

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

TRAVIS BLEDSOE, *Applicant*

vs.

**COUNTY OF NAPA, Permissibly Self-Insured;
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ15114251
San Francisco District Office**

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

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 20, 2024, wherein the WCJ found, in pertinent part, that applicant's earnings at the time of injury were \$2,034.47 per week pursuant to Labor Code section 4458¹, and the injury caused temporary partial disability for the 104 weeks following the July 27, 2021 date of injury.

Applicant contends that his employment as a volunteer firefighter entitles him to receive the maximum total temporary disability indemnity rate without consideration for his ability to perform part-time work from outside employment.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied with the exception of the issue of applicant's attorneys' fees which should be awarded.

We have considered the allegations of the Petition for Reconsideration, the contents of the Report. Based on our review of the record, and for the reasons stated in the WCJ's Report, and the reasons stated below, we will grant reconsideration and defer the issue of reasonable attorney fees to the trial judge, and otherwise affirm the findings of the WCJ.

¹ All future references are to the Labor Code unless otherwise noted.

BACKGROUND

Applicant, while employed as a volunteer firefighter on July 27, 2021, sustained a specific industrial injury arising out of and in the course of employment to the right shoulder and right arm.

On May 8, 2024, the parties proceeded to trial. They stipulated that: applicant, while employed as a volunteer firefighter for defendant, sustained injury arising out of and in the course of employment to the right shoulder and right knee; defendant has paid compensation of temporary disability at the rate of \$1,356.31 per week for the period of October 28, 2021 through September 6, 2022, and at the rate of \$830.64 per week for the period of September 7, 2022 through November 30, 2022; and applicant was temporarily disabled from his job as a volunteer firefighter for all periods at issue. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 5/8/2024 trial, 2:10 -2:26.)

The issues at trial were: earnings, with applicant claiming \$2,034.47 per week based on section 4458 and defendant alleging that based on sections 4458, 4453, and 4657, it was liable for temporary partial disability benefits and not temporary total disability benefits for the 104 week period following the July 27, 2021, date of injury; and attorney fees. (MOH/SOE, 5/8/2024 trial, 2:31 -2:40.)

DISCUSSION

Temporary disability indemnity is a workers' compensation benefit, which is paid during the time an injured worker is unable to work because of a work-related injury and is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The purpose of temporary disability indemnity is to provide a steady source of income during the time the injured worker is off work. (*Gonzales, supra*, at p. 1478.) A defendant's liability for temporary disability payments ceases when the employee returns to work, is deemed medically able to return to work, or becomes permanent and stationary. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798]; *Bethlehem Steel Co. v. I.A.C. (Lemons)* (1942) 54 Cal.App.2d 585, 586-587 [7 Cal.Comp.Cases 250]; *Austin, supra*, 16 Cal.App.4th at p. 236.)

In *Huston, supra*, the Court of Appeal stated:

In general, temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status. [] Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work). [Citation] If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage-loss basis. [] If the partially disabled worker can perform some type of work but chooses not to, his "probable earning ability" will be used to compute wage-loss compensation for partial disability. [] If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.

(*Huston, supra*, at p. 868 [citations omitted].)

As discussed by the WCJ in the Report and the Opinion, applicant was entitled to the maximum rate for temporary disability indemnity because applicant was an active firefighting member of a volunteer fire department injured in the performance of his duties, and section 4458 provides that applicant is entitled to the maximum rate in section 4453 "irrespective of his remuneration from this or other employment or from both." (Cal. Lab. Code §4458.)

However, the issues at trial were both the earnings rate of the applicant to be utilized in computing the amount of temporary disability to which applicant is entitled, as well as whether sections 4458, 4453, and 4657 allow defendants to pay applicant temporary partial disability and not total temporary disability, in spite of his other employment income.

As stated by the WCJ in the Report,

Temporary disability may be total (incapable of performing any work) or partial (capable of performing some kind of work.) (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal. App. 3d 856, 868.) Different calculations must be applied depending on whether the worker is temporarily totally disabled or temporarily partially disabled, and entitled to wage loss benefits, however, the starting point for the calculation of both is the use of the average weekly wage calculated under Labor Code section 4453. (*Gamble v. Workers' Comp. Appeals Bd.* (2006) 143 Cal. App. 4th 71, 87) The average weekly earnings are then used to calculate the amount of either temporary total disability under Labor Code section 4653 or temporary partial disability under Labor Code section 4654 and 4657.

Applicant is arguing that Labor Code section 4458 states that the applicant is entitled to temporary total disability at the maximum rate for his date of injury, without any consideration for earnings from his business during the period in which temporary disability is being paid. Labor Code section 4458 provides a “fictitious earnings component” for the “usual benefit structure” of Labor Code section 4453. (*Meredith v. Workers’ Comp. Appeals Bd.* (1977) 19 Cal. 3d 777, 781-782.) That “fictitious earnings component” is then used to calculate indemnity benefits that are due and payable. Labor Code section 4458 does not provide an entitlement to temporary total disability benefits—it just provides a different formula for calculating that benefit when it is owed.

The parties stipulated that the applicant was temporarily disabled from his job as a volunteer firefighter at all times at issue. However, applicant continued to receive money from his business during the time that he was totally disabled from his job as a volunteer firefighter. The un rebutted testimony of the applicant is that he was working at his business, Travco, albeit in a reduced capacity, consistent with the work restrictions assigned by his doctor. (Summary of Evidence, page 4:8-15.) As the applicant was able to perform some work, and received payment for it, he was not temporarily totally disabled. Instead, he was temporarily partially disabled. I find that the applicant is entitled to temporary partial disability for the 104 weeks following the date of injury.

(Report, p. 2-3.)

Sections 4453 and 4458 address how to compute an average weekly earnings. (Cal. Lab. Code §§ 4453; 4458.) Sections 4654 and 4657 determine how to calculate the proper *rate* of temporary partial disability. (Cal. Lab. Code §§ 4654; 4657. emphasis added.) Thus, the issues are distinct, and therefore, we conclude that the present record supports the finding of the WCJ as to the earnings rate and the finding of temporary partial disability.

Finally, all parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (Id., at 4 p. 158.) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Community Hosp. v. Workers’ Compensation Appeals Bd.* (McKernan)(1999), 74 Cal.App.4th 928, 936.) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ rights to due process. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, at pp. 157158.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses;

introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish, supra*, at p .1295; *Rucker, supra*, at pp. 157-158, citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)*).

As noted by the WCJ in the Report, applicant did not raise the issue of applicant attorney fees in his Petition, but it was one of the issues submitted at the time of trial. As the Report states, the WCJ recommends, “. . .that the May 24, 2024 Petition for Reconsideration, be granted solely to be remanded to for the purpose of amending the award to include an award of attorneys’ fees.” (Report, 6/6/24, p.4.) The WCJ further states that it was her intent to award applicant’s attorneys a fee of 15% of any retroactive temporary partial disability benefits that were owed under the award.

We accept the recommendation of the WCJ, and we grant reconsideration solely to defer the issue of reasonable attorneys’ fees to the trial level for further proceedings as requested by the WCJ. We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings of Fact and Award issued and served on May 20, 2024 is **AFFIRMED**, except that is **AMENDED** as follows:

FINDINGS OF FACT

4. The issue of applicant’s attorney’s fees is deferred. All other issues are deferred.

AWARD

AWARD IS MADE in favor of TRAVIS BLEDSOE against COUNTY OF NAPA of: Temporary partial disability indemnity for the 104 weeks following the July 27, 2021 date of injury, in an amount to be adjusted by the parties, less credit for any sums heretofore paid on account thereof, with jurisdiction reserved, in accordance with Findings of Fact # 2 and 3. The issue of attorney’s fees on the Award of partial temporary disability is deferred in accordance with Finding of Fact #4.

WORKERS’ COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 23, 2024

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

**TRAVIS BLEDSOE
BROWN & DELZELL
LENAHAN SLATER PEARSE & MAJERNIK**

DLM/oo

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