

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

KEVIN RUSSELL, *Applicant*

vs.

**STATE OF CALIFORNIA, DEPT OF CONSUMER AFFAIRS , Legally Uninsured;
STATE COMPENSATION INSURANCE FUND/
STATE CONTRACT SERVICES, Adjusting Agency, *Defendants***

**Adjudication Number: ADJ7376924
Riverside District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, and amend the WCJ's decision as recommended in the report. In addition, we will defer the issue of attorney fees. We otherwise affirm the November 18, 2022, Findings and Award and Orders.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 18, 2022 Findings and Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 18, 2022, Findings and Award and Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. As a result of the applicant's injury, applicant is permanently and totally disabled (100%).

* * *

7. The issue of attorney fees is deferred.

* * *

AWARD

AWARD IS MADE in favor of **KEVIN RUSSELL** and against **STATE OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS BUREAU OF AUTOMOTIVE REPAIRS**, legally uninsured, as follows:

(a) The award of permanent total disability is deferred.

* * *

(c) The allowance of attorney fees is deferred.

* * *

ORDERS

* * *

2. This matter will be set for status conference regarding benefits awarded, attorney fees awarded, deductions on notice, the permanent total disability rate, and attorney fees.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 6, 2023

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

**KEVIN RUSSELL
LAW OFFICES OF LUCY M. BISHOP
STATE COMPENSATION INSURANCE FUND, LEGAL**

PAG/mc

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

<u>Date of injury:</u>	06/15/2009
<u>Age on date of injury</u>	48
<u>Occupation</u>	Air Quality Representative
<u>Identity of Petitioner:</u>	Wendy Kalwaitis, attorney for the defendant.
<u>Parts of body claimed:</u>	Low back, right hip, right leg, right thigh, right foot, urological, excretory system, reproductive system, and psyche when he twisted his body and fell to ground.
<u>Date of Filing of Petition for Reconsideration:</u>	12/06/2022
<u>Timeliness:</u>	The petition is timely as the F & A was served on 11/18/2022.
<u>Verification:</u>	The petition was verified by an attorney.
<u>Petitioner's Contentions:</u>	Petitioner contends that with the order, decision, or award, the WCALJ acted without or in excess of its powers. The petitioner further argued that the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision, or award.

The petition for reconsideration was served at mailing address for the applicant attorney and no other address.

The petitioner contends that the WCALJ used the wrong rate in the Findings and Award, Findings of Fact Number 5, in that the correct rate for permanent total disability used was incorrect. The correct rate, according to petitioner, is the rate in effect on the date of the injury and not the temporary disability rate that was paid later such as 01/25/2013-09/30/2013. It was noted that the rate had increased at that time and the parties had stipulated to that fact.

It is recommended that reconsideration be granted as to Findings of Fact number 5.

II

FACTS AND PROCEDURAL HISTORY

The application for adjudication alleging injury to back, hips, legs, thigh, and foot on June 15, 2009 was filed on July 2, 2010 by the applicant in *propria persona*. Robin Woolsey substituted in as attorney of record on 01/18/2013. Lucy Bishop substituted in as applicant attorney on 10/08/2014.

Applicant attorney filed a declaration of readiness on August 23, 2021. Mandatory settlement conferences were held multiple times. Trial was initially set on with Judge Hill on 03/21/2022. After a few continuances the trial commenced in person with the undersigned on 08/03/2022. In person trial on 09/20/2022 commenced in person and testimony was completed on 09/20/2022. The case was considered submitted on 09/20/2022.

The parties submitted a letter dated September 23, 2022 (EAMS DOC ID 43220905) in which they jointly requested four corrections. Three changes have been made and Amended Supplemental Minutes of Hearing and Summary of Evidence issued on 10/20/2022 (EAMS DOC ID 76011828).

Findings and Orders issued on November 18, 2022. The defense attorney filed a timely Petition for Reconsideration on December 7, 2022. The applicant attorney has not filed a response at the time of preparation of this report.

III

DISCUSSION

Pursuant to Labor Code 5705, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."

Labor Code 3202.5 requires all parties and lien claimants to meet the evidentiary burden of proof on all issues by a "preponderance of the evidence." This means "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth."

It is a fundamental principle of the workers' compensation system that an employer is liable for an injury to an employee, "...arising out of and in the course of the employment..."

(Lab. Code § 3600(a); *Maier v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733 [48 Cal.Comp.Cases 326] (*Maier*)). “In applying it, this court must be guided by the equally fundamental principle that the requirement is to be liberally construed in favor of awarding benefits. (Lab. Code, § 3202; *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777-778....; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317...; *Scott v. Pacific Coast Borax Co.* (1956) 140 Cal.App.2d 173, 178...)” (*Maier, supra*, 33 Cal.3d at 733 (emphasis in the original).)

The Petitioner argued in Petition for Reconsideration that permanent disability rates should be calculated using the rate in effect on the date of the injury. They are separate benefits from temporary disability. P4ermanent disability does not fluctuate as temporary disability rates due in relation to when they are paid.

In this case the parties provided at trial the average weekly wage at the time of temporary disability being due from 01/25/2013-09/30/2013 but did not provide the average weekly wage on the date of injury on June 15, 2009 or any other time from 2009-2013. The applicant did not appear to be a maximum earner. The information is necessary for a determination of total permanent disability and the rate for same in this case.

Permanent total disability benefits are weekly payments made for life to injured workers who are 100 percent disabled (*Baker v. WCAB* (2011) 76 CCC 701). Permanent total disability benefits are paid at two-thirds of an employee's average weekly earnings subject to the minimum and maximum amounts specified in Labor Code section 4453. If an employee's permanent disability is total, he or she is entitled to permanent disability indemnity at his or her temporary disability rate for life (Labor Code 4659(b)). Permanent total disability payments generally begin at permanent and stationary status and cease only on the employee's death.

Labor Code 4661.5 specifically mentions only temporary total disability. Labor Code 4661.5 does not apply to permanent total disability (*Duncan v. The Singer Co.* (1978) 43 CCC 467 (appeals board *en banc*)).

For injuries occurring on or after Jan. 1, 1990, permanent disability benefits must be calculated according to the limits in effect on the date of injury, and those limits remain in effect for the duration of any disability resulting from the injury (Labor Code 4453(d)). A subsequent change in the statutory maximum and minimum amounts does not change the rate at which the employer must pay an employee (Labor Code 4661.5), which provides that temporary total disability indemnity payments made two years or more from the date of the injury must be paid in accordance with the statutory limits in effect on the date each payment is made. This is inapplicable to permanent disability benefits (Labor Code 4453.5).

Further the last paragraph in the Permanent Disability/Impairment section of Opinion on Decision should be deleted insofar as it relates to the Permanent Total Disability rate of \$755.54. Additionally, the 4th paragraph in Opinion on Decision, Attorney fees, should be stricken and the case be set for a status conference to further develop and explore the permanent disability rate in relation date of injury as indicated herein and for calculation of resulting attorney fees.

It is recommended that the petition for reconsideration be granted with regarding's to Finding of Fact Number 5 as a result of the foregoing discussion and legal authority discussed herein and the corresponding sections of the Opinion on Decision.

IV **RECOMMENDATIONS**

It is recommended that the Petition for Reconsideration be granted as to Findings of Fact Number 5, and related sections of the Opinion on Decision. It is requested that the remainder of the Findings, Award, and Orders and Opinion on Decision remain intact and be affirmed.

It is further recommended that the matter be set for status conference to develop record regarding permanent total disability rate and set a status conference. Alternatively, it is recommended that the Appeals Board issue an amended Findings of Fact as follows and the case be set for status conference:

As a result of the applicant's injury, applicant is permanently and totally disabled (100%) entitling applicant to permanent disability based on the temporary disability rate in effect at the time of the injury, and subject to consideration of adjustment pursuant to Labor Code Section 4659(c), to be adjusted between the parties.

DATE: 12/15/2022

Eric Thompson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

LUCY BISHOP RIVERSIDE, lbishop@lucybishoplaw.com

SCIF STATE EMPLOYEES RIVERSIDE, STATEFUNDLEGAL@SCIF.COM SCIF STATE EMPLOYEES SANTA ANA,
STATEFUNDLEGAL@SCIF.COM

On: parties and lien claimants present
 X all parties as shown on Official Address Record ON:
December 15, 2022

BY: ggarcia

Enclosed: Official Address Record

