

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

**DEXTER ALAN NITTA, *Applicant***

**vs.**

**RALPHS GROCERY COMPANY, Permissibly Self-Insured;  
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ3459081 (LAO 0822105); ADJ183911 (LAO 0822102);  
ADJ3352607 (LAO 0822104); ADJ477044 (LAO 0825294); ADJ3699308 (LAO 0822103)  
Los Angeles District Office**

**OPINION AND DECISION AFTER REMAND**

The following Decision after Remand is issued pursuant to the Order issued on March 7, 2022 by the Second District Court of Appeal, Division 3 (Court), in which the Court granted a writ of review filed by defendants “with respect to the indemnity rate of permanent total disability only.” (Order, March 7, 2022, pp. 2-3.) The Court denied the remainder of the petition, and remanded this case to the Workers’ Compensation Appeals Board (Appeals Board) to issue an amended award at the statutorily prescribed permanent total disability indemnity rate of \$490.00 per week.” This is our decision after remand.

Defendant contended on review<sup>1</sup> that the WCJ and the WCAB erred in awarding permanent total disability (PTD) indemnity at a rate of \$507.16 per week pursuant to the parties’ stipulation that, “At the time of injury, the employee’s earnings were \$760.74 per week, warranting an indemnity rate of \$507.16 for temporary disability. (See Minutes of Hearing and Summary of Evidence, January 22, 2020.) Defendant contended that the parties’ stipulation to a temporary disability indemnity rate is not a stipulation to a PTD indemnity rate; and, that based on the parties’ stipulation to applicant’s average weekly earnings of \$760.74, applicant cannot be awarded a higher rate than the statutory maximum of \$490.00 per week (Lab. Code, § 4453) for his cumulative trauma injury ending in 2002.

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<sup>1</sup> Petitioner sought a writ of review of the Opinion and Order Denying Petition for Reconsideration issued by the Appeals Board on August 30, 2021 (Opinion). The Opinion denied defendant’s petition for reconsideration of the Findings and Award and Order issued by a workers’ compensation administrative law judge (WCJ) on January 6, 2021.

Upon initial review of defendant's Petition for Writ of Review, the Court determined that defendant's claim that "the indemnity rate for the permanent disability award is neither authorized by the Labor Code nor stipulated to by the parties," appeared to have merit. (Order, January 10, 2022, p. 1.) The Court ordered the Appeals Board "to file a response to the petition for a writ of review addressing only the basis of the Board's decision to award permanent disability at a rate of \$507.16 weekly rather than \$490, which appears to be the statutorily prescribed rate." (*Id.*, pp. 1-2.)

After further review of the record in this case, and the legal question presented by the Court, the Appeals Board concurred with the Court that the statutorily prescribed PTD indemnity rate in this case is \$490.00 per week.<sup>2</sup> PTD is awarded at 2/3 of an applicant's average weekly earnings. (*Gamble v. Workers' Compensation Appeals Bd.* (2006) 143 Cal.App.4th 71, 87.) The parties in this case stipulated that respondent's average weekly earnings were \$760.74, an amount exceeding the statutory cap on average weekly earnings for a 100% permanent disability occurring on or after July 1, 1996, but before January 1, 2003. (Lab. Code, § 4453(a)(7) [average weekly earnings may not be "more than seven hundred thirty-five dollars (\$735)"].) Consequently, respondent's PTD indemnity rate is statutorily capped at 2/3 of \$735.00, or \$490.00 per week, and the parties may not stipulate out of those statutorily prescribed indemnity rates.<sup>3</sup>

For the foregoing reasons,

**IT IS ORDERED** as the Decision after Remand of the Workers' Compensation Appeals Board that the Opinion and Order Denying Petition for Reconsideration issued by the Appeals Board on August 30, 2021 is hereby **AFFIRMED** except for the first full paragraph of page 3 (beginning, "With regard to defendant's contention that the WCJ erred in awarding indemnity at the rate of \$507.16 per week...").

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<sup>2</sup> In addition, the Appeals Board notes that respondent did not address the issue in response to the Writ, and conceded the issue in Applicant's Answer to Petition for Reconsideration (Answer). (Answer, p. 14.)

<sup>3</sup> An applicant who sustains a permanent total disability is "entitled to permanent disability indemnity payments at the temporary total disability rate for life. (§§ 4659(b), 4453(a).)" (*Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 561-562 (Appeals Bd. en banc).) However, in this case, the parties could stipulate to an amount of temporary disability payment exceeding the statutory cap where temporary disability payments were made two years or more from the applicant's date of injury. (Lab. Code, § 4661.5.) However, based on the express language of section 4661.5, permanent disability payments are not subject to Labor Code section 4661.5. (See *Jansen v. Folgergraphics*, 2017 Cal. Wrk. Comp. P.D. LEXIS 241, \*10, as persuasive authority.) We also note that pre-2003 injuries, such as the 2002 injury involved in this case are also not subject to an annual increase based on the state average weekly wage under Labor Code section 4659, subdivision (c). (Lab. Code, § 4659(c).)

**IT IS FURTHER ORDERED** as the Decision after Remand of the Workers' Compensation Appeals Board that the Findings and Award and Order issued by a workers' compensation administrative law judge on January 6, 2021 is **AFFIRMED** except that it is hereby **AMENDED** as follows:

**FINDINGS OF FACT**

...

9. Applicant's injuries caused a combined permanent disability, after apportionment of 100 percent payable at \$490.00 per week for life with accrued sums payable forthwith, less credit for all sums paid on account thereof, and further payable in accordance with Labor Code section 4650, if applicable, and 4904, if applicable, and Labor Code section 4659(c), if applicable, and Labor Code section 4658, subdivision (d)(2) and (d)(3) and (d)(B), if applicable. The exact amount due is to be adjusted by the parties and the Employment Development Department, if applicable, with jurisdiction reserved by the Board.

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**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**CRAIG SNELLINGS, COMMISSIONER**  
**CONCURRING NOT SIGNING**



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

**July 20, 2022**

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

**DEXTER NITTA  
GRAIWER & KAPLAN  
MICHAEL SULLIVAN & ASSOCIATES**

**AJF/abs**

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