

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

**RONALD THEUS, *Applicant***

**vs.**

**MELODY EXPRESS, ILLEGALLY UNINSURED;  
UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ424792 (FRE0241357)  
Fresno District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration<sup>1</sup> 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.

Applicant seeks reconsideration of the Third Findings of Fact, Order and Opinion on Decision (F&A), wherein the workers' compensation administrative law judge (WCJ) determined that the Uninsured Employers Benefits Trust Fund (UEBTF) appropriately paid all benefits owed to decedent's minor dependent child.

Applicant contends that the payments made by the UEBTF over the final 18 months of the award were improperly reduced without appropriate explanation.

We have not received an answer from any party. 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, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this opinion.

---

<sup>1</sup> Commissioner Lowe, who was on the panel that granted reconsideration to further study this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

## FACTS

The relevant factual background is set forth in the WCJ's November 3, 2020 Opinion on Decision, as follows:

While working as a truck driver for MELODY EXPRESS, Ronald Theus sustained fatal injuries as a result of a trucking accident occurring in the State of Oregon on December 29, 2005.

At the time of his death, Applicant was responsible for three (3) children, DeLois Theus, [birthdate]; DeVora Theus [birthdate]; and Destiny Theus [birthdate]. A claim was filed against Employer, although it was determined that- at the time of the incident, Employer was illegally uninsured for Workers' Compensation in violation of Labor Code§ 3700. The Uninsured Employers Benefits Trust Fund (UEBTF) appeared in the case.

The two elder children, DeLois and De Vora, appeared *in propria persona*, while the youngest child, Destiny, was represented by attorney Douglas A. Low. All parties entered into a Stipulations With Request for Award ("Award") settlement, which was approved by the WCAB on January 8, 2008. The settlement called for the children to be paid the total sum of \$840.00 per week, but, as each reached their age of majority, the award would be split between the younger children.

Based on the terms of the settlement, on April 25, 2010, Destiny Theus began to the entirety of the Award as her sisters, DeLois Theus and DeVora Theus, each had reached their ages of majority. The Addendum to the Award additionally required that Destiny receive the "minor's extension" after the entirety of the stipulated Award was paid out. Counsel's fees, totaling \$60,000.00, were taken from the "far end" of the Award.

(F&A, p. 4.)

Ms. Shaundra Bess, the guardian ad litem for Destiny, has raised issues relating to whether the award was appropriately and sufficiently paid per the terms of the settlement agreement. In proceedings held on July 10, 2018, the parties proceeded to trial on the issue of the clarification and enforcement of the Award of January 8, 2008. (Minutes of Hearing, July 10, 2018, at 3:4.)

On September 7, 2018, the WCJ issued his Findings of Fact, Order and Opinion on Decision. Therein, the WCJ observed that attorney's fees had been commuted from the final weekly payments of the death benefit in order to pay attorney fees at the time of the issuance of the award. However, the WCJ further noted that per the express terms of the settlement agreement, Destiny was intended to receive the entire death benefit until she reached age 18. (Finding of Fact

No. 8.) Accordingly, the WCJ ordered that Destiny “continue receiving the "minor's extension" Death Benefit until such time as she reaches the age of majority, or dies prior thereto in accordance with the terms of the Stipulated Award.” (Findings of Fact, Order and Opinion on Decision, September 7, 2018, at p. 2.)

The UEBTF resumed payments to Destiny, who reached age 18 on April 25, 2019.

The instant proceedings arise out of a dispute as to whether the UEBTF adequately paid all benefits owed to Destiny per the January 8, 2008 Award. The WCJ directed the parties to address the issue to the Disability Evaluation Unit to perform a retrospective accounting of the payment history submitted by the UEBTF.

On November 3, 2020, the WCJ issued his F&A, entering a finding of fact that pursuant to the analysis of the DEU, “the entirety of the Death Benefits has been paid out to Destiny Theus through the date she reached her age of majority, or on April 25, 2019.” (Finding of Fact No. 16.) The WCJ noted payments by the UEBTF to Destiny continued through April 25, 2019, and that “Court is satisfied that all payments owed by Destiny Theus have been paid as contractually required in the Stipulations With Request for Award dated January 8, 2008. Nothing further is owed as a result of this stipulated Award.” (F&A, Opinion on Decision, at p. 5.)

Applicant observes that in 2017, she was receiving a weekly benefit of \$1,172.57. The UEBTF ceased making payments under the Award as it averred the number of weeks of the award was reduced in an amount equivalent to the attorney fees which were paid in 2008. However, following the WCJ’s September 7, 2018 decision, the amount of the weekly benefit the WCJ ordered reinstated was significantly reduced. (Petition, at p. 3.) Applicant contends that the accounting provided by the DEU does not accurately reflect the WCJ’s determination that indemnity was to be paid to applicant without regard to commutation of attorney fees. (*Id.* at p. 6.)

## **DISCUSSION**

We initially observe that the Petition was filed by Shaundra Bess, the guardian ad litem (GAL) for Destiny Theus. Ms. Bess filed the Petition on November 30, 2020, after Destiny Theus had reached her 18th birthday on April 25, 2019. The WCJ’s report raised the issue of whether Ms. Bess was retained the standing necessary to file a petition after Destiny had reached the age of majority. (Report, at p. 2.)

The California Court of Appeal recently addressed the issue of whether a guardian ad litem, appointed to represent minor beneficiaries of a trust, may continue in that position once the wards reach the age of majority:

The fact that [beneficiaries of the trust] Jacqueline and Michael are both adults and yet [guardian ad litem] Chen appears to continue to act as their guardian ad litem raises the question whether a guardian ad litem, appointed to represent minors, may continue in that position once his wards reach the age of majority. Although the parties do not refer us to California authority squarely addressing this point, we read the statutory authorization for the appointment of a guardian ad litem in proceedings under the Probate Code as authorization for maintaining such appointment *only so long as the grounds for the appointment continue to exist*. This is the rule in other jurisdictions that have addressed the issue, and [guardian ad litem] offers no authority or sound reason why the rule should be otherwise in this state. (See *Mason v. Royal Indemnity Co.* (N.D.Ga. 1940) 35 F.Supp. 477, 480 [“the authority of a guardian ad litem of an infant defendant to represent him in the conduct of a cause expires with the minority of the infant”]; *Maryland Casualty Co. v. Owens* (Ala. 1954) 74 So.2d 608, 611 [“it is well settled that the authority of a guardian ad litem of an infant defendant to represent him in the conduct of a cause expires with the minority of the infant”]; *Staggenborg v. Bailey* (Ky.Ct.App. 1904) 80 S.W. 1109, 1110 [duties of guardian ad litem are “terminated by the arrival of the infant at the age of majority”]; *West St. Louis Trust Co. v. Brokaw* (Mo.Ct.App. 1937) 102 S.W.2d 793, 795 [“the function and authority” of a guardian ad litem terminates when infant reaches the age of majority]; *Malik ex rel. O’Brien v. Malik* (N.Y.Sup.Ct. 2007) 15 Misc.3d 883, 888 [“guardian ad litem is without authority to continue his representation of the former infant plaintiff” once the plaintiff “attained the age of her majority”]; *Spell v. William Cameron & Co.* (Tex.Ct.Civ.App. 1910) 131 S.W. 637, 638 [guardian ad litem’s authority to represent an infant “expires with the minority of the infant”]; see generally 42 Am.Jur.2d (2022) Infants, § 159 [“[t]he authority of a . . . guardian ad litem to represent an infant in the conduct of a cause . . . expires with the minority of the infant”]; 6A Wright & Miller, Federal Practice and Procedure (3d ed. 2022) § 1570 [guardian ad litem’s “power is dependent upon the continued disability of the person being protected” and once the disability has ended, the representative “loses authority to maintain the suit on behalf of the former infant or incompetent”]; cf. *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1067 [appointment of court-appointed special advocate for dependent child necessarily ends when child is adopted].)

(*Benjamin Tze-Man v. Chui* (2022) 86 Cal. App. 5th 929, 938-939 [2022 Cal. App. LEXIS 1045].)

Thus, where the guardian ad litem is appointed because the party in interest is a minor, the appointment continues only until the minor child reaches the age of majority. Here, the

appointment of Ms. Bess was appointed guardian ad litem when Destiny Theus was a minor, and the grounds for the appointment ceased when Destiny reached her 18th birthday on April 25, 2019.

Nonetheless, Labor Code section 5700 provides that parties to proceedings before the Workers' Compensation Appeals Board "...may be present at any hearing, in person, by attorney, or by any other agent..." (Lab. Code, § 5700; *Bland v. Reed* (1968) 261 Cal.App.2d 445, 67 Cal. Rptr. 859, 1968 Cal. App. LEXIS 1765) ["...representation of claimants before the Industrial Accident Commission ... is specifically authorized by the Legislature."] Moreover, our Rules provide that "a non-attorney representative may act on behalf of a party in proceedings before the Workers' Compensation Appeals Board if the party has been informed that the non-attorney representative is not licensed to practice law by the State of California." (Cal. Code Regs., tit. 8, § 10401.)

Here, Ms. Bess has represented her daughter's interests in multiple proceedings before the WCAB spanning more than 10 years. Given the uncertainty with respect to the disposition of the guardianship over Destiny following her 18th birthday, we are persuaded that substantial justice requires we consider the Petition on its merits. However, we recommend that in further proceedings, applicant clarify her status as either *in propria persona*, or as represented by an attorney or non-attorney representative. Should Ms. Bess continue to represent applicant in further proceedings, a notice of representation pursuant to Rule 10401(c) will be required. (Cal. Code Regs., tit. 8, § 10401(c).)

Turning to the merits of applicant's Petition, we begin our analysis with the January 8, 2008 Award, wherein the parties agreed that death benefits would be paid to decedent's three children, and that \$24,000 of attorney fees would be commuted to pay attorney fees. The parties further agreed that an additional \$60,674 in attorney fees would be commuted from the far end of the award. (Stipulations with Request for Award, January 8, 2008, p. 2.)

On May 9, 2017, the parties again stipulated that the end date for the payment of death benefits by the UEBTF would be October 30, 2017. Although Destiny's 18th birthday would not transpire until April 25, 2019, the agreed upon date reflected the commutation of approximately 77.5 weeks corresponding to the attorney fee of \$60,674, paid to applicant's attorney in 2008. (Ex. C, DEU Evaluator Accounting of Benefits Payable, p. 1.) The parties further stipulated that the UEBTF would pay retroactive indemnity of \$28,500 reflecting prior SAWW increases to the

weekly death benefit rate, and would further resume payments in the amount of \$1,172.57 we week through the agreed upon payment termination date of October 30, 2017.<sup>2</sup>

Irrespective of these agreements, the parties proceeded to trial on July 10, 2018, framing the issue of clarification and enforcement of the Stipulated Award of January 8, 2008. (Minutes of Hearing, July 10, 2018, at 3:4.) The WCJ's September 7, 2018 Findings of Fact, Order, and Opinion on Decision explained that the original Stipulated Award provided was clear in its intended provision of benefits to be paid to the guardian ad litem until Destiny's 18th birthday. Based on this unequivocal language, the WCJ ordered that the UEBTF continue to pay the weekly death benefit to applicant until her 18th birthday, without regard to the commutation of attorney fees. (Findings of Fact, Order and Opinion on Decision, September 7, 2018, p. 2.)

Applicant thereafter asserted that the UEBTF had failed to substantially comply with the Award, and the parties proceeded to trial on September 10, 2019, framing the issue of whether the UEBTF had properly satisfied its payment obligations under the January 8, 2008 Stipulated Award. (Minutes, at p. 2:4.) The WCJ again referred the matter to the DEU, and ultimately issued his Findings of Fact on November 3, 2020, determining that the UEBTF had appropriately satisfied its obligation under the January 8, 2008 Award. (F&A, Opinion on Decision, at p. 2.)

Following our independent review of the record, however, we are concerned that the basis for this conclusion is not adequately explained in the record.

Applicant asserts that she was entitled to weekly benefits at the maximum available TTD rate for the period of 2017 through her 18th birthday on April 25, 2019, or approximately 18 months. Applicant contends that given the maximum TTD rate in 2017 of \$1,172.57, that she was entitled to 18 months of payments at \$1,172.57 per week, totaling approximately \$84,423.00. (Petition, at p. 4.) However, it does not appear that the issue of the rate at which applicant was to be paid following the resumption of payments in 2017 was fully adjudicated. We further note that the original anticipated last date of payment of the death benefit before the commutation period began was October 30, 2017. The total attorney fees to be commuted was \$60,674.00 (Stipulations with Request for Award, January 8, 2008, p. 2; Ex. C, DEU Evaluator Accounting of Benefits Payable, p. 3.) We further observe that the total benefits paid to applicant between October 30, 2017 (last date of payment before commutation period) and April 25, 2019 (applicant's 18th

---

<sup>2</sup> This figure corresponds to the maximum TTD rate in 2017 as set by the maximum average weekly wage of \$1,758.85. See <https://www.dir.ca.gov/dwc/WorkersCompensationBenefits.htm>.

birthday) also totaled to \$60,674.00. This appears to be the basis for the DEU's assertion that the UEBTF's obligations under the Stipulated Award had been satisfied.

Accordingly, the issue at bar appears to arise out of the discrepancy between applicant's assertions of a right to benefits at the maximum prevailing TTD rate, versus the UEBTF's payment of the exact amount of benefits that it had already commuted and paid as attorney fees.

The Labor Code and the WCAB Rules set forth what must be included in a proper trial record. It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*)). The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) "For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Hamilton, supra*, at p. 476.)

Here, we are persuaded that the record must be developed to address the issue of the appropriate rate at which applicant is to be paid. Although we do not decide the issue herein, we do note that typically, death benefits are not subject to the SAWW adjustment specified under Labor Code section 4659. As we explained in *Munson v. Workers' Comp. Appeals Bd.* (2012) 77 Cal.Comp.Cases 384, 388 [2012 Cal. Wrk. Comp. P.D. LEXIS 23] (writ den.):

For a PTD [permanent and total disability] award, there is a cost-of-living adjustment (COLA) that is based on the percentage increase in the SAWW from the prior year, and this COLA begins on the January 1 after the injured employee becomes permanent and stationary and then applies annually thereafter for the rest of the employee's life. (Lab. Code, § 4659(c); *Baker v. Workers' Comp. Appeals Bd. (X.S.)* (2011) 52 Cal.4th 434 [257 P.3d 738, 129 Cal. Rptr. 3d 133] [76 Cal. Comp. Cases 701], 2011 Cal. LEXIS 8085, 2011 WL 3516243.)

For death benefits, there is also a COLA of sorts. This is because death benefit payments that have or will be made two years or more after the date of injury must be made at the TD rate in effect at the time each payment is made. (Lab. Code, § 4661.5; *Phillips v. Sacramento Municipal Utilities Dist.* (1998) 63 Cal. Comp. Cases 585 (Appeals Board en banc).) Further, when the two-year period has elapsed, "[c]ommencing on January 1, 2007, and each January 1 thereafter,

the [TD-and, therefore, death benefit payments] shall be increased by an amount equal to the percentage increase in the [SAWW] for the prior year.” (Lab. Code, § 4453(a)(10).) Accordingly, with death benefits—as with PTD benefits—an increase based on the change in the SAWW does come into play. However, unlike PTD benefits, the annual increases in the death benefits rate based on the SAWW do not continue indefinitely for the recipient’s life. This is because, regardless of the SAWW increases, the death benefits are eventually capped at two-thirds of the injured employee’s average weekly earnings at the time of injury. (Lab. Code, § 4653.)

*(Id. at p. 388.)*

We acknowledge, however, that the parties stipulated on May 9, 2017 that the UEBTF would pay benefits at the then prevailing maximum TTD rate until October 30, 2017, without reference to decedent’s earnings or section 4661.5. (Stipulation, Award, and/or Order, May 9, 2017.) We believe that in order to properly account for the benefits provided under the January 8, 2008 Award, the WCJ must determine the appropriate weekly rate at which applicant was to be paid the death benefit.

Accordingly, we will rescind the November 3, 2020 F&A, and return the matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any person aggrieved thereby may seek reconsideration.



For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Third Findings of Fact, Order, and Opinion on Decision, dated November 3, 2020, is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

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

**September 7, 2023**

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

**DEVORA THEUS  
DOLORES THEUS  
KAREN CAMESE (GAL) FOR DEVORA & DOLORES THEUS  
LUELLA THEUS  
DESTINY THEUS  
SHAUNDRA BESS (GAL) FOR DESTINY THEUS  
BRADLEY ADAME IND DBA MELODY EXPRES  
MELODY EXPRESS  
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)  
UEBTF**

**SAR/abs**

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