

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

**ARTHUR GARCIA, *Applicant***

**vs.**

**KING COUNTY, Permissibly Self-Insured, Administered by  
INNOVATIVE CLAIM SOLUTIONS, *Defendants***

**Adjudication Numbers: ADJ11248645, ADJ11248646  
Fresno District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Joint Findings of Fact of August 12, 2020, the workers' compensation administrative law judge ("WCJ") found that applicant, while employed as a detention sergeant on March 7, 2017, sustained industrial injury to his right knee (ADJ11248645), and that applicant, while employed as a detention sergeant during the period March 1, 2017 through March 1, 2018, sustained industrial injury to his right elbow, bilateral shoulders, left ankle, thoracic spine, and bilateral knees (ADJ11248646). The WCJ also found that for the right knee injury in ADJ11248645, defendant paid Labor Code section 4850 pay at the rate of \$1,338.96 from July 11, 2017 through February 14, 2018 and permanent disability advances at the rate of \$290.00 from February 15, 2018 through September 3, 2018, that applicant received an Industrial Disability Retirement, effective February 15, 2018, based on restrictions for his right knee of limited kneeling and squatting, limited high impact activities, and limited running and jumping, and that applicant is receiving CalPERS industrial disability retirement benefits to the present, as well as EDD disability benefits. The WCJ also found that applicant is not entitled to temporary disability benefits from Kings County for the left knee injury in ADJ11248646, as claimed by applicant, because the benefits are barred by Labor Code section 4853.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that although he would not have a claim for temporary disability benefits if it arose from the specific injury to his right knee that gave rise to his CalPERS industrial disability retirement, he is entitled to temporary disability, notwithstanding Labor Code section 4853, because the disability is caused by the cumulative trauma injury to his left knee from March 1, 2017 through March 1, 2018, which is a different date of injury and disability than that which gave rise to his CalPERS industrial disability retirement.

Defendant filed an answer.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will affirm the Joint Findings of Fact of August 12, 2020.

We further note that applicant's proposed interpretation of sections 4850 and 4853 seems to suggest he may be entitled to two industrial disability retirement pensions from the same employer (one for each injury), which violates the rule that statutory interpretations leading to absurd consequences should be avoided. (See *Medrano v. Workers' Comp. Appeals Bd.* (2008) 167 Cal.App.4th 56, 63 (73 Cal.Comp.Cases 1407) [The fundamental rule of statutory interpretation ascertains the Legislature's intent concerning a law's purpose by reference to the plain meaning of the statute's words; if the language has more than one reasonable interpretation, courts may look to other sources such as legislative history, the statute's purpose, and public policy. After considering these extrinsic aids, a court must select the construction that most closely comports with Legislature's apparent intent, to promote rather than defeat the general purpose of the statute, and to avoid interpretations that lead to absurd consequences.])

More importantly, the WCJ's decision here is supported by the Board panel's analysis in the recent case of *Merino v. Ventura County Fire Dep't.* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 370. In *Merino*, which involved two claims of 4850 benefits for two different injuries, defendant paid section 4850 benefits for one year, followed by additional temporary disability, due to the injured firefighter's heart claim. However, applicant later became temporarily disabled again, due to an industrial injury to her left hip. The Board panel stated that the period of disability for the left hip injury did "not overlap with the period she was already paid benefits for a separate injury, and she may receive section 4850 benefits for up to a year in lieu of temporary disability *for each*

*injury where the disability does not run concurrently.” (Merino slip opinion at p. 31, citing City of Lompoc v. Workers’ Comp. Appeals Bd. (Coday) (1984) 49 Cal.Comp.Cases 248 (writ den.); City of Montclair v. Workers’ Comp. Appeals Bd. (Leone) (2001) 66 Cal.Comp.Cases 899 (writ den.), italics added.) The Merino panel concluded, “applicant is not barred from receiving section 4850 benefits for her left hip injury based on receipt of those benefits for her separate injury.” (Ibid.)*

Although *Merino* might seem to support the claim of the applicant herein for temporary disability due to the second injury to his left knee, the panel in *Merino* further discussed the effect of the firefighter’s industrial disability retirement and application of section 4853, as follows:

“Under long-standing law, section 4850 benefits terminate at the time of a valid PERS retirement.” (*City of Martinez v. Workers’ Comp. Appeals Bd. (Bonito)* (2000) 85 Cal.App.4th 601, 614 [102 Cal. Rptr. 2d 588, 65 Cal.Comp.Cases 1368], citing *Ritchie v. Workers’ Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1186-1187 [29 Cal. Rptr. 2d 722]; *Gorman v. Workers’ Comp. Appeals Bd.* (1982) 133 Cal.App.3d 998, 999-1001 [184 Cal. Rptr. 406]; *State Comp. Ins. Fund v. Workmen’s Comp. Appeals Bd.* (1972) 26 Cal.App.3d 200, 204 [103 Cal. Rptr. 29].) Additionally, after the one-year period of disability for which an employee may receive section 4850 benefits, section 4853 bars receipt of disability indemnity once an employee has retired under the Public Employees’ Retirement Act. (See *Gorman, supra*, 133 Cal.App.3d at p. 1002 [“upon the effective date of his or her retirement under the Public Employees’ Retirement Act, the right to temporary disability benefits under the Workers’ Compensation Act terminates”].)

(*Merino* slip opinion at p. 32.)

Then the panel in *Merino* concluded, “we disagree with defendant that applicant may not receive section 4850 benefits for her left hip injury based on her receipt of those benefits for her separate heart claim. However, the award will include a credit for the advanced disability pension payments made by defendant since applicant may not receive section 4850 benefits or temporary disability after the effective date of her retirement.” (*Ibid.*, emphasis added.)

Similarly, we agree with the WCJ here that applicant may not receive section 4850 or temporary disability benefits after the effective date of his retirement, regardless of the fact that he claims temporary disability for the second cumulative trauma injury to his left knee and not for the specific right knee injury, for which he already received benefits under section 4850.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact of August 12, 2020 are **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**August 31, 2023**

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

**ARTHUR GARCIA  
THOMAS J. TUSAN, ATTORNEY AT LAW  
PARKER, KERN, NARD & WENZEL  
DUNCAN CASSIO**

**JTL/ara**

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

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

**I**  
**INTRODUCTION**

1. Applicant's Occupation: Detention Sergeant  
Age at Injury: 55 years old (3/7/17 DOI) and 56 years old (CT to 3/1/18)  
Date of Injury: 3/7/17 and a CT to 3/1/18  
Parts of Body Alleged Injured: 3/7/17 injury - right knee  
CT to 3/1/18 - right elbow, bilateral shoulders, left ankle, thoracic spine, bilateral knees
  
2. Identity of Petitioner: Applicant  
Timeliness: The Petition was timely filed on September 8, 2020.  
Verification: The Petition was verified.
  
3. Date of Order: August 12, 2020
  
4. Petitioner contends:
  - a. The WCJ made the decision without or in excess of the WCAB's powers;
  - b. The evidence does not justify the findings of fact;
  - c. The Findings of Fact to not support the decision.

In short, petitioner contends that temporary total disability should be paid based on the right knee cumulative trauma through March 1, 2018, despite a CalPERS disability retirement related to his left knee and the specific injury of March 7, 2017.

At the time of filing this Report and Recommendation, the Defendant had not filed a response.

**II**  
**FACTS**

The facts of the case are not in dispute. The Applicant worked for Kings County Sheriff as a Detention Sergeant. On March 7, 2017 he had an accepted injury to his right knee. He continued to be employed by Kings County and later filed a cumulative trauma (which was accepted) for injury through March 1, 2018 to his right elbow, bilateral shoulders, left ankle, thoracic spine, and bilateral knees.

For the Applicant's accepted right knee injury of March 7, 2017, he was off work and received Labor Code section 4850 pay from July 11, 2017 through February 14, 2018. (Joint Findings of Fact; Opinion on Decision, 8/12/20, p.1-2, stipulations 1 & 4.) For that right knee injury, the Applicant applied for, and received, industrial disability retirement through CalPERS effective

February 15, 2018. (FoF, p. 2, stipulation 6.) When the Applicant's disability retirement started, his Labor Code section 4850 benefits stopped. The Applicant continues to receive his CalPERS disability retirement to the present. (FoF, p. 2, stipulation 8.)

Subsequent to the Applicant's disability retirement, he underwent left knee surgery on March 9, 2020 on an industrial basis related to the cumulative trauma injury through March 1, 2018. (Joint Exhibit S.) The Applicant at that time was working for a subsequent employer and was taken off work by his treating physicians. (Joint Exhibits T and U.) Applicant's counsel conceded that Labor Code section 4850 benefits were not due as the Applicant had retired on a CalPERS disability retirement. (Applicant's Exhibit 4.) However, Applicant demanded temporary disability.

Defendant objected to the demand for temporary disability issuing notices on March 25, 2020 (Defendant's Exhibit D) and May 11, 2020 (Defendant's Exhibit E). The Defendant's denial of temporary disability was based on the Applicant's industrial disability retirement which was effective February 15, 2018.

On July 8, 2020, the matter proceeded to an Expedited Hearing primarily on the issue of whether the Applicant was entitled to temporary disability, or whether it is barred by operation of Labor Code section 4853.

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

The issue from the perspective of the judge is whether temporary disability is owed by a governmental entity when the Applicant is temporarily totally disabled due to an industrial surgery for one date of injury, but receiving a CalPERS disability retirement due to a different injury with the same governmental entity.

Two dates of injury proceeded to trial. The Applicant concedes no temporary disability is due for the March 7, 2017 injury as it pertains to only the right knee and the current cause of temporary disability is the left knee.

The Applicant concedes no Labor Code section 4850 pay is due to the Applicant as he has retired and is receiving CalPERS disability benefits.

The question then is whether Applicant is entitled to temporary disability for his industrial left knee surgery when he is receiving CalPERS disability retirement benefits pertaining to an earlier injury to his right knee.

Labor Code section 4853 provides, "Whenever such disability of any such officer or employee continues for a period beyond one year, such member shall thereafter be subject as to disability indemnity to the provisions of this division other than Section 4850 during the remainder of the period of said disability or until the effective date of his retirement under the Public Employees' Retirement Act, and the leave of absence shall continue."

Applicant's contention is that the reference to "such disability" within Labor Code section 4853 acts to limit the effect of section 4853 to only that same date of injury. In other words, if an Applicant is receiving CalPERS disability retirement then the Applicant cannot receive temporary disability for the same date of injury as "such disability" refers to that particular date of injury. However, Applicant contends that if it is a different date of injury then the Applicant could receive temporary disability and CalPERS disability retirement payments from the same governmental entity.

It is true the Applicant in this case was off work due to the industrial knee surgery. However, he is not without sustenance, as he was receiving the CalPERS disability retirement payments. As noted in Gorman, "a safety employee who has retired for disability and is receiving disability retirement payments is not also entitled to continued temporary disability payments. Sustenance is provided the employee during the rehabilitative process by the disability retirement payments being received by him." (Gorman v. WCAB (1992) 133 Cal.App.3d 998 [47 Cal.Comp.Cases 745].)

The Gorman court continued, "And the meaning of section 4853 is perfectly clear: when a safety employee has received a disabling industrial injury and the disability continues beyond one year, the employee "shall thereafter be subject as to disability indemnity to the provisions of this division [he or she shall receive temporary disability benefits up to the maximum number of weeks allowed] ... during the remainder of the period of said disability or until the effective date of his retirement under the Public Employees' Retirement Act ...." In other words, upon the effective date of his or her retirement under the Public Employees' Retirement Act, the right to temporary disability benefits under the Workers' Compensation Act terminates." (Ibid.) In this matter the Applicant's retirement under the Public Employees' Retirement Act precludes the payment of temporary disability.

The Gorman court did not draw a distinction between there being two dates of injury, with one leading to the disability retirement and the other leading to temporary disability as here. The distinction drawn by the Applicant to there being two distinct injuries is an important one. If the two injuries were with different employers or different governmental entities, the operation of Labor Code section 4853 may lead to a different situation. However, here the injuries both occurred with Kings County Sheriff, and it would be incongruous to have the Applicant receive temporary total disability from the Kings County Sheriff while at the same time receiving a CalPERS disability retirement due to another injury with the Kings County Sheriff.

The Burns court dealt with whether Labor Code section 4853 pertained to a governmental entity not participating in CalPERS. (Burns v. WCAB (1987) 190 Cal.App.3d 759, 767 [52 Cal. Comp. Cases 111].) The Burns court noted that, "We further conclude that such an employee's right to VRTD is unaltered by the employee's simultaneous receipt of a CERL disability pension and a PERS service pension earned in prior employment for a different governmental entity." (Ibid.) This would seem to align with the hypothetical that an Applicant receiving a PERS retirement, with a subsequent injury at another employer, would still be entitled to temporary disability. However, even the Burns court noted that the subsequent injury would be while working "for a different governmental entity." (Ibid.) Here, the Applicant was working for the same governmental entity for both dates of injury.

The effect of Labor Code section 4853 is to cut off liability for temporary disability for employees with a disability retirement under the PERS Act. There is no distinction in the statute that the liability for temporary disability is only terminated as to the date of injury for which the disability retirement was granted under PERS. The statute, as noted by Applicant, refers to “such disability” and “said disability,” but then changes after the word “or” to reference “or until the effective date of his retirement under the Public Employees’ Retirement Act.” The references to disability continuing and being paid all then stop when the statute references retirement. Upon that retirement, such disability and said disability payment liability terminates for that governmental entity.

**IV**  
**RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

DATE: 09/16/2020

**Jeremy Lusk**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE