WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NATHALIE HURTADO, ***Applicant***

vs.

COUNTY OF NAPA, permissibly self-insured,
adjusted by SEDGWICK, ***Defendants***

Adjudication Number: ADJ16975645

Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on September 27, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was correctly paid 52 weeks of benefits pursuant to Labor Code[1], section 4850 and ordered that applicant take nothing further as to such benefits.

Applicant argues that she is entitled to an entire year of section 4850 benefits, and that defendant may not take credit for days where applicant worked full duty during the period that 4850 benefits were due and payable.

We have received an answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the Petition for Reconsideration (Petition), the Answer, the contents of the Report, and we have reviewed the record in this matter. Based upon our review of the record, and for the reasons discussed below we will grant applicant's Petition for Reconsideration, and as our Decision After Reconsideration, we will rescind the September 27, 2024 F&O and return this matter to the trial level for further proceedings.

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[1] All future references are to the Labor Code, unless noted.

FACTS

The facts of this case do not appear to be in dispute, it is merely application of the facts to the law. Per the WCJ's Report:

> Applicant sustained injury in the form of presumptively compensable cancer. She lost time from work as a result of that injury. Specifically, she was totally disabled for the period October 31, 2022 through September 11, 2023. For this period, she received her full salary replacement pursuant to Labor Code § 4850. She was then returned to work on a part time basis, working 3 days a week and receiving 4850 benefits so that she received her full salary replacement: part from salary and part in 4850 benefits. Defendant ended this on October 27, 2023, at which point applicant had received 52 weeks of 4850 benefits - after which she received partial temporary disability benefits.
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> Applicant argues that this was in error. She argues that for the period she was working part time, she was only using 4850 time 2 days per week, and not weekly. In other words, pursuant to Labor Code § 4850, applicant is entitled to 52 weeks times 5 work days each week for a total of 260 days, as opposed to 52 weeks. Calculating the time daily, rather than weekly, she would be entitled to additional salary replacement for one day of salary replacement if she was off work, for each day she worked and was paid regular salary. Defendant argues that she is only entitled to 4850 time for a period of 52 weeks, even if some of those weeks she worked part time.

(WCJ's Report, pp. 1-2.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 15, 2024, and 60 days from the date of transmission is Saturday December 14, 2024, which by operation of law means that this decision is due by Monday, December 16, 2024. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on December 16, 2024, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on October 15, 2024, and the case was transmitted to the Appeals Board on October 15, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 15, 2024.

II.

Section 4850 states, in pertinent part:

> (a) Whenever any person listed in subdivision (b), who is employed on a regular, full-time basis, and is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments, if any, that would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

The Courts of Appeal have long held that the one-year period described in section 4850, when read together with section 4854, may constitute broken periods of leave.

> As to the first question, appellant contends that "not exceeding one year" means a cumulative total of 52 weeks so that the temporary disability resulting in leave of absence need not be continuous. Respondent asserts that "one year" means one calendar year from the date of injury.
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> Labor Code section 3202 directs the courts to liberally construe the sections of the Labor Code "with the purpose of extending their benefits for the protection of persons injured in the course of their employment." A number of cases note and reiterate this basic rule of construction.
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> Only the one salary is payable, as Labor Code section 4854 provides: "No disability indemnity shall be paid to any such officer or employee concurrently with wages or salary payments." **Therefore any payments of salary between intervals of leaves of absence must be considered salary and not payments for temporary disability.**
>
> Quite aside from section 3202 and the cases, fair play and logic impel the conclusion that an injured employee who works between intervals of disability should not be penalized by having such periods of employment charged against his right to compensation resulting from temporary disability. Conversely, the employer who is receiving the services of the employee should not be allowed to

> credit earned salary against the employee's right to a total of one year's leave of absence with pay, arising from his injury.
>
> Public policy favors an injured employee's return to work, and he should be given every encouragement to do so. To hold that salary earned during attempts to return to work count against his leave of absence is to penalize him for trying to return to work, and contrary to the spirit of the Labor Code.

(*Eason v. Riverside* (1965) 233 Cal.App.2d 190, 193-194, 30 Cal. Comp. Cases 464, 465-466 (emphasis added).)

Defendant wishes to take credit for an entire week of section 4850 benefits, when applicant earned regular salary for three days of the week. However, as discussed in *Eason*, *supra*, and pursuant to section 4854 defendant is not permitted to combine payment of salary with payment of 4850 benefits.

Defendant argues that section 4850 benefits are payable only on a weekly basis. We can find no support for such argument. Defendant's argument fails to recognize that the statutory text allows such benefits to continue for one year. Defendant improperly conflates one year as equivalent to 52 weeks; however, one year is 365 days, which equals 52 weeks *and one day*. Although section 4850 is credited against payment of temporary disability, that does not mean that section 4850 must be paid in weekly units.

The WCJ relied upon our panel decision in *James v. Workers' Comp. Appeals Bd*., 79 Cal. Comp. Cases 1548 (2014 writ denied), however that case is distinguishable.[2] In *James*, the applicant returned to work for four hours per day and would collect section 4850 benefits for the remaining four hours she left work early. Applicant received a half day of salary and section 4850 benefit, each day of work. The *James* panel correctly found that section 4850 benefits were payable based upon an *aggregate of 365 days* and not based upon the number of lost hours accumulated over the course of the year.

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[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citeable authority and the Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *James, supra,* because it considered a similar issue. We recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

The distinction here is that applicant received *full salary* three days per week. As applicant was only capable of working three days per week, the remaining four days each week, applicant collected section 4850 benefits. Each week constituted a broken period of section 4850 benefits per the holding in *Eason*, *supra*. Applicant was permitted to collect an aggregate of 365 days of section 4850 benefits.

Accordingly, we will grant applicant's petition for reconsideration and as our Decision After Reconsideration, we will rescind the September 27, 2024 F&O and return this matter to the trial level for further proceedings. We will defer to the parties to adjust the appropriate dates of section 4850 benefits, pursuant to our decision above, with jurisdiction reserved at the trial level in the event of a dispute.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Order issued on September 27, 2024 is **GRANTED**.

IT IS FURTHER ORDERED that as our Decision After Reconsideration, the Findings and Order issued on September 27, 2024 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 16, 2024

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

NATHALIE HURTADO
BROWN & DELZELL, LLP
LENAHAN, SLATER, PEARSE & MAJERNIK, LLP

EDL/mc

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