

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

KEVIN SUH, *Applicant*

vs.

**METROPOLITAN STATE HOSPITAL; STATE COMPENSATION INSURANCE
FUND, *Defendants***

**Adjudication Numbers: ADJ9017624, ADJ9017629
Anaheim 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.¹

In the Joint Finding and Order of November 13, 2020, the Workers' Compensation Judge ("WCJ") found, in relevant part, that on March 15, 2013 (ADJ9017624) and during the period January 1, 2002 through March 15, 2013 (ADJ9017629), applicant sustained industrial injury "to body parts listed in the Stipulations with Request for Award dated February 7, 2017 and January 8, 2020." The WCJ also found and ordered that applicant's "life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability."

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that Labor Code section 4659 mandates commencement of life pension benefits when permanent disability payments are exhausted, that the parties' stipulations of January 8, 2020 are clear and unambiguous, that defendant failed to file a petition to set aside the January 8, 2020 stipulations, that extrinsic evidence cannot be considered to avoid application of section 4659, that the WCJ impermissibly relied upon extrinsic evidence, that a unilateral mistake by defendant does not avoid the effect of its voluntary stipulation, that the WCJ failed to explain why section 4659 is ambiguous, that the WCJ erred in relying upon *Horton v. California* (2012) 2012 Cal. Wrk. Comp.

¹ Earlier in this case, the Appeals Board issued an Opinion and Order Denying Petition for Reconsideration dated July 21, 2017. Commissioner Frank M. Brass signed that decision, but he is no longer a member of the Appeals Board. A new panel member has been substituted in his place.

P.D. LEXIS 29 instead of *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701], and that defendant must start paying applicant's life pension now.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

INTRODUCTION

Labor Code section 4859(a) provides that life pension payments begin "after payment for the maximum number of weeks" of permanent disability indemnity. Applicant and defendant entered into an approved stipulation to commute all indemnity due under an award of 92% permanent disability, but without agreeing when life pension payments should begin. After a dispute and hearing over defendant's refusal to start life pension payments following the commutation, the WCJ determined there is no acceleration of the life pension payments, which creates a lengthy "hiatus" before applicant begins receiving his life pension. Based on our review of the record and applicable law, we disagree with the WCJ and conclude that applicant's life pension payments are due immediately following defendant's payment of the commuted permanent disability indemnity.

FACTUAL BACKGROUND

In the approved Stipulated Award dated February 7, 2017, the parties stipulated that on March 15, 2013 (ADJ9017624) and during the period January 1, 2002 through March 15, 2013 (ADJ9017629), applicant sustained industrial injury to his psyche, neurological and neurocognitive systems, hypertension, stroke, and platelet disorder, causing permanent disability of 85%, indemnity for which was payable beginning March 14, 2015 at the weekly rate of \$290.00 until the sum of \$195,242.50 would be paid (less credit for any such payments made), followed by a life pension "per Labor Code and case law." In the stipulations, applicant's attorney requested and was awarded a fee of \$41,648.15 based on "permanent disability \$195,242.50 x 15% [equals] \$29,286.37 off far end of award and present value of life pension of \$82,411.91 x 15% [equals] \$12,361.78 utilizing the uniform reduction method off side of life pension payments."

Applicant later filed a Petition for Commutation dated March 8, 2017, to which defendant objected. After an Expedited Hearing on May 23, 2017, wherein applicant testified that he needed funds to pay off credit cards and to buy a car for work, the WCJ ordered "commutation of applicant's permanent disability award herein...in the sum of \$34,577.81, from the far end of the permanent disability award, payable within 20 days." There was no mention of the life pension in

the WCJ's commutation order. Defendant sought reconsideration of the order. The Board denied reconsideration.

Applicant filed a timely Petition to Reopen on July 26, 2017, alleging his condition had worsened. The parties ultimately entered into a second, approved Stipulated Award on January 8, 2020. This second set of stipulations included the same dates of injuries, body parts and case numbers as the first Stipulated Award, but it was further stipulated that the injuries resulted in permanent disability of 92 percent, indemnity for which was payable beginning March 14, 2015 at the weekly rate of \$290.00 until the total sum of \$227,722.50 would be paid (less credit for any such payments made), followed by a life pension "reserved per terms of this agreement." The stipulations included an additional fee for applicant's attorney in the sum of \$4,872.00; they also incorporated an addendum that commuted all permanent disability indemnity (excluding the life pension) due under the award of 92%. In relevant part, the addendum provided that "(1) within 30 days, defendant shall pay applicant \$73,805.07...in a lump sum, which reflects the [difference between] sums paid under the prior 2/7/17 stipulation (85% PD) and the parties current [stipulation] (@92% PD)."²

In the addendum, the parties also stipulated that the "WCAB retains jurisdiction over all life pension issues," and that "defendant shall pay [applicant's attorney] \$4872.00 for attorney's fees for increased PD only [within] 30 days. There will be no additional payment of [attorney's fees] per this stipulation once the amount herein has issued on PD only. [Attorney's fees] regarding [Life Pension] reserved." The parties further stipulated: "As part of the consideration for this agreement, the parties agree that all residual PD payments shall be commuted/paid...in one lump sum of [\$73,805.07] excluding life pension benefits [...]."

Shortly after the WCJ's approval of the Second Stipulated Award of January 8, 2020, a dispute arose over its interpretation and payment. The dispute proceeded to hearing on August 12, 2020. The issues were described as follows:

1. The commencement of life pension following commutation of PD.
2. Enforcement of terms of January 8, 2020 Stipulation with Request for Award.

² The addendum included the following calculations: 92% permanent disability indemnity worth \$227,722.50 (excluding life pension), less \$107,397.33 for permanent disability payments advanced through December 24, 2019 and payments made pursuant to the previous commutation of May 23, 2017, less \$41,648.10 paid pursuant to a prior stipulation dated February 17, 2017, less an attorney's fee of \$4872.00 based on 15% of the difference between 85% and 92% permanent disability indemnity, leaving applicant with a lump sum of \$73,805.07.

After hearing, the WCJ issued the Joint Finding and Order of November 13, 2020 disputed here. The WCJ found and ordered that applicant’s “life pension shall not be accelerated by the commutation of permanent disability nor the lump sum payment of permanent disability.”

DISCUSSION

Labor Code section 4659(a) provides in relevant part:

If the permanent disability is at least 70 percent, but less than 100 percent, 1.5 percent of the average weekly earnings for each 1 percent of disability in excess of 60 percent is to be paid during the remainder of life, *after payment for the maximum number of weeks specified in Section 4658³ has been made.* (Italics added.)

In interpreting section 4659(a), “[o]ur fundamental task...is to determine the Legislature’s intent so as to effectuate the law’s purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.” (*People v. Czirban* (2022) 77 Cal.App.5th 1050, 1064 [87 Cal.Comp.Cases 393], quoting *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190, internal quotation marks omitted.)

Section 4659(a) states that a life pension is to be paid “after payment for the maximum number of weeks [of permanent disability indemnity] has been made.” The plain and commonsense meaning of this language is that life pension payments begin after payment of all weeks of permanent disability indemnity due under an award exceeding 70%. The statutory language does not mention any exception for permanent disability indemnity paid out by virtue of commutation. Further, based on our understanding of *Baker v. Workers’ Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701] (“*Baker*”), we are persuaded that giving this plain and commonsense meaning to section 4659(a) is consistent with the purpose of permanent disability indemnity and life pensions, and it will not produce absurd results the Legislature did not intend.

In *Baker*, our Supreme Court held that “through the operative language of [Labor Code section 4659] subdivision (c), the Legislature intended that COLA’s be calculated and applied prospectively commencing on the January 1 following the date on which the injured worker first

³ Labor Code section 4658 specifies how to compute the number of weeks of permanent partial disability indemnity.

becomes entitled to receive, and actually begins receiving, such benefit payments, i.e., the permanent and stationary date in the case of total permanent disability benefits, and the date on which partial permanent disability benefits become exhausted in the case of life pension payments.” (52 Cal.4th at 439.)

In construing section 4659(c), our Supreme Court also explained the purpose of permanent disability and life pension benefits:

Permanent disability and life pension benefits are intended to compensate the injured worker for the long-term, residual effects of an industrial injury once the worker has attained maximum medical recovery. (*Department of Rehabilitation v. Workers’ Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1291 [135 Cal. Rptr. 2d 665, 70 P.3d 1076] (*Department of Rehabilitation*)). Total permanent disability benefits are weekly payments made for life to injured workers who are 100 percent disabled. (§ 4659, subd. (b).) They generally commence on the date the injured worker reaches a medically stable condition (permanent and stationary) because, at that point, the full nature and extent of the worker’s permanent disability, if any, can be determined. (*Department of Rehabilitation, supra*, 30 Cal.4th at p. 1292.) Life pensions are a form of supplemental partial permanent disability benefit, consisting of payments to a subclass of seriously injured workers, i.e., those whose “permanent disability is at least 70 percent, but less than 100 percent.” (§ 4659, subd. (a).) *Life pension payments commence once the worker’s partial permanent disability payments have been exhausted*, and thereafter continue weekly for life. (*Ibid.*)”

(*Baker*, 52 Cal.4th at 438, italics added.)

We observe that throughout its opinion in *Baker*, the Supreme Court used the word “exhaustion” of permanent partial disability indemnity payments as the event that triggers the commencement of life pension payments. According to the Supreme Court then, life pension payments begin after “exhaustion” of permanent disability indemnity payments. Our interpretation of section 4659(a) - that life pension payments begin after payment of all weeks of permanent disability indemnity due under an award exceeding 70%, without exception for indemnity paid by virtue of commutation – is consistent with the Supreme Court’s view that life pension payments commence once the worker’s partial permanent disability payments have been “exhausted.” Our interpretation is likewise consistent with the Supreme Court’s view that (1) life pension benefits are intended to compensate the injured worker for the long-term, residual effects

of an industrial injury; and (2) life pensions are a form of *supplemental* partial permanent disability benefit, consisting of payments to a *subclass of seriously injured workers*.

The Appeals Board expressed a similar view in its en banc opinion in *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550. Although the Board did not specifically interpret section 4659(a), it did address the timing of permanent disability indemnity payments in relation to payment of temporary disability benefits. The Board held (1) 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 based on a reasonable estimate of the injured worker's ultimate level of permanent disability; (2) when an injured worker who is receiving permanent partial disability payments pursuant to section 4650(b)(1) becomes permanent and stationary and is determined to be permanently totally disabled, the defendant shall pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability indemnity terminated; and (3) COLAs begin on the first day in January after an injured worker becomes entitled to receive permanent disability indemnity pursuant to sections 4650(b)(1) or (b)(2).

For purposes of our analysis here, *Brower* is instructive because the Board noted by way of example that an applicant who sustains at least 70% but less than 100% permanent disability is entitled to a life pension *after payment of the number of weeks specified in section 4658 has been made.* (79 Cal.Comp.Cases at 561, italics added.) The Board did not mention any exception for permanent disability indemnity payments made pursuant to an order of commutation.

We note defendant argues in its answer that absent commutation of the permanent disability indemnity part of applicant's 92% award, he would not begin receiving life pension payments until March 31, 2030, so that his immediate receipt of the payments gives him a "windfall" in view of his life expectancy. We find the argument unpersuasive. As discussed before, in *Baker* our Supreme Court remarked that life pensions are a form of *supplemental* partial permanent disability benefit, consisting of payments to a subclass of seriously injured workers. The applicant herein is within the subclass of seriously injured workers given solicitude by our Supreme Court. Accordingly, applicant's receipt of life pension benefits immediately following payment of the agreed-upon commutation of permanent disability indemnity is not properly characterized as a "windfall."

Finally, we observe that the better practice concerning the stipulated commutation of January 8, 2020 would have been to withhold approval until the parties specified how payment of the life pension was to be handled. After all, it is within the WCAB's discretion to allow or disallow a request for commutation. (See Lab. Code, § 5100(a) [Board may consider applicant's ability to live without periodic indemnity payments in determining whether commutation is in applicant's best interest.].) Here, the absence of an agreement on applicant's life pension created an unnecessary risk that one or the other party's interpretation of section 4659(a) would prevail. Under the circumstances, we are persuaded that it is appropriate for defendant to bear the consequences of our interpretation of section 4659(a) here. (See *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689, 704 [74 Cal.Comp.Cases 419], citing *City of Fresno v. Workers' Comp. Appeals Bd.* (1985) 163 Cal.App.3d 467, 471 [209 Cal. Rptr. 463]; § 3202 [workers' compensation statutes pertaining to permanent disability "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment"].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Finding and Order of November 13, 2020 is **RESCINDED**, and the following Finding and Order is **SUBSTITUTED** in its place:

FINDING

On March 15, 2013 (ADJ9017624) and during the period January 1, 2002 through March 15, 2013 (ADJ9017629), applicant sustained industrial injury to body parts listed in the Stipulations with Request for Award dated February 7, 2017 and January 8, 2020. Applicant's life pension shall be accelerated.

ORDER

Applicant's life pension shall be accelerated by the commutation of permanent disability and lump sum payment of permanent disability.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



I DISSENT. (See attached Dissenting Opinion.)

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 15, 2022

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

**KEVIN SUH
LAW OFFICE OF THOMAS MARTIN
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

DISSENTING OPINION OF COMMISSIONER RAZO

There is no basis to accelerate applicant's life pension because the approved commutation order of January 8, 2020 included no such agreement. Therefore, I dissent. By definition, a commuted award of permanent disability indemnity accelerates the weekly payments of indemnity and reduces them to a lump sum at present value, payable immediately to the applicant. (Lab. Code, §§ 5100, 5101(b).) The applicant receives the benefit of an early lump sum payment in exchange for relinquishing the right to weekly payments in the future. In the approved commutation at issue here, however, there is no evidence applicant bargained for the *additional* benefit of having his life pension payments accelerated. The parties agreed in paragraph (3) of their stipulations that applicant is entitled to a life pension "reserved per terms of this agreement." But the addendum purporting to memorialize this "reservation" only included the stipulations that "WCAB retains jurisdiction over all life pension issues," that "attorney's fees regarding life pension [are] reserved," and that "all residual [permanent disability indemnity] payments shall be commuted/paid...in one lump sum...*excluding* life pension benefits [...]." (Italics added.) Without resolution of the life pension issue, the applicant risked a lengthy "hiatus" between receipt of the commuted lump sum and commencement of his life pension payments (a hiatus of about ten years, according to defendant). In approving the parties' stipulated commutation, it is unclear whether the WCJ contemplated that this hiatus might result in "undue expense or hardship to the applicant." (Lab. Code, § 5100(b).)

The dilemma created by this case illustrates why the WCAB has recognized since the start of the workers' compensation system that the law's policy is to pay compensation in installments, and that commutation is contrary to that policy. Therefore, it has been held that the Board's power and discretion to allow commutation of an award under Labor Code section 5100 must be exercised with great care (*Wilson v. Gallegher* (1914) 1 Ind. Acc. Comm. Pt. II 306, 308), upon a showing of immediate and necessary need for more money than periodic payments can provide, as with an applicant facing pressing or emergency debts. (*Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 227 [41 Cal.Comp.Cases 691].)

The policy favoring preservation of periodic payments is the reason why permanent disability indemnity awards are typically commuted "from the far end of the award," and the reason why "horizontal" commutations are applied to life pensions in cases of permanent disability exceeding 70%. (2 *California Workers' Compensation Law & Practice* § 17:41(V) Attorney Fees:

Manner of Allowance.) I further note that an order for payment of an award in a lump sum is not the legal equivalent of a rescission, alteration, or amendment of an award under Labor Code section 5804. (*Norwich Union Indem. Co. v. Industrial Acci. Com.* (1934) 140 Cal.App. 36 [20 Ind. Acc. Comm. 261].) In this case, the commutation order of January 8, 2020 did not amend the award of 92% permanent disability, which means that the life pension should not commence until the final weekly permanent disability indemnity payments otherwise would have been made. (See *Horton v. California* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 29 [life pension of emergency service volunteer commences following final permanent disability payments required by Labor Code sections 4353 and 4354].)

In summary, the very reason the commencement of the life pension has been called into question is because applicant already received an extraordinary benefit – commutation – that is within the Board’s *discretion* to grant under Labor Code section 5100. For this reason, the application of Labor Code sections 4659(a) and 5100 must be considered together, as contrasted with construing section 4659(a) in isolation. Under section 4659(a), permanent disability and life pension benefits are intended to compensate the injured worker for the *long-term*, residual effects of an industrial injury, compensable by periodic payments over time. (*Baker v. Workers’ Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701].) Under section 5100, the Board has *discretion* to allow commutation upon a showing of immediate and necessary need for more money than periodic payments can provide. (*Hulse v. Workers’ Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 227 [41 Cal.Comp.Cases 691].)

In this case, I agree with the WCJ that because section 4659(a) ordinarily mandates periodic payments over time, while section 5100 allows the Board to depart from that mandate only upon a showing of dire financial need by applicant, the January 8, 2020 commutation order did not automatically accelerate applicant's life pension payments. I would affirm the WCJ's decision that applicant's life pension is not accelerated by the commutation of permanent disability or by the lump sum payment of permanent disability.



WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 15, 2022

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

**KEVIN SUH
LAW OFFICE OF THOMAS MARTIN
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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