

**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  
NOTICE OF INTENTION**

Applicant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 6, 2024, wherein the WCJ found in pertinent part that the proper permanent total disability rate is the rate of \$1,066.72.

Applicant contends that the proper permanent total disability rate is the rate of \$1,260.00.

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 believe that substantial justice requires that we grant reconsideration so as to issue notice of our intention to amend the F&A to find that pursuant to Labor Code sections 3212.1, 4453 and 4458.5<sup>1</sup> the proper permanent total disability indemnity rate is \$1,260.00, subject to section 4659(c) increases (Finding of Fact 3). In order to provide the parties with an opportunity to address the issues raised by our proposed holding, the notice of intention will allow the parties twenty (20) days in which to respond.

---

<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

We will also order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to section 5950 et seq.

### **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.

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 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.)

On March 6, 2023, the WCJ issued a Joint Findings of Fact, Award and Order, wherein the WCJ found in pertinent part that at the time of his injury decedent had no earnings, producing a temporary disability rate of \$0 per week, and that his condition did not reach maximum medical improvement prior to his death on September 18, 2021. There was no award.

The WCJ awarded death benefits in ADJ15260996 of \$250,000.00 payable at the weekly rate of \$1,066.72. In her Opinion on Decision, the WCJ stated that:

Labor Code section 4702(b) states, in part, that “[a] death benefit in all cases shall be paid in installments in the same manner and amounts as temporary total disability indemnity would have to be made to the employee, unless the appeals board otherwise orders. However, no payment shall be made at a weekly rate of less than two hundred twenty-four dollars.” (Labor Code section 4702(b).) The appeals board has the jurisdiction to award a higher weekly rate than the decedent’s temporary disability rate. (*See, L.B. Price Mercantile Company v. I.A.C.* (1956) 49 Cal. 2d 13.) It is within the board’s discretion to award payments at the maximum rate of temporary total disability even when the decedent’s earnings were minimum. (*Scheufler v. Workmen’s Comp. Appeals Bd.* (1971) 36 Cal. Comp. Cases 128 (writ denied).)

Defendants are currently paying the death benefit at the statutory minimum weekly rate of \$224.00. Payment of the death benefit at that rate would take more than 21 years. Based on the age and life expectancy of the applicant, she may not receive the full statutory death benefit if it is continued to be paid at the minimum rate. In order for it to have any meaningful benefit to the applicant, I therefore find that it is in the applicant's best interest for the benefits to be paid at the temporary disability rate at the time the decedent last worked in 2013, or \$1,066.72 per week.

Applicant timely sought reconsideration of the WCJ's decision. Applicant contended 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. No party sought reconsideration regarding the decision in ADJ15260996, the death benefits case.

On May 26, 2023, we issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (May 26, 2023 Opinion). In the May 26, 2023 Opinion, as relevant herein, we concluded as follows:

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.

(May 26, 2023 Opinion, pp. 5-6.)

In the May 26, 2023 Opinion, we granted applicant’s petition for reconsideration, and we affirmed the WCJ’s decision, except that we amended it to find that pursuant to sections 3212.1, 4453 and 4458.5, the proper permanent total disability indemnity rate is \$1,066.72, subject to section 4659(c) increases; and 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. We deferred 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 returned the matter to the WCJ for further proceedings consistent with this opinion.

The parties did not brief the issue of the actual indemnity rate, except that applicant contended that the rate should be the maximum. As evidenced by our discussion, our intention was to award compensation at the maximum rate. However, rather than finding that the rate was

“maximum” for applicant’s section 5412 date of injury of September 5, 2018, we found compensation at the rate of \$1,066.72, which was the rate the WCJ found for applicant’s dependency claim rather than the maximum rate for a 2018 date of injury of \$1,215.27.

In her decision, the WCJ concluded that since applicant had not sought reconsideration of our May 6, 2023 Opinion, our finding was final.

### DISCUSSION

There are 25 days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).) Pursuant to section 5911, an aggrieved party may seek reconsideration of an Appeals Board decision within the same time limits or file a petition for writ of review under section 5950, et seq.

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

However, the issue before us concerns our ability to correct our own error.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) “The Appeals Board or a Workers’

Compensation Judge may correct a clerical error at any time and without necessity for further hearings, notwithstanding the lapse of the statutory period for filing a petition for reconsideration.” (*Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558, internal citation omitted.)

We emphasize that when the Appeals Board grants reconsideration, it has the power to address all issues, including those not previously raised. In *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals Board en banc), we noted that once reconsideration has been granted, the Appeals Board has the power under sections 5906 and 5908 to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (Citing *Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 (10 I.A.C. 322); *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases. 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].)

Additionally, the WCAB maintains original jurisdiction in this matter. (Lab. Code § 5300.) “The power of original decision invested in the [WCAB] is unrestricted by any limitations of time other than that set forth by sections 5400–5412 of the Labor Code. The [WCAB] therefore can make a valid decision on an original claim any number of years after the injury if the original proceedings are commenced within the time prescribed by section 5405, and quite apart from a consideration of a waiver of the statute.” (*State of California, Subsequent Injuries Fund v. Industrial Acci. Com. (Busch)* (1962) 198 Cal. App. 2d 818, 827 [27 Cal. Comp. Cases 14, 19].)

Section 4702 sets forth the computation of death benefits. With respect to the case herein, benefits were awarded at the statutory maximum of \$250,000.00, pursuant to subdivision a(3). The statute does not dictate how the benefit will be paid. Here, the WCJ exercised her discretion to conclude that the weekly benefit should be paid in relation to the amount that decedent was earning based on his last date of work in 2013.

In cases involving an alleged cumulative trauma injury, the date of injury is governed by section 5412, which provides:

The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew,

or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

“The ‘date of injury’ is a statutory construct which has no bearing on the fundamental issue of whether a worker has, in fact, suffered an industrial injury...the ‘date of injury’ in latent disease cases ‘must refer to a period of time rather than to a point in time.’ (citation.) The employee is, in fact, being injured prior to the manifestation of disability...[T]he purpose of section 5412 was to prevent a premature commencement of the statute of limitations, so that it would not expire before the employee was reasonably aware of his or her injury.” (*J. T. Thorp v. Workers’ Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 341 [49 Cal.Comp.Cases 224].)

Here the parties stipulated that decedent’s date of injury was September 5, 2018 pursuant to section 5412.

In *Van Voorhis v. Workmen’s Comp. Appeals Bd.* (1974) 37 Cal.App.3d 81 [39 Cal.Comp.Cases 137], the court held that “the compensation must be measured by the applicant’s earning capacity as it existed at the time he incurred his compensable disability [citation].” (*Id.* at p. 87.) Under former section 4453, average weekly earnings for computing indemnity amounts or rates were based on when compensable disability occurred or “at the time of the injury”, which was when an injured worker had earnings before retiring; this date could potentially occur before the date of injury under section 5412. (See *Van Voorhis, supra*, 37 Cal.App.3d at pp. 83-89.)

For injuries sustained after January 1, 1990, section 4453 disability indemnity benefits are calculated “according to the limits in this section in effect on the date of injury.” (Lab. Code, § 4453(d); see *Baker v. Workers’ Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 444-447 [76 Cal.Comp.Cases 701].) Where there is concurrence of compensable disability and the employee’s knowledge that the disability was caused by employment, the date of injury is pursuant to section 5412. (*Chevron U.S.A. v. Workers’ Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1270-1271 [55 Cal.Comp.Cases 107].) Consequently, the applicable permanent disability indemnity amount and rate provided in section 4453 is based on the date of injury and not the date of compensable disability or permanent and stationary status. (*Steele, supra*, 219 Cal.App.3d at pp. 1270-1271.) Thus, here we should have found that the rate was based on the section 5412 date of injury of September 5, 2018, and it was a legal error to find that the rate was \$1,066.72.

Since the issue of whether the rate should be calculated with respect to the last day worked by decedent or the section 5412 date of injury was not raised in the original decision or petition

for reconsideration, we believe that due process requires that the parties be given an opportunity to submit responses that address the issue.

Therefore, we grant the Petition for Reconsideration and issue notice of our intention to amend the F&A to correct our error and find that the rate was at the maximum for a 2018 date of injury of \$1,260.00.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on March 6, 2024, is **GRANTED**.

**NOTICE IS HEREBY GIVEN** that the Workers' Compensation Appeals Board intends to issue the following Decision After Reconsideration:

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 6, 2024, Findings of Fact and Order, is **AFFIRMED**, except that it is **AMENDED** as follows:

3. Pursuant to Labor Code sections 3212.1, 4453 and 4458.5 the proper permanent total disability indemnity rate is \$1,260.00, subject to Labor Code section 4659(c) increases.

**NOTICE IS FURTHER GIVEN** that applicant and defendant may each file a response to this Notice of Intention. Responses shall only address the issue identified above. Responses shall be filed within twenty (20) days of service of this Notice of Intention, plus five (5) days under WCAB Rule 10605 (*Cal. Code Regs., tit. 8, § 10605*) and any additional day(s) as applicable under WCAB Rule 10600 (*Cal. Code Regs., tit. 8, § 10600*), and shall be filed at the Office of Commissioners of the Workers' Compensation Appeals Board at its street address (455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102) or e-filed in EAMS.



**IT IS FURTHER ORDERED** that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

**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 20, 2024**

**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**

**AS/mc**

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