WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHERRY BRAZIL, *Applicant*

vs.

SAN MATEO COUNTY TRANSIT DISTRICT, PERMISSIBLY SELF-INSURED, ADMINISTERED BY THE CITIES GROUP, *Defendants*

Adjudication Number: ADJ6831983
San Francisco District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant San Mateo County Transit District (defendant) has filed an "Objection to Opinion and Decision After Reconsideration Because of Failure to Serve Defendant," dated February 27, 2023 (Objection). Defendant avers it first received notice of our Opinion and Decision After Reconsideration (ODAR) on February 27, 2023, when a copy of the decision was emailed to defense counsel by counsel for applicant. (Objection, at 2:1.) Defendant asserts service of our decision was defective, and requests that we rescind our December 14, 2022 decision and reissue the decision.

In the interests of due process, we will treat defendant's Objection as a Petition for Reconsideration of our December 14, 2022 decision, grant the petition, rescind our December 14, 2022 ODAR, and reissue our decision.

The correct identification of parties is essential to assure that issues of jurisdiction and liability are properly addressed. The importance of timely and proper identification of parties is part of the Appeals Board's Rules of Practice and Procedure and has been emphasized by the Appeals Board in its decisions. (Cal. Code Regs., tit. 8, § 10550 ["each attorney or other representative shall set forth the full legal name(s) of the party or parties he, she, or it is representing…an adjusting agent or third-party claims administrator… shall disclose… whether it

is appearing on behalf of an employer, an insurance carrier, or both…if an insurance carrier is appearing, it shall disclose…whether it is appearing solely on its behalf, or also on behalf the insured employer…"]; cf. *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (Appeals Board en banc); *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 1466 (Appeals Board en banc).)

When a party is represented, service is generally required only upon a party's representative and not upon the party itself, and the WCAB is required to serve all parties of record with any final order, decision or award issued by it on a disputed issue after submission. (Cal. Code Regs., tit. 8, §§ 10625(a), 10628(a).)

Pursuant to WCAB Rule 10628(d), "[i]f the Workers' Compensation Appeals Board electronically serves a document, the proof of electronic service shall be made by endorsement on the document, setting forth the fact of electronic service on the persons or entities listed on the official address record as required by rules 10400 and 10401 and the date of electronic service." (Cal. Code Regs., tit. 8, § 10628(d).)

Additionally, WCAB Rule 10390 states:

> Any party that appears at a hearing or files a pleading, document or lien shall:
>
> > (a) Set forth the party's full legal name on the record of proceedings, pleading, document or lien;
> >
> > (b) File a notice of representation if a party is represented and the attorney or non-attorney representative has not previously filed a notice of representation or an Application for Adjudication of Claim; and
> >
> > (c) Identify the insurer and/or employer as the party or parties and not identify a third party administrator as a party. The third party administrator shall be included on the official address record and case caption if identified as such.

Finally, section 10205.5 of the Electronic Adjudication Management System Rules requires that the "Division of Workers' Compensation shall maintain an official participant record for each adjudication file, which shall contain the names of all parties and lien claimants, and their attorneys or hearing representatives." (Cal. Code Regs., tit. 8, § 10205.5(a).) The rule makes clear that official participants have an ongoing duty to furnish a correct uniform name, mailing address and preferred method of service, for all claims administrator and representatives offices. (Cal.

Code Regs., tit. 8, § 10205.5(b)(1).) The Rule further provides that "[e]xcept as required by subdivision (b), every party and every lien claimant having an interest in an active case pending before the district office or appeals board shall advise the district office and all parties of any change of mailing address and telephone numbers by furnishing the current information within five business days of any change." (Cal. Code Regs., tit. 8, § 10205.5(c).) *Accordingly, all parties to these proceedings, including their legal representative, have an ongoing obligation to ensure that their contact information as set forth in the Official Address Record is complete and accurate.*

Here, service was made on the email address listed in the official address record for defense counsel. (Official Address Record, dated December 14, 2022.)

We observe, however, that the email address listed in the Official Address Record (tonimllos@agmlawlaw.com) is not the same email address as that listed in the caption of defendant's September 7, 2022 Petition for Reconsideration (tonimills@agmlaw.com). We remind the parties of their ongoing obligation to confirm that the contact information listed in the Official Address Record is complete and accurate.

Defendant avers it did not receive a copy of our December 14, 2022 ODAR until February 27, 2023. Following our review of the record, and in the interests of due process of law, we will rescind our December 14, 2022 ODAR and reissue it.

The following is our Decision After Reconsideration:

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant San Mateo County Transit District (defendant) seeks reconsideration of the August 16, 2022 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a bus operator on September 11, 2008, sustained industrial injury to her back, right knee and psyche. The WCJ determined that the correct date of commencement of permanent total disability benefits was June 13, 2009, the day following the last payment of temporary total disability. The WCJ further determined that defendant's failure to timely pay accrued benefits triggered the statutory increase of Labor Code section 4650(d), and

warranted the imposition of penalties for unreasonable delay pursuant to Labor Code section 5814.[1] The WCJ also awarded attorney fees pursuant to section 5814.5 and statutory interest.

Defendant contends the appropriate permanent total disability start date was December 7, 2018, and that it is not reasonable to commute attorney fees, and further challenges the award of penalties, interest and attorney fees.

We have 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, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, as our decision after reconsideration, we will amend the manner of commutation of attorney fees, but otherwise affirm the F&A.

FACTS

Applicant alleged injury to her back, right knee, and psyche, while employed as a bus operator by defendant San Mateo County Transit District on September 11, 2008.

On September 21, 2020, the WCJ found that applicant sustained injury arising out of and in the course of employment to the back, right knee and psyche, and awarded applicant permanent and total disability without apportionment, less attorney fees. (F&A, dated September 21, 2020, Award No. 1.)

On December 14, 2020, we denied defendant's Petition for Reconsideration of the September 21, 2020 F&A. (Opinion and Order Denying Petition for Reconsideration, dated December 14, 2020.)

On January 24, 2022, the First Appellate District Court of Appeal denied defendant's Petition for Writ of Review. (Order, California Court of Appeals, dated January 24, 2022.)

On March 23, 2022, the California Supreme Court denied defendant's petition for review. (Order, California Supreme Court, en banc, dated March 23, 2022.)

On April 15, 2022, applicant filed a Petition to Enforce, averring entitlement to permanent disability benefits starting June 13, 2009, which was the day following the last payment of temporary disability benefits on June 12, 2009. (Petition to Enforce, dated April 15, 2022, at 3:4.)

[1] All further statutory references are to the Labor Code unless otherwise stated.

Applicant further petitioned for the commutation of attorney fees, the award of a statutory increase in benefits pursuant to section 4650, penalties of 25% pursuant to section 5814, and statutory interest pursuant to section 5800. (*Id*. at pp. 3-4.) Applicant further requested the award of attorney fees pursuant to section 5814.5. (*Id*. at 5:3.)

On August 11, 2022 the parties proceeded to trial on the issues of the date of commencement of permanent disability payments, commutation of attorney fees, penalties pursuant to section 4650, penalties pursuant to section 5814, attorney fees pursuant to section 5814.5, and interest pursuant to section 5800.

On August 16, 2022, the WCJ issued her F&A, determining in relevant part that the final payment of temporary disability occurred on June 12, 2009, and that applicant was entitled to permanent disability payments commencing June 13, 2009. (Findings of Fact No. 2; Award No. 1.) The WCJ determined that defendant did not commence payment of permanent disability until December 7, 2018, and the delay in indemnity triggered the statutory increase of section 4650. (F&A, Findings of Fact No. 4, Award No. 3.) The WCJ further determined that the delay was unreasonable, and awarded section 5814 penalties. (Findings of Fact No. 5; Award Nos. 4.) The WCJ further awarded attorney fees pursuant to section 5814.5, and statutory interest. (Findings of Fact Nos. 6, 7; Award Nos. 5, 6.) The WCJ further determined that it was appropriate to commute attorney fees "from the far end of the award, or in an alternate commutation agreed upon by the parties." (Findings of Fact No. 3; Award No. 2.)

Defendant's Petition for Reconsideration (Petition), dated September 7, 2022, states that on May 26, 2022, it issued a retroactive permanent total disability payment addressing the period of December 7, 2018 to May 26, 2022, and that its payment included interest and COLA adjustment, less attorney fees. (Petition, at 3:21.) The Petition states that defendant continues to pay biweekly installments of permanent total disability, with 15% deducted from each payment and forwarded to applicant's counsel as attorney fees. (*Id*. at 4:3.)

Defendant contends that under the facts of this case, the appropriate permanent total disability start date is December 7, 2018. (*Id*. at 5:2.) Defendant maintains that it is not reasonable or necessary to commute attorney fees. (*Id.* at 10:17.) Defendant further contends that because it paid permanent disability indemnity appropriately, the awards of statutory increase pursuant to section 4650, penalties pursuant to section 5814, statutory interest pursuant to section 5800, and attorney fees pursuant to section 5814.5 are unfounded. (*Id.* at 14:13.)

Applicant's Answer responds that pursuant to section 4650(b)(1), permanent disability benefits are to commence following the last date for which temporary disability is paid, which in this matter was June 12, 2009. (Answer, at 4:23.) Citing to the WCAB panel decision in *Villagio Inn & Spa v. Workers' Comp. Appeals Bd. (Soto)* (2009) 74 Cal.Comp.Cases 987 [2009 Cal. Wrk. Comp. LEXIS 207] (Soto), applicant avers the WCJ correctly identified the date following the last payment of temporary disability as the commencement date of permanent disability payments. Applicant asserts that attorney fees are properly commuted for reasons related to attracting and remunerating competent counsel. (*Id*. at 5:13.) Finally, applicant contends that because the district did not appropriately pay permanent and total disability indemnity retroactive to June 13, 2009, that the statutory increase, penalties, interest, and attorney fees awarded by the WCJ are appropriate. (*Id*. at 6:5.)

The WCJ's Report notes that pursuant to section 4650(b)(1), the first payment of permanent disability shall be made within 14 days after the date of last payment of temporary disability indemnity, except under limited circumstances involving applicant's return to work under subdivision (b)(2). (Report, at p. 4.) The Report maintains that commutation of attorney fees was reasonable, with the appropriate method for commutation deferred to the parties' discretion. (*Id*. at p. 5.) The Report also notes that defendant's failure to indemnify applicant at the permanent and total disability rate retroactive to June 24, 2009 (i.e., 14 days after the last payment of temporary disability) warrants the award of the statutory increase of section 4650, penalties pursuant to section 5814, attorney fees pursuant to section 5814.5, and interest pursuant to section 5800. (*Id*. at pp. 5-6.)

DISCUSSION

Defendant asserts that under the facts of this case, the appropriate permanent total disability start date is December 7, 2018. (Petition, at 5:2.) Defendant observes that applicant originally sustained an admitted back injury on September 11, 2008, and that applicant amended the claim in 2017 to include a compensable consequence right knee injury. Defendant asserts that applicant "could not have been determined to be 100% disabled until her right knee reached maximum medical improvement/permanent and stationary status." (*Id*. at 5:13.) Defendant concludes that the appropriate date for commencement of permanent disability benefits at the total disability rate

would be December 7, 2018, the permanent and stationary date fixed by Agreed Medical Evaluator (AME) Dr. Zwerin.

Under the California law of workers' compensation, the "compensable consequence" doctrine provides that when a subsequent injury is the direct and natural consequence of an original industrial injury, the subsequent injury is considered to relate back to the original injury and—unless it also occurred at work or under other conditions that might make it industrial—it is not treated as a new and independent injury. (E.g., *Southern Cal. Rapid Transit Dist. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107] (injury sustained in an auto accident while driving home after delivering a "return to work" slip to the employer following the employee's recovery from industrial injury was found to relate back to the industrial injury); *Ballard v. Workmen's Comp. Appeals Bd.* (1971) 3 Cal.3d 852 [92 Cal. Rptr. 1, 478 P.2d 937, 36 Cal.Comp.Cases 34] (drug addiction from pain medication prescribed for industrial injury found to relate back to original industrial injury); *Heaton v. Kerlan* (1946) 27 Cal.2d 716 [166 P.2d 857, 11 Cal.Comp.Cases 78] (increased disability due to medical malpractice in surgery to treat industrial injury found to relate back to industrial injury); *Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230 [60 P.2d 276] (disability caused by doctor's improper treatment of industrial injury found to relate back to industrial injury); *Beaty v. Workers' Comp. Appeals Bd.* (1978) 80 Cal.App.3d 37 [144 Cal. Rptr. 78, 43 Cal.Comp.Cases 444] (increased disability caused by off-the-job fall from a ladder found to relate back to industrial injury where pain and weakness from industrial injury contributed to the fall); *Dixon v. Ford Motor Co.* (1975) 53 Cal.App.3d 499 [125 Cal. Rptr. 872, 40 Cal.Comp.Cases 1058] (employee's death due to negligent treatment in employer's dispensary following industrial injury found to relate back to industrial injury); *Laines v. Workers' Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872 [40 Cal.Comp.Cases 365] (injury sustained in car accident on the way to treatment for industrial injury found to relate back to industrial injury); *State Comp. Ins. Fund v. Industrial Acc. Com. (Wallin)* (1959) 176 Cal.App.2d 10 (increased disability caused when employee amputated a finger while using power saw at home found to relate back to industrial eye injury where industrial injury impaired employee's vision while using saw).)

Thus, as the California Supreme Court has observed, a compensable consequence arises out of, and in the course of applicant's employment "as of the time when the industrial injury was received." (*Laines v. Workmen's Comp. Appeals Bd., supra*, 48 Cal.App.3d 872, 880.)

Here, defendant's Petition acknowledges the WCJ's determination that the right knee and psychiatric injuries were compensable consequences of applicant's admitted September 11, 2008 back injury. (Findings of Fact No. 1, dated September 21, 2020; Petition, at 3:6.) Accordingly, we find no merit in defendant's assertion that it had no obligation to indemnify applicant at the permanent and total disability rate prior to December 7, 2018. Nor are we persuaded that the date applicant chose to amend additional body parts beyond those originally pleaded, or the date those amended body parts became permanent and stationary, is dispositive of when applicant first experienced disability arising out of her compensable consequence injuries. For the purposes of permanent disability indemnity, subsequently injured body parts arising out of a single date of injury are treated no differently, whether identified as "compensable consequences" or not, because calculation of permanent disability indemnity is based on when all industrially injured body parts arising out of an injury are finally permanent and stationary. As discussed further below, we emphasize that section 4650(b)(1) requires that an employer make the first payment of permanent disability based on the "reasonable estimate of permanent disability due" and "regardless of whether the extent of permanent disability can be determined at that date." In other words, this requirement to make permanent disability indemnity payments assumes that at the time that the first payment is due the parties may not know the ultimate level of permanent disability, including which body parts will ultimately be found to arise out of the injury.

Defendant contends that the WCJ erred in awarding permanent and total disability as of the date temporary disability ended on June 13, 2009. (Petition, at 7:21.) Defendant submits that section 4650(b)(1) does not apply to the "facts and circumstances" of this case, that section 4650 does not apply to a denied claim, and that the ambit of section 4650(b) extends only to instances where temporary disability has ended because of the statutory 104-week limit of section 4656. (Petition, at 8:3; 8:11.)

Section 4650(b) provides:

> (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 indemnity, except as provided in paragraph (2). 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.
>
> (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.

We have previously addressed the relationship between the end of temporary disability payments and the commencement date of permanent disability indemnity in *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550 [2014 Cal. Wrk. Comp. LEXIS 69] (Appeals Bd. en banc). Therein, we noted that permanent disability and temporary disability are separate and distinct benefits, designed to compensate for different losses. (See Lab. Code, § 4661; *Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd. (Lopez)* (1996) 14 Cal.4th 76, 88 [61 Cal.Comp.Cases 1360]; *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 405 [33 Cal.Comp.Cases 647].)[2] We observed that pursuant to section 4650(b), "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." (*Brower, supra,* at 561.) Accordingly, we held that "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

[2] "Temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment." (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App. 4th 790, 801 [71 Cal.Comp.Cases 1044].) In contrast, "permanent disability is understood as 'the irreversible residual of an injury.'" (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1111 [48 Cal. Rptr. 3d 618], quoting 1 Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. 2005) § 5.1, p. 276, italics omitted.) "A permanent disability is one '…which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.'" (*State Compensation Ins. Fund v. Industrial Acc. Com.* (1963) 59 Cal.2d 45, 52 [27 Cal. Rptr. 702].) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity. (Lab. Code, § 4660, subd. (a); *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753 [7 Cal. Rptr. 2d 808, 828 P.2d 1195].) (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [57 Cal.Rptr.3d 644, 156 P.3d 1100].)

based on a reasonable estimate of the injured worker's ultimate level of permanent disability." (*Id*. at 552.) We further observed:

> 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, 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. (*Id*. at 562, emphasis added.)

Accordingly, we held that, "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. 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." (*Brower, supra,* 79 Cal.Comp.Cases 550, at 562.)

Our decision in *Brower* also held that pursuant to changes made by SB863, "[a]ctual 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." Accordingly, we determined that the most "uniform and fair date from which to calculate COLAs was the January 1 after the injured worker became entitled to receive permanent disability." (*Brower, supra,* 79 Cal.Comp.Cases 550, at 563.)

The en banc holding in *Brower* is binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

Thus, and irrespective of the date applicant was ultimately declared to be permanent and stationary, section 4650(b) and *Brower* require that defendant's permanent disability payments be adjusted to the correct rate retroactive to the last date of temporary disability, which in this case was June 12, 2009. (F&A, dated August 16, 2022, Findings of Fact No. 2; *Brower, supra,* 79 Cal.Comp.Cases 550; see also *Collins v. Macro Crane Rigging* (May 18, 2020, ADJ2484312 (SDO 0284449) [2020 Cal. Wrk. Comp. P.D. LEXIS 192]; *Flickinger v. City of El Segundo*

(February 10, 2020, ADJ8627969, ADJ9506151) [2020 Cal. Wrk. Comp. P.D. LEXIS 54]; *Furgol v. UCLA Med. Ctr.* (April 12, 2018. ADJ3327542, ADJ7143228) [2018 Cal. Wrk. Comp. P.D. LEXIS 148].)[3] Accordingly, we affirm the WCJ's award of permanent and total disability retroactive to June 13, 2009, the day following the last payment of temporary disability. (F&A, dated August 16, 2022, Award No.1.)

We next address defendant's contention that there is no reasonable basis for the commutation of attorney fees. Defendant avers the commutation of attorney fees does not benefit applicant, and is unfair and prejudicial to the defendant. (Petition, at 3:21.) However, the WCJ is empowered to award attorney fees by way of uniform reduction of the present-day value of an applicant's permanent disability pursuant to WCAB Rules 10169 and 10169.1 (Cal. Code Regs., tit. 8, §§ 10169 and 10169.1). Additionally, "commutation to pay attorneys' fees is routine in workers' compensation matters, since it simplifies matters for all parties…so that at least that part of the case can come to a final conclusion." (*Karr-Reddell v. Christopherson Homes* (July 25, 2013, ADJ3563222 (SRO 0126894) [2013 Cal. Wrk. Comp. P.D. LEXIS 316]; see also *Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 224, fn. 2 [41 Cal.Comp.Cases 691].)

Defendant contends that the commutation of attorney fees unfairly places the risk of applicant's early death on the defendant. However, as we noted in *Karr-Reddell, supra,* 2013 Cal. Wrk. Comp. P.D. LEXIS 316, the converse is also true, and applicant's counsel bears the risk that applicant may outlive the award of attorney fees. (*Id*. at 5-6.) We continue to believe that the attendant risks on either side of the commutation of attorney fees bend toward equilibrium, and that the collateral benefits of attracting competent representation to workers' compensation matters provides a reasonable basis for the WCJ to order the commutation of attorney fees. (See also *Munson v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 384 [2012 Cal. Wrk. Comp.

[3] The defendant further contests the WCJ's reliance on the panel decision in *Villagio Inn & Spa v. Workers' Comp. Appeals Bd. (Soto)* (2009) 74 Cal.Comp.Cases 987 [2009 Cal. Wrk. Comp. LEXIS 207 (writ denied)] (Soto), wherein the applicant received an award of 48% in 2002, then filed a petition for new and further disability, resulting in an award of 100% disability in 2009. The panel in *Soto* determined that permanent total disability was payable retroactive to the date temporary disability ended on July 17, 2002. While we apply the binding precedent in *Brower* to the instant matter, we further observe that our holding in *Soto* is consistent with *Brower, supra*, 79 Cal. Comp. Cases 550, as both decisions require the adjustment of permanent total disability benefits retroactive to the ending date of temporary disability. (*Villagio Inn & Spa v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 987 [2009 Cal. Wrk. Comp. LEXIS 207 (writ denied); see also *Valdez v. L.A. County Prob. Dept.* (September 28, 2022, ADJ8566293) [2022 Cal. Wrk. Comp. P.D. LEXIS 283]; *Morris v. County of Riverside* (February 15, 2019, ADJ8386503) [2019 Cal. Wrk. Comp. P.D. LEXIS 59]; *Garietz v. Vertis Communs.* (November 19, 2018, ADJ3394569 (OAK 0341726), ADJ1459791 (OAK 0314647)) [2018 Cal. Wrk. Comp. P.D. LEXIS 552].)

LEXIS 23] (writ denied); *Knutson v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1306 [1999 Cal. Wrk. Comp. LEXIS 5651] (writ denied); *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (Pilkenton)* (1992) 3 Cal.App.4th 1564, 1572 [57 Cal.Comp.Cases 142].) Accordingly, we discern no error in the WCJ's commutation of attorney fees.

However, we do note that Finding of Fact No. 3 determined that "it is reasonable to commute applicant's attorney's fees from the far end of the award, or in an alternate commutation calculation agreed upon by the parties, with WCAB jurisdiction reserved if the parties are unable to agree upon an exact amount." Given the lifetime award of permanent total disability, commutation of attorney fees from the far end of the award is not possible. Accordingly, we will amend Findings of Fact No. 3 to reflect that to the extent possible, attorney fees are to be paid from unpaid accrued benefits, and any remaining unpaid attorney fees are to be commuted horizontally (i.e., "off the side") from the award of permanent disability consistent with WCAB Rules 10169 and 10169.1.

We next address defendant's contention that because it correctly adjusted applicant's permanent disability to reflect the permanent total disability rate on December 7, 2018, the WCJ's award of statutory increase, penalties, interest and attorney fees was unwarranted. (Petition, at 14:13.)

However, as discussed above, defendant was required to adjust its payment of permanent disability to reflect permanent total disability rates, retroactive to the date of the last payment of temporary disability. (Lab. Code § 4650(b); *Brower, supra*, 79 Cal.Comp.Cases 550.) Defendant's failure to do so triggers the self-executing statutory increase of section 4650(d), as well as statutory interest on accrued but unpaid sums pursuant to section 5800. (*Mote v. Workers Compensation Appeals Bd.* (1997) 62 Cal.Comp.Cases 891, 895 [1997 Cal. Wrk. Comp. LEXIS 4665], "[section 4650] is a self-executing, strict liability provision not dependent on a finding of unreasonable delay.") Additionally, we agree with the WCJ's assessment that the defendant's delay in the provision of mandatory benefits was unreasonable, and warranted the imposition of a 25% penalty. (See *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 [2008 Cal. Wrk. Comp. LEXIS 278] (Appeals Bd. en banc).) Accordingly, we affirm the award of penalties under section 5814 and attorney fees under section 5814.5.

In summary, we conclude that irrespective of the date applicant was ultimately declared to be permanent and stationary, section 4650(b) and *Brower, supra*, 79 Cal.Comp.Cases 550, require

that defendant's permanent disability payments be adjusted to the correct rate retroactive to the last date of temporary disability, which in this case was June 12, 2009. We further agree with the WCJ's determination that commutation of attorney fees was appropriate, that defendant's delay in the provision of benefits triggered a statutory increase of section 4650 and statutory interest per section 5800, and that the delay was unreasonable, warranting the imposition of penalties pursuant to section 5814, and attorney fees pursuant to section 5814.5.

We affirm the F&A, and amend it solely for the purpose of amending the language of Findings of Fact No. 3 to reflect that attorney fees are to be paid from accrued, unpaid benefits to the extent possible, and that any remaining attorney fees are to be commuted horizontally (i.e. off the side of the award), in an amount necessary to pay the balance of attorney fees as a lump sum.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our Opinion and Decision After Reconsideration, dated December 14, 2022, is **GRANTED.**

IT IS FURTHERED ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Decision After Reconsideration, dated December 14, 2022, is **RESCINDED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 16, 2022 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. In the decision issued on 9/23/2020, the applicant's attorney was determined to be entitled to a reasonable fee of 15% of all permanent disability indemnity awarded herein. It is reasonable to pay attorney fees from any unpaid, accrued permanent disability benefits awarded herein, with any remaining attorney fees commuted horizontally ("off the side") from the award in an amount sufficient to pay applicant's counsel as one lump sum, or in an alternate commutation calculation agreed upon by the parties, with WCAB jurisdiction reserved if the parties are unable to agree upon an exact amount.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2023

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

SHERRY BRAZIL
JONES CLIFFORD LLP
AGM LAW OFFICES

SAR/abs

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