

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

LARRY COOPER, *Applicant*

vs.

**SAN GABRIEL VALLEY WATER COMPANY;
LIBERTY MUTUAL; INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ6428257
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Larry Cooper. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the February 14, 2020 Findings and Answer, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that (1) applicant was underpaid temporary disability for the periods August 6, 2009 through and including October 4, 2009, and the period July 1, 2011 through and including October 6, 2011; and (2) the reasonable value of services rendered by applicant's attorney is \$21,435.00, which is 15% of the total sum of applicant's permanent disability award of \$142,897.50, not including the life pension award.

Applicant contends that (1) the WCJ erred in failing to award attorney's fees from the additional temporary disability awarded; (2) the WCJ failed to apply the 15% increase to the value of permanent disability per Labor Code¹ section 4658, subdivision (d)(2)²; and (3) the attorney's fees did not take into account the section 4658(d)(2) statutory increase and the life pension award.

We have not received an answer from defendants Liberty Mutual or Insurance Company of the West. The WCJ prepared a Report and Recommendation on Petition for Reconsideration

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

² All subsequent references to a subdivision are noted by a parenthesis.

(Report), recommending that the Petition be granted and the Award amended to include attorney's fees in the amount of 15% of the additional temporary disability awarded and to deny the rest of applicant's contentions.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend the Findings and Award to defer the issue of attorney's fees and the issue of whether applicant is eligible for the section 4658(d)(2) statutory increase and return this matter to the trial level for further proceedings consistent with this Opinion.

FACTS

As the WCJ stated,

Initially, the issues of date of injury pursuant to Labor Code section 5412, and liability pursuant to Labor Code section 5500.5 were tried. The proper Defendants were found to be Insurance Company of the West, and Liberty Mutual Insurance. Old Republic Insurance was dismissed as a party defendant, after the initial trial, pursuant to Labor Code section 5500.5. The remaining defendants were unable to resolve the issues of underpayment of temporary disability, permanent disability, and apportionment. The matter proceeded to trial on November 19, 2019. The court found the Applicant had been underpaid temporary disability for the period August 6, 2009 through and including October 4, 2009, and for the period July 1, 2011 through and including October 6, 2011. The parties were ordered to adjust the underpayment less credit for amounts of temporary disability previously paid. The undersigned did not provide an award of attorney fees on the underpayment temporary disability.

Permanent disability of 76% payable at the rate of \$270.00 per week less credit to Defendant for permanent disability previously paid, and less a reasonable attorney fee was awarded. The parties stipulated the Applicant was entitled to the supplemental job displacement voucher. (See MOH/SOE November 19, 2019 p. 2, [] 21-22) The parties, however, did not stipulate to, or raise as an issue the fifteen percent increase pursuant to Labor Code section 4658 (d) (2). Attorney fees of 15% were awarded on the total permanent disability amount of \$142, 879.50. The attorney fee awarded was \$21, 435.00. The petitioner was aggrieved the attorney fee awarded did not include anything based on a commutation of the life pension. The Findings and Award issued on February 14, 2020. It is from

the Findings and Award the Applicant now seeks reconsideration.
(Report, pp. 1-2.)

DISCUSSION

A. ATTORNEY'S FEES FROM THE ADDITIONAL TEMPORARY DISABILITY AWARD.

Per the Report, we return this matter to the trial level to amend the Findings and Award to include attorney's fees in the amount of 15% of the additional temporary disability awarded.

B. STATUTORY INCREASE UNDER SECTION 4658(D)(2)

Section 4658(d)(2) provides,

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 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. (§ 4658(d)(2).)

According to the Report, the applicant failed to prove that the employer employed 50 or more employees in order to meet the requirements of section 4658(d)(2). The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120-1122 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc), we stated that “[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (Citations.)” (*McDuffie, supra*, 67 Cal.Comp.Cases at 141.) Here, we return this matter to the trial level to develop the record on this issue.

C. ATTORNEY’S FEES FROM SECTION 4658(D)(2) INCREASE AND LIFE PENSION

Section 4903 authorizes the Appeals Board to award attorney’s fees for legal services pertaining to any claim for compensation. (§ 4903(a).) WCAB Rule 10844 states,

In establishing a reasonable attorney's fee, the workers' compensation judge or arbitrator shall consider the:

- (a) Responsibility assumed by the attorney;
- (b) Care exercised in representing the applicant;
- (c) Time involved; and
- (d) Results obtained.

(Cal. Code Regs., tit. 8, § 10844.)

We disagree that attorney’s fees on the life pension award is dependent on the complexity of the matter and conclude that applicant’s attorney is entitled to attorney’s fees on the life pension award. We return this matter to the trial level to determine what constitutes reasonable attorney’s fees from the life pension award.

Accordingly, we amend the Findings and Award to defer the issue of attorney’s fees and the issue of whether applicant is eligible for the section 4658(d)(2) statutory increase and return this matter to the trial level for further proceedings consistent with this Opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the February 14, 2020 Findings and Answer is **AMENDED** as follows and the matter is **RETURNED** to the trial level for further proceedings.

FINDINGS OF FACT

...

2. For the period August 6, 2009 through and including October 4, 2009, the employee's earnings were \$1,164.00 per week, warranting indemnity rates of \$776.00 for temporary disability; and for the period July 1, 2011 through and including October 6, 2011, the employee's earnings were \$1,193.20 per week, warranting indemnity rates of \$795.57 for temporary disability. Applicant was underpaid temporary disability for the periods August 6, 2009 through and including October 4, 2009, and the period July 1, 2011 through and including October 6, 2011. The underpayment shall be adjusted by the parties, less credit for amounts paid, and less a reasonable attorney’s fee, with jurisdiction reserved to the WCJ in the event of a dispute.

...

5. The issue of attorney's fee is deferred.

...

7. The issue of the statutory increase per Labor Code section 4658(d)(2) is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2022

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

**LARRY COOPER
THE LAW OFFICES OF LUCY M. BISHOP
LAW OFFICES OF MUHAR, GRABER, AV & DUNCAN
LAW OFFICES OF BRADFORD & BARTHEL, LLP**

LSM/pc

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