplemental Job Displacement Benefit Voucher, correctly stating that Labor Code section 4658.7 applies only if the injury causes permanent partial disability. Applicant is not permanently partially disabled, but is in fact permanently totally disabled.

Nonetheless, Applicant is not claiming he is entitled to a Supplemental Job Displacement Benefit Voucher in order to avail himself of the

education-related retraining or skill enhancement contemplated by section 4658.7. He can never work again, so retraining would be pointless. Instead, Applicant is claiming entitlement to a Supplemental Job Displacement Benefit Voucher only because that is the method promulgated by statute to apply for the \$5,000.00 Return-to-Work Supplement payment.

It is undisputed that Applicant is no longer working for his at-injury employer, and because he can never work again in any capacity, he has by definition experienced greater-than average earnings losses. He fits squarely within the stated public policy the Return-to-Work Supplement Program, which exists to provide supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss.

For the foregoing reasons, Applicant is entitled to supplemental payments from the Return-to-Work Supplement Program, and Defendant should be ordered to provide a Supplemental Job Displacement Benefit Voucher for the sole purpose of allowing Applicant to apply for supplemental payments from the Return-to-Work Supplement Program. Alternatively, the Administrative Director should issue an order directing the Return-to-Work Supplement Program to issue supplemental payments to Applicant. (Applicant Exhibit 3, Request for Dispute Resolution Before Administrative Director.)

On June 30, 2022, the Administrative Director issued a letter in response to applicant's Request for Dispute Resolution stating that per the decision in *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389 (Appeals Board En Banc), the Administrative Director will take no action on the request for dispute resolution. (Applicant Exhibit 2, Response to Request for Dispute Resolution Before Administrative Director.)

DISCUSSION

Labor Code, section 4658.7(b)¹ provides that an injured worker is entitled to a SJDB voucher if the industrial injury causes permanent partial disability and the employer fails to make an offer of regular, modified, or alternative work. (§ 4658.7(b).) Section 4658.7(b)(1) and (2) and Rule 10133.31(b) provide that the offer of regular, modified, or alternative work must be made no later than 60 days after receipt of the Physician's Return to Work & Voucher Report (Form DWC-AD 10133.36) and must last for at least 12 months. (§ 4658.7(b)(1) and (b)(2); Cal. Code of Regs.

¹ All future statutory references are to the Labor Code unless otherwise indicated.

tit. 8, § 10133.31(b).)

A different Appeals Board panel in *Sanchez v. Forever 21, Inc.* (ADJ11573028, December 5, 2022) [2022 Cal. Wrk. Comp. P.D. LEXIS 333] and *Schmidt v. Fremont Swim School* (ADJ12311590, December 7, 2022) [2022 Cal. Wrk. Comp. P.D. LEXIS 342] opined that a Physician's Return to Work & Voucher Report is not necessary so long as applicant makes a showing that he sustained permanent partial disability and the employer failed to show that it offered regular, modified, or alternative work.

Here, Dr. Baum's report serves as notice to defendant that applicant sustained permanent disability, which would trigger defendant's duty to offer regular, modified, or alternative work within 60 days, or a SJDB voucher, if the permanent disability is partial. Contrary to the Findings, however, Dr. Baum did not opine that applicant sustained 78% permanent disability. (Findings and Award dated February 10, 2023, Finding no, 3; Dr. Baum's report dated September 13, 2018, p. 31.) Instead, Dr. Baum opined that applicant sustained a 55% whole person impairment (WPI) as a result of his stroke and a 50% WPI due to hypertensive cardiovascular disease, for a combined WPI of 78%. (Dr. Baum's report dated September 13, 2018, p. 31.) It is unclear what percentage of permanent disability results from Dr. Baum's impairment rating. If Dr. Baum's impairment rating results in permanent partial disability, then the WCJ is correct that the SJDB statute is triggered at that time. If Dr. Baum's impairment rating results in permanent total disability, then defendant is correct that applicant is not entitled to a SJDB voucher.

Furthermore, applicant's position that it is not seeking a voucher for its retraining purposes but merely as a step to obtain a Return-to-Work supplemental benefit is concerning. While we understand that the Return-to-Work supplemental benefit requires the issuance of a SJDB voucher, seeking a voucher in name only without intending to benefit from its intended purpose of retraining a worker is not proper. (See *Finch v. Chicos* (ADJ10123459, June 17, 2020 [2020 Cal. Wrk. Comp. P.D. LEXIS 233] [Appeals Board affirming the WCJ's conclusion that a voucher "in name only" is not sufficient to trigger the applicant's eligibility for the Return-to-Work Supplemental Program benefit].) We also note that applicant is represented by a guardian-ad-litem because he is deemed incompetent and we question the propriety of a voucher in circumstances where the applicant is deemed incompetent. (Petition for Appointment of Guardian Ad Litem; Order Appointing Guardian Ad Litem.)

Lastly, we see as problematic that neither party entered Dr. Baum's report into evidence.

While the Rules of Evidence are relaxed in workers' compensation proceedings (§ 5709), they must still be observed in order to create a record of evidence from which the parties may rely upon.

Accordingly, for the reasons set forth above, we grant reconsideration, rescind the February 10, 2023 Findings and Award, and return this matter to the trial level for further development of the record consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED that defendant State of California, Department of California Highway Patrol's Petition for Reconsideration of the February 10, 2023 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 10, 2023 Findings and Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 2, 2023

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

**ANGEL JIMENEZ
JONES CLIFFORD, LLP
STATE COMPENSATION INSURANCE FUND**

LSM/pc

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