

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

CHENEENE R. CLARK, WILLIAM B. CLARK (Deceased), *Applicant*

vs.

**CITY OF VALLEJO, permissibly self-insured, administered by
LWP CLAIMS SOLUTIONS, INC., *Defendants***

**Adjudication Number: ADJ12000811
San Francisco District Office**

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

Cheneene Clark (applicant) seeks reconsideration of the Joint Findings of Fact, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 6, 2023, wherein the WCJ found in pertinent part that at the time of his injury, William B. Clark (Mr. Clark) had no earnings, producing a temporary disability rate of \$0 per week, and that Mr. Clark's condition did not reach maximum medical improvement prior to his death on September 18, 2021.¹

Applicant contends that Mr. Clark was permanently totally disabled for the period from September 5, 2018, through his death on September 18, 2021, and that the permanent disability indemnity was owed at the maximum rate based on his earnings when Mr. Clark last worked for defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, and we will affirm the F&A except that we will amend the F&A in case number

¹ The injury claim in case number ADJ15260996 was tried and ruled upon by the WCJ. The WCJ's decision pertaining to that injury claim is not disputed and will not be addressed herein.

ADJ12000811 to find that pursuant to Labor Code sections 3212.1, 4453 and 4458.5 the proper permanent total disability indemnity rate is \$1066.72, subject to Labor Code section 4659(c) increases (Finding of Fact 3); that Mr. Clark was permanently totally disabled as a result of his injury, and was entitled to receive permanent total disability indemnity until the date of his death on September 18, 2021 (Finding of Fact 4); to defer the issues of the commencement date for the payment of the permanent total disability indemnity and the amount of attorney fees owed to applicant's attorney (Finding of Fact 6); and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Mr. Clark claimed injury in the form of kidney cancer, while employed by defendant as a police officer during the period ending June 2013. He retired from the City of Vallejo on October 11, 2013, with an industrial disability retirement; his last day of work was June 6, 2013.

Internal medicine qualified medical examiner (QME) Ira Fishman, M.D., issued five medical-legal reports from October 14, 2019, to February 20, 2022. The following is a summary of his reports relevant to the issues addressed herein:

On October 14, 2019, QME Dr. Fishman evaluated Mr. Clark. Dr. Fishman examined Mr. Clark, took a history, and reviewed the medical record. The diagnoses included metastatic renal carcinoma [kidney cancer that has spread to other body parts]; post right radical nephrectomy [surgical removal of a kidney]; and chronic cumulative occupational carcinogen exposure. (Joint Exh. 105, Ira Fishman, M.D., October 14, 2019, p. 32.) The doctor had noted that renal cancer "is considered a chronic insidious and progressive disease process" (Joint Exh. 105, p. 12) and he stated, "I would therefore date the first clinical manifestation of renal cancer as March 2, 2018, when microscopic hematuria was detected." (Joint Exh. 105, p. 34.) Regarding Mr. Clark's disability status, Dr. Fishman explained:

The applicant has been TTD [temporarily totally disabled] from the time of original kidney cancer diagnosis to the present. Shortly after the time that he had recovered from his right nephrectomy, he developed metastatic renal cancer. He has not reached MMI [maximum medical improvement] for metastatic renal cancer because an additional radiation treatment is pending, and the applicant is currently receiving intermittent intravenous administration of chemotherapy. Metastatic renal cancer is classified as a chronic insidious disease process with the exact timeline of cancer progression not entirely evident at this time. (Joint Exh. 105, p. 54.)

In his supplemental report, Dr. Fishman stated:

In the interim since his original evaluation, and since I issued a supplemental report, the applicant has developed new metastatic lung lesions, has stopped immunotherapy due to GI side effects and lack of efficacy, has been recently switched to a new form of chemotherapy and just completed a course of pulmonary radiation therapy. He now has immediate post-radiation pneumonitis for which he still receiving treatment in the form of prednisone and nasal oxygen. ¶ As the parties are aware, such cases present an extreme challenge to the medical legal evaluator and our administrative law system concerning how and when to declare such an injured worker at maximal medical improvement. At present, based on what the applicant has told me, he is not at MMI. (Joint Exh. 103, Ira Fishman, M.D., September 4, 2020, p. 20.)

Subsequently, having concluded that Mr. Clark had not reached MMI status “for metastatic cancer treatment” (Joint Exh. 102, Ira Fishman, M.D., November 17, 2020, p. 14) Dr. Fishman explained that:

... [A]s already stated above, based on the relentlessly progressive nature of the applicant's metastatic renal cancer, the dismal 5-year survival rates and the ongoing occurrence of cancer treatment related side effects, which are highly likely to continue, this applicant is permanently unable to compete in the open labor market. (Joint Exh. 102, p. 18.)

Mr. Clark passed away as a result of kidney cancer on September 18, 2021. In his final report, Dr. Fishman stated:

... [I]n retrospect and absent prior orthopedic injury-based (low back and right hip) retirement, the decedent was permanently totally disabled from the date of renal cancer diagnosis, 09/05/18, (date of abdominal CT scan demonstrating a large right renal mass), until the date of demise, 09/18/21. (Joint Exh. 101, Ira Fishman, M.D., February 28, 2022, p. 9.)

The parties proceeded to trial on December 20, 2022. They stipulated that Mr. Clark sustained injury arising out of and occurring in the course of employment (AOE/COE), in the form of kidney cancer and that the Labor Code section 5412 date of injury was September 5, 2018. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 20, 2022, p. 2.) The issues submitted for decision included “earnings” (to determine the proper indemnity rate), and whether Mr. Clark had been entitled to permanent disability indemnity payments for the period from September 5, 2018, until the date of his death, September 18, 2021. (MOH/SOE, p. 2.)

DISCUSSION

Pursuant to Labor Code section 4662: “(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character ... (b) In all other cases, permanent total disability shall be determined in accordance with the fact.” (Lab. Code, § 4662.)²

It is well settled that the relevant and considered opinions of one physician may constitute substantial evidence and that the Appeals Board may rely on the medical opinion of a single physician unless it is “based on surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp. Appeals. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525, 529].)

As noted above, at the trial the parties stipulated that Mr. Clark sustained an injury AOE/COE in the form of kidney cancer. In his initial report, Dr. Fishman stated that renal cancer is considered a chronic insidious and progressive disease process and that Mr. Clark’s “first clinical manifestation of renal cancer [was] March 2, 2018, when microscopic hematuria was detected.” (Joint Exh. 105, p. 34.) He then stated that Mr. Clark was temporarily totally disabled “from the time of original kidney cancer diagnosis to the present.” (Joint Exh. 105, p. 54.) In his supplemental reports (quoted above), Dr. Fishman reiterated his opinion that Mr. Clark’s condition had not reached maximum medical improvement (MMI) and in the November 17, 2020 report he found that due to the “relentlessly progressive nature of the applicant's metastatic renal cancer, ... the dismal 5-year survival rates and the ongoing occurrence of cancer treatment related side effects,” Mr. Clark was “permanently unable to compete in the open labor market.” (Joint Exh. 102, p. 18.)

Based on our review of the trial record, including Dr. Fishman’s summary and discussion of the extensive medical record, it is clear that Mr. Clark’s physical condition did not at any time after the “first clinical manifestation of renal cancer” improve to the point that he would be able to participate in any type of work. As Dr. Fishman subsequently stated, Mr. Clark was “permanently totally disabled from the date of renal cancer diagnosis ... until the date of demise...” (Joint Exh. 101, p. 9.)

The trial record does not contain any medical reports other than those from Dr. Fishman. Again, Dr. Fishman examined Mr. Clark and reviewed the extensive medical record. In each of his reports Dr. Fishman provided a detailed explanation of his analysis and conclusions. There is no indication that his opinions are based on “surmise, speculation, conjecture, or guess.” (*Place v. Workmen’s Comp. Appeals. Bd., supra.*) Therefore, his reports constitute substantial evidence and

² All further statutory references are to the Labor Code unless otherwise noted.

are an appropriate basis for finding that Mr. Clark was permanently totally disabled during the course of his treatment for the metastatic renal cancer. Thus, Mr. Clark was entitled to permanent total disability indemnity benefits until the date of his death.

Regarding the rate of the permanent total disability indemnity, section 3212.1 states:

(a) This section applies to all of the following: ...

(4) Peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

(b) The term “injury,” as used in this division, includes cancer, including leukemia, that develops or manifests itself during a period in which any member described in subdivision (a) is in the service of the department or unit, if the member demonstrates that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director.

(c) The compensation that is awarded for cancer shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits, as provided by this division.

(d) The cancer so developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment.

Further, section 4458.5 states:

If a member suffers “an injury” following termination of active service, and within the time prescribed in Section 3212, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, or 3213, then, irrespective of his remuneration from any post active service employment, his average weekly earnings for the purposes of determining temporary disability indemnity, permanent total disability indemnity, and permanent partial disability indemnity, shall be taken at the maximum fixed for each such disability, respectively, in Section 4453.

(Lab. Code, § 4458.5, quotation marks in original.)

The Appeals Board has previously held that the section 4458.5 reference to the presumption statutes incorporates the time provisions in those statutes but does not limit the application of section 4458.5 to injuries covered by those presumptions. (*City of Pinole v. Workers' Comp. Appeals Bd. (Field)* (2018 W/D) 84 Cal.Comp.Cases 22.) The application of section 4458.5 is not limited to injuries covered by the presumption statutes listed in that section, but rather extends to any injuries incurred by retired public safety members. (*California. Highway Patrol v. Workers' Comp. Appeals Bd. (Hazelbaker)* (2021 W/D) 86 Cal.Comp.Cases 230.) We also note that the theory that the legislature intended to include only public safety employees whose injuries fall within the listed presumptions and exclude all others (including firefighters and peace officers

identified in section 3212.1), from the benefit of section 4458.5, fails to address the fact that when section 4458.5 was enacted in 1976, it included all of the public safety employee presumption statutes in existence at that time. It has not been substantively amended since 1976 and section 3212.1 was added in 1982. Based thereon, the permanent total disability rate for the indemnity that was owed to Mr. Clark shall be based on section 4453(a) maximum earnings.

Finally, having reviewed the entire record, it appears there is not substantial evidence upon which we can determine the appropriate start date for the payment of the permanent total disability indemnity that was owed to Mr. Clark. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) Under the circumstances of this matter it is appropriate that the issue of the permanent total disability indemnity start date is deferred and the matter is returned to the WCJ for further proceedings addressing that issue.

Accordingly, we grant reconsideration, and we affirm the F&A, except that we amend the F&A in case number ADJ12000811 to find that pursuant to Labor Code sections 3212.1, 4453 and 4458.5, the proper permanent total disability indemnity rate is \$1066.72, subject to section 4659(c) increases; that Mr. Clark was permanently totally disabled as a result of his injury, and was entitled to receive permanent total disability indemnity until the date of his death on September 18, 2021; to defer the issues of the commencement date for the payment of the permanent total disability indemnity and the amount of attorney fees owed to applicant's attorney; and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Joint Findings of Fact, Award and Order issued by the WCJ on March 6, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 6, 2023, Joint Findings of Fact, Award and Order, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT ADJ12000811

* * *

3. Pursuant to Labor Code sections 3212.1, 4453 and 4458.5 the proper permanent total disability indemnity rate is \$1066.72, subject to Labor Code section 4659(c) increases.

4. Mr. Clark was permanently totally disabled as a result of his injury and was entitled to receive permanent total disability indemnity until the date of his death on September 18, 2021.

* * *

6. The issues of the commencement date for the payment of the permanent total disability indemnity and the amount of attorney fees owed to applicant's attorney are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 26, 2023

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

**CHENEENE CLARK
JONES CLIFFORD
MULLEN & FILIPPI, LLP**

TLH/mc

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