

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

CYNTHIA TOOHEY GREEN, *Applicant*

vs.

**SANTA BARBARA UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured,
Administered by SELF-INSURED SCHOOLS OF CALIFORNIA, *Defendants***

**Adjudication Numbers: ADJ10913893, ADJ8153795
Santa Barbara 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 and Award of September 21, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") issued findings in two case numbers.

In ADJ8153795, the WCJ ruled on a petition for new and further disability filed by applicant in connection with a prior Stipulations and Award approved in 2013, for 6% permanent disability. In his September 21, 2021 decision in ADJ8153795, the WCJ found that on November 15, 2010, applicant, while employed as a teacher, sustained industrial injury to her bilateral knees, left hip, gastrointestinal system, and psyche, that "applicant is entitled to temporary disability from June 12, 2012 through November 6, 2018, subject to the 104-week statutory cap and less credit for monies received, earned or benefits paid," that applicant became permanent and stationary ("P&S") on or about November 6, 2018, that applicant is entitled to a permanent partial disability award of 60 percent, equivalent to 367.25 weeks of indemnity payable at the weekly rate of \$230.00 per week, in the total sum of \$84,467.50, commencing the date temporary disability indemnity was last paid or the P&S date of November 6, 2018, that applicant's attorney is allowed a reasonable attorney's fee of \$14,526.29 to be commuted off the far end of the award, and that applicant is entitled to a job displacement benefit voucher.

In ADJ10913893, the WCJ found that applicant, while employed as a teacher during the period October 17, 1983 through June 12, 2012, sustained industrial injury to her bilateral knees,

that “applicant is entitled to temporary disability from June 12, 2012 through November 6, 2018, subject to the 104-week statutory cap and less credit for monies received, earned or benefits paid [and] this period overlaps with the temporary disability awarded in ADJ8153795,” that applicant is entitled to a permanent partial disability award of 23 percent, equivalent to 90.50 weeks of indemnity payable at the weekly rate of \$230.00 per week, in the total sum of \$20,815.00, commencing the date temporary disability indemnity was last paid or the P&S date of November 6, 2018, that no evidence of an offer of regular, modified or alternative work having been made, applicant’s “total permanent disability” is increased by 15% or \$23,641.54 pursuant to Labor Code section 4658(d)(2), less a reasonable attorney’s of \$3,546.23 allowed to applicant’s attorney to be commuted from the far end of the award, and that applicant is entitled to a job displacement benefit voucher.

Applicant and defendant each filed a timely petition for reconsideration of the Joint Findings and Award of September 21, 2021.

In applicant’s petition, it is contended that in ADJ8153795, the WCJ’s findings should be amended “to include the second paragraph finding no evidence of regular or modified work was offered and the...permanent disability award should be increased 15%, which should be \$92,609.91 and the amount of attorney’s fees should be left alone.”

In defendant’s petition, it is contended that the award of permanent disability in ADJ8153795 requires correction because permanent disability of 60% is compensable by 351.25 weeks of indemnity at \$230.00 per week, for a total of \$80,787.50. Defendant further contends that applicant is not entitled to the 15% increase authorized by Labor Code section 4658(d)(2) because she retired from employment, and that even if the increase applies it does not start until sixty days after December 3, 2018, when Dr. Newton’s last P&S report was served. Finally, defendant contends that the award of temporary disability is not supported by the evidence because applicant removed herself from the labor market, that temporary disability is barred by Labor Code section 4656(c)(2), and that the medical evidence does not justify an award of 104 weeks of temporary disability benefits.

Applicant filed an answer to defendant’s petition for reconsideration.

We have considered the allegations of the Petitions 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 except the first sentence

of the second paragraph of Section II, we will amend the finding on permanent disability in ADJ8153795 to reflect the correct total amount of indemnity and to reflect applicant's entitlement to the 15% increase authorized by Labor Code section 4658(d)(2). Otherwise, we affirm and amend the Joint Findings and Award of September 21, 2021 for the reasons set out in this opinion.

In affirming and amending the Joint Findings and Award of September 21, 2021, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id.*)

In addition, we reject defendant's allegation that applicant is not entitled to temporary disability indemnity because she voluntarily removed herself from the labor market. Applicant testified that she retired because after her injury of November 10, 2010, she could no longer do her job as a teacher, and that she could not get up and down from a seated position. (Summary of Evidence, 10/22/20, 6:22-23.) Contrary to defendant's allegation, applicant did not retire voluntarily, and therefore her retirement does not preclude a post-retirement award of temporary disability indemnity. (See *Bedi v. San Mateo County Transit Dist.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 228, citing *Gonzales v. Workers Compensation Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477].)

In reference to the WCJ's overlapping award of temporary disability indemnity in the two cases herein,¹ we note that Labor Code section 4656(c)(2) provides: "Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks *within a period of five years from the date of injury.*" (Italics added.)

Neither applicant's answer nor the WCJ's Report responds to defendant's contention that applicant is not entitled to temporary disability indemnity after the five-year anniversary dates of her injuries, due to the five-year limitation period of section 4656(c)(2).

In ADJ8153795, the five-year anniversary date is November 15, 2015, after which it appears temporary disability indemnity would not be payable in ADJ8153795, even though

¹ We perceive no error in the WCJ's finding that the period of temporary disability in ADJ10913893 – June 12, 2012 through November 6, 2018 – overlaps the period of temporary disability in ADJ8153795.

applicant filed a petition for new and further disability in ADJ8153795. (*County of San Diego v. Workers' Comp. Appeals Bd. (Pike)* (2018) 21 Cal.App.5th 1 [83 Cal.Comp.Cases 465].)

In ADJ10913893, the five-year anniversary of the date of injury is June 12, 2017, after which it appears that section 4656(c)(2) would preclude an award of temporary disability indemnity.

However, we further note that neither the trial stipulations nor the admitted evidence show if or when defendant paid temporary disability benefits after June 12, 2012. Without expressing a final opinion, we are unaware why applicant would not be entitled to temporary disability indemnity for 104 weeks, from June 12, 2012 to June 12, 2014; this period falls within the five-year limitation of section 4656(c)(2) in both case numbers. With the record apparently being incomplete to precisely determine the issue, and in an abundance of caution, we will affirm the WCJ's findings that applicant is entitled to temporary disability indemnity, but we will amend said findings to include reference to section 4656(c)(2) and to leave the exact amount of temporary disability indemnity owed to applicant subject to adjustment by the parties or determination by the WCJ absent adjustment, with jurisdiction reserved at the trial level.

Also in connection with the issue of temporary disability, the WCJ recommends in his Report that "applicant's petition for 15% attorney fees on the temporary disability awarded herein should be granted." However, applicant's petition for reconsideration does not include any such request. In fact, the petition claims "the amount of attorney's fees should be left alone." To avoid guesswork, we will defer the issue of attorney's fees in ADJ8153795 pending further proceedings and determination by the WCJ, with jurisdiction reserved at the trial level.

Finally, we turn to defendant's contention in ADJ8153795 that applicant is not entitled to the 15% increase in permanent disability authorized by Labor Code section 4658(d)(2) because she retired from teaching, and that even if the increase applies it does not start until sixty days after December 3, 2018, when Dr. Newton's last P&S report was served. (Applicant's Exhibit 2.)

We reject defendant's contention that applicant is not entitled to the 15% increase for the reason stated above in connection with temporary disability, i.e., applicant is entitled to the increase because her retirement from teaching was not "voluntary." (*University of California v. Workers' Comp. Appeals Bd. (Sedlack)* (2020) 85 Cal.Comp.Cases 311 [writ den].)

However, defendant further alleges that even if the increase of section 4658(d)(2) applies, it does not start until sixty days after December 3, 2018, when Dr. Newton's last P&S report was served.

Section 4658(d)(2) states in relevant part: "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. [...]" (Italics added.)

Here, the parties stipulated that applicant became permanent and stationary around November 6, 2018. In her answer, however, applicant proposes earlier permanent and stationary dates and raises other factual allegations concerning when the 15% increase should accrue. To avoid guesswork, we conclude that the WCJ should revisit and determine this issue in ADJ8153795, in further proceedings at the trial level. In doing so, the WCJ may consider whether good cause exists to relieve applicant of her stipulation to the P&S date of November 6, 2018. (See *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 (52 Cal.Comp.Cases 419); *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation absent showing of good cause].)

Accordingly, we will amend the WCJ's findings in ADJ8153795 to defer calculation of the 15% increase of section 4658(d)(2), and we will return this matter to the WCJ for further proceedings and new determination of the issue, with jurisdiction reserved at the trial level. We see no basis to disturb the WCJ's application of section 4658(d)(2) in ADJ10913893.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Award of September 21, 2021 is **AFFIRMED**, **EXCEPT** that said decision is **AMENDED** in the following particulars:

(ADJ8153795)

7. Applicant is entitled to temporary disability from June 12, 2012 through November 6, 2018, subject to the 104-week cap and five-year limitation of Labor Code section 4656(c)(2), less credit for monies received or earned or benefits paid, with the exact amount of temporary disability indemnity to be adjusted by the parties or determined by the WCJ absent adjustment, jurisdiction reserved at the trial level.

8. Applicant is entitled to a permanent partial disability award of 60 percent, compensable by 351.25 weeks of indemnity payable at the rate of \$230.00 per week, in the total sum of \$80,787.50, commencing the date temporary disability was last paid or the permanent and stationary date of November 6, 2018, plus the 15% increase authorized by Labor Code section 4658(d)(2), with the exact amount of the 15% increase to be adjusted by the parties or determined by the WCJ absent adjustment, jurisdiction reserved at the trial level.

12. The amount of a reasonable fee for applicant's attorney is deferred pending further proceedings and determination by the WCJ, with jurisdiction reserved at the trial level.

(ADJ10913893)

4. Applicant is entitled to temporary disability from June 12, 2012 through November 6, 2018, which overlaps with the temporary disability awarded in ADJ8153795 and likewise is subject to the 104-week cap and five-year limitation of Labor Code section 4656(c)(2), less credit for monies received or earned or benefits paid, with the exact amount of temporary disability indemnity to be adjusted by the parties or determined by the WCJ absent adjustment, jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new determination of the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 27, 2024

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

**CYNTHIA TOOHEY GREEN
LAW OFFICE OF ALAN H. FENTON
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**

JTL/oo

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

JOINT REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

- | | | |
|----|----------------------------------|---|
| 1. | Applicant's Occupation: | Teacher |
| | Date(s) of Injury: | Nov. 15, 2010;
Oct. 17, 1983 – June 12, 2012 |
| | Parts of Body Injured: | Bilateral knees, left hip, G.I. system &
Psych |
| | Manner in Which Injury Occurred: | Not in dispute |
| 2. | Identity of Petitioner: | Applicant & Defendant |
| | Timeliness: | The petitions are timely |
| | Verification: | The petitions are verified |
| | Service: | The petitions were served on all parties |
| 3. | Date of Issuance of Order: | September 13, 2021 |
| 4. | Petitioner's Contention: | The WCJ erred in awarding Temporary
Disability, a miscalculation of Permanent
Disability including L.C. § 4658 (d)
Increase & not awarding attorney
Fees on the TD awarded. |

I.
FACTS

Applicant was employed as a school teacher and sustained an admitted specific injury on November 15, 2010 to her right knee that was resolved by way of a Stipulated Findings and Award. On October 7, 2013.

A timely petition to reopen was filed alleging additional body parts and a continuous trauma claim was also filed alleging injury to her bilateral knees.

Following an Opinion on Decision and Findings of Fact and Award issued, finding inter alia permanent disability, temporary disability, applicant filed a petition for reconsideration alleging the WCJ erred in the amount of permanent disability (PD) and erred in not awarding attorney fees in connection with the temporary disability (TD) awarded.

Defendant filed their own petition for reconsideration averring, the same incorrect PD award, and that applicant was not entitled to the TD awarded nor was applicant entitled to a L.C. § 4658 (d) increase.

II. **DISCUSSION**

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cure those defects.

Applicant's petition for 15% attorney fees on the temporary disability awarded herein should be granted. He further points out the lack of a L.C. § 4658(d) in the Findings of Fact and Award but were included in the Opinion on Decision, this should also be granted

Both sides agree the permanent disability award of 60% is appropriate and both sides (and the WCJ agrees) the award should read, Applicant is entitled to a partial permanent disability award of 60 percent, equivalent to 351.25 weeks of indemnity payable at the weekly rate of \$230.00 per week, in the total sum of \$80,787.50, commencing the date TD was last paid or .November 6, 2018; the date applicant became permanent and stationary.

Defendant's substantive disagreement with the decision is the awarding of temporary disability and the increasing of the permanent disability awarded pursuant to L.C. § 4658(d).

As to the increase in permanent disability, defendant does not contend any such L.C. §4658(d) notice requirement was ever provided to applicant.

Their contention is that applicant retired and thus removed herself form the labor market thereby excusing their obligation to provide an offer in writing.

Applicant underwent knee surgery on an industrial basis on February 10, 2011.and returned to work on March 9, 2011. Applicant was found to be permanent and stationary December 5, 2011. There is no evidence of any offer of regular, modified or alternative work offered to applicant in the manner and form proscribed by the Administrative Director and therefore Applicant was entitled to a 15% increase on all permanent disability remaining to be paid.

Applicant was also found to be permanent and stationary by Dr. Newton on November 6, 2018. Again, no offer or regular modified or alternative work by defendant was proffered into evidence, thus warranting the awarding of a 15% increase in the value of the permanent disability award.

As to temporary disability, Applicant was evaluated by Peter Newton, M.D., Arthur Lipper, M.D., and Arnold Gilberg, M.D. All performed an evaluation of applicant in the capacity of an Agreed Medical Evaluator (AME).

Dr. Newton stated in his medical report (Exhibit 2) dated November 6, 2018 on page 20,

“After my evaluation of 12/01/15, this applicant should have been able to continue working with restrictions up until the time of her two knee replacements. After each of her knee replacement surgery, it would have been reasonable for her to have been TTD for six weeks, after which time she should have been able to return to work with restrictions. If at any time her employer could not have accommodated her, she would have been considered TTD through today.”

Applicant testified credibly at trial with due regard for her demeanor as witness that she only stopped working due to her inability to perform her job duties as a result of her industrial injury.

Based on the employer’s inability to meet their burden to show any offer of modified or alternative work during the period applicant was TTD/TPD and when taken together with Dr. Newton’s finding as quoted hereinabove, applicant is entitled to 104 weeks of temporary disability for both injuries concurrently as the temporary disability period overlaps for both injuries, less credit for all monies paid or benefits received.

Based on the employer’s failure to show any offer of regular, modified or alternate work was offered in the manner and form proscribed by the Administrative Director, applicant is entitled to an increase in her permanent disability award of 15%.

III.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant’s Petition for Reconsideration be denied based on the arguments and merits addressed herein.

Date: October 20, 2021

SCOTT J. SEIDEN
Workers' Compensation Administrative
Law Judge