

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

JACOB DIPIERO, *Applicant*

vs.

**CITY OF CAMPBELL, permissibly self-insured;
administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ15251480
San Francisco District Office**

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

Applicant seeks reconsideration of the “Findings of Fact and Order” (F&O) issued on March 12, 2025, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that the Appeals Board does not have jurisdiction to determine an applicant’s entitlement to advance disability pension payments (“ADPP”) under Labor Code¹ section 4850.4.

Applicant contends that pursuant to the holding in *Gage v. Workers’ Comp. Appeals Bd.* (2016) 6 Cal.App.5th 1128 [81 Cal.Comp.Cases 1127], the Appeals Board has jurisdiction to award ADPP as *Gage* found that ADPP constitutes compensation under Division 4 of the Labor Code.

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 allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ’s Report. Based on our review of the record we will grant applicant’s Petition for Reconsideration and as our Decision After Reconsideration, we will rescind the February 26, 2025 F&A and return this matter to the trial level for further proceedings.

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

FACTS

Per the WCJ's Report:

1. Procedural background.

This trial arose from threshold dispute regarding whether the Board has jurisdiction to determine applicant's entitlement to advance disability pension payments. Applicant, while working as a police officer, sustained an admitted cumulative trauma injury to the lumbar spine, during the period ending 02/26/2021. If jurisdiction is found, the issue is whether applicant is entitled to those advance disability pension payments, and penalties and attorney's fees. Applicant contends the Board has jurisdiction to award advance disability pension payments (ADPP) under Division 4 of the California labor code, and also that applicant is entitled to ADPP. Defendant contends that an award of ADPP is outside of the Board's jurisdiction, and that applicant is not entitled to ADPP. The matter proceeded to trial on January 28, 2025.

2. Evidence at trial and decision.

There were several exhibits offered at trial. Applicant testified at trial. There were two Offers of Proof made by defendant. I received trial briefs from both applicant and defendant, judicial notice of which has been taken. The parties stipulated to a timeline and certain facts.

The following is undisputed. Defendant accepted liability for applicant's claim of industrial injury to his low back. Applicant received Labor code section 4850 benefits at his full salary on 03/19/2021. Applicant returned to modified duty on 10/15/2021, and worked modified duty until 06/27/2022, at which time he received 4850 benefits again. Defendant paid permanent disability advances from 11/27/2022 through the present. On 12/12/2022, applicant was arrested for alleged domestic violence. On 12/13/2022, applicant was placed on paid administrative leave. On 01/30/2023, applicant filed an application for industrial disability retirement (IDR) with CalPERS. The last payment of any 4850 benefits, wages, or sick leave was paid on 12/24/2023. CalPERS denied applicant's IDR application. Applicant appealed that denial, which is still pending. A Skelly hearing appealing the employer's recommendation to terminate applicant's employment, the final decision of which is pending, occurred on 11/12/2024.

A. Documentary Evidence

i. Medical Reports

Joint Exhibit 1 is reports of QME Christian Foglar, M.D., dated 09/13/2024, and 06/01/2022. In his 06/01/2022 report, Dr. Foglar found that applicant had sustained a cumulative trauma injury to his spine. He diagnosed him with low back pain, lumbar region radiculopathy, and lumbosacral intervertebral disc degeneration. He

assigned an 18% whole person impairment (WPI). He found applicant has permanent work restrictions, and he "...certainly cannot perform the duties of a police officer." (pp. 52-55.)

In his 09/13/2024, report, Dr. Foglar added additional diagnoses of: "chronic back pain status post multiple spine surgeries", lumbar stenosis, and status post-posterior lumbar laminectomy L5-S1. He also noted in the 01/16/2024 of the MRI spine: interval increase revision, right L5-S1 laminotomy and microdiscectomy, and disc bulges at L4-L5 and L5-S1. He noted applicant "is unable to return to his usual and customary job duties." He gave an updated impairment rating of 28% WPI and 3% pain add-on. He then went on to provide a *Guzman* analysis and provided a 36% WPI. He recommended future medical treatment for the industrial injury. (pp. 29-33.)

Defendant's Exhibit A is records from St. Louise Regional Hospital. The record dated 12/12/2022 noted:

Lumbar laminectomy at Kaiser about 4 weeks ago was doing well at his last postop visit about a week ago based on the notes. He was in an altercation this evening and says he has severe burning pain going down his entire right lower extremity to his foot...He feels like his right lower extremity is numb. Is able to walk a bit....Patient is complaining of significant exacerbation of his symptoms after an altercation....Discharged against medical advice. (pp. 2 – 5.)

ii. Benefits printout

Defendant's Exhibit E is a benefits printout dated 01/27/2025. It is a ledger that details "LC 4580 Differential" payments, "LC 4850/TD" payments, "Permanent/Permanent Partial Disability" payments, and "Medical" payments.

iii. Payroll records

Joint Exhibit 4 is a series of "City of Campbell Concise Check History Report" for applicant.

iv. Memorandum from Sergeant Lee Heitzman

Applicant's exhibit 2 is a memorandum from Sergeant Lee Heitzman dated 12/13/2022. It states in relevant part: "This memo is to notify that you are being placed on paid administrative leave effective Tuesday, December 13, 2022. This action is a result of the administrative investigation that you were notified of to allow the police department time to conduct an investigation into the alleged policy violations..." (p. 1.)

v. IDR application

Joint Exhibit 2 is a CalPERS “Disability Retirement Election Application” for applicant1. It states in relevant part:

What is your specific disability? Herniated disc between S1-L5 & L5-L4

When did the disability occur? 02-25-2021

How did the disability occur? Compounding injury over time

What are your limitations/preclusions due to your injury or illness?
No sitting, standing, or walking for more than 20 minutes without lying down, max. lifting 20lbs

How has your injury or illness affected your ability to perform your job? I am unable to perform my normal job duties

(p. 2.)

vi. CalPERS correspondence

Joint Exhibit 3 is correspondence to and from CalPERS with multiple dates. Applicant’s Exhibit 1 is correspondence from CalPERS with multiple dates. The correspondence details a determination by CalPERS that applicant is ineligible to apply for industrial disability retirement, a notice of appeal of that determination by applicant2, and a letter from CalPERS to applicant’s attorney stating that a hearing will be set.

vii. Skelly hearing request

Defendant’s Exhibit C is applicant’s request for Skelly hearing dated 10/18/2024. It is addressed to the City of Campbell and states in relevant part:

...We are in receipt of a Notice of Intent to Terminate...We are writing to request a Skelly hearing... [¶] At your earliest convenience, please provide us with a complete copy of everything the City reviewed in reaching its decision to propose termination for [applicant]. Please note we do not believe your decision to terminate is supported by Just Cause, and in the event we cannot resolve this matter at Skelly, we intend to discipline to the fullest extent available under the law.

(p. 1.)

viii. Defendant’s Exhibit B marked for identification

I excluded defendant's Exhibit B.

ix. Defendant's Exhibit D marked for identification

Defendant's Exhibit D is a deposition transcript of applicant dated 05/01/2024. Its entry into evidence was opposed by applicant, as applicant was present at, and available to testify at (and did testify at) trial. The transcript was not used for impeachment and would therefore be subject to exclusion. However, in its brief, defendant contends applicant failed to fully cooperate in providing the employer with medical information as required in Labor Code section 4850(d) and is therefore not entitled to ADPP benefits. Defendant contends applicant was instructed by his attorney not to answer questions regarding the alleged domestic violence incident, and did not answer certain questions at his deposition. Because defendant is using those portions to show that applicant did not answer the questions, not for the contents of what was testified to, I admitted defendant's exhibit D. 3

3. Decision

I found that the Board does not have jurisdiction to determine whether an applicant is entitled to advance disability pension payments (ADPP). All other issues were deferred.

(WCJ's Report, pp. 1-6.)

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 April 4, 2025, and 60 days from the date of transmission is Tuesday, June 3, 2025. This decision is issued by or on June 3, 2025, 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 April 4, 2025, and the case was transmitted to the Appeals Board on April 4, 2025. 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 April 4, 2025.

II.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) 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 Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

As explained in *Gage*:

California's workers' compensation law is codified in division 4 of the Labor Code (§ 3200 et seq.). (See Cal. Const., art. XIV, § 4.) Its fundamental purpose is "to protect individuals from any 'special risks' of employment." (*Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 774 [100 Cal. Rptr. 377, 494 P.2d 1].) Division 4 "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (§ 3202.)

Public employees are covered by workers' compensation. (§ 3351; *State of California v. Workers' Comp. Appeals Bd.* (1996) 44 Cal.App.4th 128, 133 [51 Cal. Rptr. 2d 606] (*Ellison*).) Certain public employees engaged in active law enforcement who are disabled on the job are entitled to special benefits in lieu of disability benefits. Under section 4850, they are entitled to a leave of absence without loss of salary. A county that is subject to the County Employees Retirement Law of 1937 (Gov. Code, § 31450 et seq.) "may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance." (§ 4850.3, italics added.) "The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application process which would reduce the pension allowance below 50 percent." (*Ibid.*)

In 2002, the Legislature made these advance disability retirement payments mandatory. (Stats. 2002, ch. 189, § 1, p. 847.) The county "shall make advanced disability pension payments in accordance with Section 4850.3 unless" a "physician determines that there no discernible injury to, or illness of, the employee," the "employee was incontrovertibly outside the course of his or her employment duties when the injury occurred," or there is proof of fraud. (§ 4850.4, subd. (a), italics added.) The employer is required to make advanced disability payments if the employee files a timely application for disability retirement and fully cooperates in providing information and with the medical examination and evaluation process. (*Id.*, subd. (d).) The payments shall commence no later than 30 days after the latest of the employee's last payment of wages or salary, benefits under section 4850, or sick leave. (*Id.*, subd. (b).) If the employee's disability application is denied, the employee must repay these benefits; if the employer and the local agency cannot agree on a repayment plan, the matter shall be submitted to the local agency administrative appeals remedy. (*Id.*, subd. (f).)

* * *

"'Compensation'" under division 4 "includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence." (§ 3207.) "'The term 'compensation' is a technical one and includes all payments conferred by the act upon an injured employee. 'Compensation' of an employee in the form of wages

or salary for services performed, does not have the same meaning as the word “compensation” in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained. ...’ [Citation.]” (*Knopfer v. Flournoy* (1973) 34 Cal.App.3d 318, 320–321 [109 Cal. Rptr. 892] (*Knopfer*).)

(*Gage*, *supra*, 6 Cal. App. 5th at pp. 1133-1135.)

Gage clearly found that section 4850.4 benefits are compensation within Division 4. (*Id.* at p. 1136.) The Appeals Board has exclusive jurisdiction to decide any issue regarding “the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.” (§ 5300(a).) Furthermore, the Appeals Board is empowered to enforce “against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee.” (§ 5300(b).) Accordingly, the Appeals Board has jurisdiction to issue an award of ADPP where applicant is entitled to receive the benefit.

Defendant argues that the Appeals Board cannot have jurisdiction over the issue of *advanced* disability pension payments because such jurisdiction conflicts with Government Code sections 21156, 21157, and 21166. These code sections govern the employer’s obligations in determining whether applicant qualifies for disability retirement. The payment of ADPP does not require any determination of whether applicant qualifies for disability retirement. In fact, the statute expressly contemplates that an adverse finding may occur, as it contains a provision for applicant to reimburse the employer for all advances where applicant’s application for disability retirement is ultimately rejected. (§ 4850.4(f).) Applicant’s ability to qualify for ADPP is separate and distinct from the ability to qualify for disability retirement. Accordingly, we see no conflict in the Government Code.

The WCJ limited the decision in this matter to the question of jurisdiction. No decision issued as to whether applicant qualifies for ADPP. Furthermore, defendant argues that applicant should be precluded from receipt of ADPP due to his alleged failure to cooperate pursuant to section 4850.4(d)(2). We do not decide whether payment of ADPP is appropriate at this time. To preserve all parties right to due process that issue must be considered at the trial level in the first instance. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal. Comp. Cases 473 (Appeals Board en banc); see also *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal. App. 4th 1284, 1295 [108 Cal. Rptr. 2d 1, 66 Cal. Comp. Cases 584].)

Accordingly, we grant applicant's petition for reconsideration and as our Decision After Reconsideration, we rescind the March 12, 2025 F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Findings of Fact and Order issued on March 12, 2025, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on March 12, 2025, by the WCJ 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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 3, 2025

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

**JACOB L. DIPIERO
JONES CLIFFORD
RTGR LAW 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*