

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4
5 **SALEM NAJJAR,**

6 *Applicant,*

7 *vs.*

8
9 **MEEKS BUILDING CENTER and ZURICH
10 AMERICAN INSURANCE COMPANY,**

11 *Defendants.*

**Case Nos. ADJ4254212 (SAC 0369491)
ADJ3966016 (SAC 0369493)**

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

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13 Applicant, Salem Najjar, seeks reconsideration of the Findings of Fact and Order, issued
14 May 11, 2010, in which a workers' compensation administrative law judge (WCJ) held that
15 applicant is precluded from receiving temporary disability indemnity more than 104 weeks after
16 September 11, 2007, or after September 9, 2009. The WCJ found applicant's receipt of a payment
17 of \$64.71 on September 11, 2007, to attend a medical examination, pursuant to Labor Code section
18 4600(e)(1), constituted the payment of temporary disability and triggered the 104 week limitation
19 on the receipt of temporary disability indemnity in Labor Code section 4656(c)(1).

20 Applicant contests the WCJ's legal conclusion that the payment mandated by Labor Code
21 section 4600(e)(1) for attendance at a medical-legal examination constitutes the payment of
22 temporary disability for purposes of applying the 104 week cap provided in Labor Code section
23 4656(c)(1). Applicant argues that the WCJ's interpretation of the payment made on September 11,
24 2007, is contrary to the plain language of section 4600(e)(1), which provides that benefits paid are
25 to be added to all other benefits, and not in lieu of other benefits. Applicant further argues that the
26 WCJ's determination is contrary to public policy, as it would prohibit the payment of lost wages
27 for attendance at medical-legal examinations conducted more than 104 weeks after the first

1 payment of temporary disability. Defendant has filed an answer to applicant's petition.

2 We concur with applicant. The payment made pursuant to Labor Code section 4600(e)(1),
3 did not constitute the payment of temporary disability and therefore did not trigger the
4 commencement of the 104 week limitation period set out in Labor Code section 4656(c)(1).
5 Accordingly, we grant reconsideration, rescind the WCJ's decision and return this matter to the
6 trial level for a redetermination of the date on which temporary disability indemnity was first paid,
7 and whether, based on that applicant is entitled to temporary disability from March 17, 2009 and
8 continuing.

9 Background

10 Applicant sustained an industrial cumulative trauma injury to his low back, neck and left
11 shoulder over the period ending June 12, 2007, while employed as a paint department manager at
12 Meeks Building Center.

13 The parties stipulated that applicant was paid \$64.71 on September 11, 2007 for attending a
14 panel Qualified Medical Evaluation (QME) with Dr. Bellomo. According to defendant's payment
15 history (Def. Exhibit A), the applicant was paid one day's temporary total disability rate for the
16 September 24, 2007 QME appointment. The payment was made pursuant to Labor Code section
17 4600(e)(1), which mandates that:

18 "When at the request of the employer, the employer's insurer, the
19 administrative director, the appeals board, or a workers'
20 compensation administrative law judge, the employee submits to
21 examination by a physician, he or she shall be entitled to receive, in
22 addition to all other benefits herein provided, all reasonable
23 expenses of transportation, meals, and lodging incident to reporting
for the examination, *together with one day of temporary disability
indemnity for each day of wages lost in submitting to the
examination.*" (Emphasis added.)

24 Applicant was evaluated by Dr. Bellomo for complaints of pain in the left shoulder and
25 lower back. Dr. Bellomo's first QME report is dated September 28, 2007, and states that the
26 evaluation occurred on that date. (App. Exhibit 1.) Dr. Bellomo took a history of applicant's injury
27 and current complaints, noting that "he has been doing his usual job activities since that time." Dr.

1 Bellomo noted that applicant had received conservative care and would benefit from additional
2 physical therapy. He indicated applicant's left shoulder condition would not require extensive
3 treatment and he would be permanent and stationary in two to three months. Dr. Bellomo did not
4 offer an opinion as to whether applicant was temporarily disabled and did not place any work
5 restrictions on him.

6 At some point in 2009, applicant was determined to be temporarily disabled and defendant
7 began paying him temporary disability benefits. Defendant ceased paying temporary disability
8 benefits on September 8, 2009, based upon the 104 week limitation period of Labor Code section
9 4656(c)(1). Applicant then sought an expedited hearing on the issue of his entitlement to
10 continuing temporary total disability benefits, and a hearing was held on May 6, 2010.

11 Discussion

12 Labor Code section 4656(c)(1), in effect on applicant's date of injury, places a 104 week
13 limit on payment of temporary disability from the date of commencement of such benefits.

14 Section 4656(c)(1) provides:

15 "Aggregate disability payments for a single injury occurring on or
16 after April 19, 2004, causing temporary disability shall not extend
17 for more than 104 compensable weeks within a period of two years
from the date of commencement of temporary disability payment."

18 As held in the Appeals Board's en banc decision, "'the date of commencement of
19 temporary disability payment,' as used in Cal. Labor Code § 4656(c)(1), means the date on which
20 temporary disability indemnity is first *paid*, and not the date for which temporary disability
21 indemnity is first owed." (*Hawkins, v. Amberwood Products* (2007) 72 Cal. Comp. Cases at 808
22 [Appeals Board en banc opinion] (emphasis in original).)

23 The issue presented here is whether the single payment of \$64.71 on September 11, 2007,
24 required by Labor Code section 4600(e)(1) to compensate applicant for his lost wages while
25 attending a QME examination, constitutes the commencement of temporary disability payments
26 under section 4656(c)(1).

27 The WCJ concluded the \$64.71 payment on September 11, 2007 constituted the

1 commencement of temporary disability benefits, based upon case law holding that a single
2 payment of the functional equivalent of temporary disability can trigger the 104 week limitation
3 period, citing *Mt. Diablo Unified School District v. Workers' Comp. Appeals Bd.* (2008) 165
4 Cal.App.4th 1154 [73 Cal.Comp.Cases 1212], and *Brooks v. Workers' Comp. Appeals Bd.* (2008)
5 161 Cal.App.4th 1522 [73 Cal.Comp.Cases 447]. Neither of the above cases compels the
6 conclusion he reached.

7 In *Mt. Diablo*, the court held the 104 week limitation on receipt of temporary disability
8 benefits was triggered by the payment of benefits pursuant to Education Code section 44043,
9 which provides that an injured worker receiving temporary disability benefits will be paid his or
10 her normal wage by supplementing the temporary disability benefits with the employee's accrued
11 leave time. Because an injured worker's entitlement to the payment of a full wage under the
12 Education Code is contingent upon payment of temporary disability benefits under the Labor
13 Code, temporary disability is "commenced" for purposes of applying the 104 week limitation upon
14 receipt of the Education Code wage benefit.

15 In *Brooks*, the court held an injured State employee's receipt of Industrial Disability Leave
16 (IDL) benefits constituted the functional equivalent of temporary disability, such that the period of
17 IDL benefits was included within the 104 week limit on receipt of temporary disability, since the
18 Government Code authority for IDL defined the benefit as temporary disability. (Gov't Code
19 section 19870(a).)

20 The characteristic that distinguishes the instant case from the facts in *Mt. Diablo* and
21 *Brooks*, is that in both reported cases, the injured workers were receiving the functional equivalent
22 of temporary disability indemnity because they were, in fact, temporarily disabled and unable to
23 return to work. The same cannot be said for applicant herein. There is no evidence that applicant
24 was temporarily disabled on September 11, 2007. His receipt of \$64.71 on that date was solely to
25 compensate him for his wage loss for attending a medical-legal examination. The QME did not
26 find applicant to be temporarily disabled, noting that applicant had returned to his usual
27 occupation following his industrial injury.

1 Labor Code section 4656(c)(1) requires the existence of temporary disability, where it
2 provides that “[a]ggregate disability payments for a single injury occurring on or after April 19,
3 2004, *causing temporary disability* shall not extend for more than 104 compensable weeks within
4 a period of two years from the date of commencement of temporary disability payment.” Here,
5 applicant was not temporarily disabled and was paid a single check to compensate his wage loss so
6 he could attend a QME exam. His period of actual temporary disability, for which defendant
7 initiated regular payments, apparently did not begin for several years.

8 Our conclusion that the mandated payment for attending a QME exam is not the equivalent
9 of commencing temporary disability payments is consistent with the decision in *Dept. of*
10 *Rehabilitation v. Workers’ Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1294 [68
11 Cal.Comp.Cases 831] wherein the Court addressed this provision in Section 4600. The Court noted
12 that this provision provides that when “the employee submits to examination by a physician, he or
13 she shall be entitled to receive in addition to all other benefits ... one day of temporary disability
14 indemnity for each day of wages lost in submitting to the examination.” The Court further stated:
15 “[T]his specific statutory benefit is not a broad obligation to pay TDI Rather, this benefit is in
16 the nature of a medical-legal benefit, reimbursing the employee for his time when requested to
17 submit to a medical examination to resolve a compensation claim.” *Lauher*, 30 Cal.4th 1281,
18 1294-1295 [68 Cal.Comp.Cases 831, 840].

19 Defendant, citing *Morris v. Workers’ Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 794
20 [writ denied], contends that a single day of temporary disability is sufficient to trigger the
21 commencement of the 104 week period under Section 4656(c)(1), and that the Appeals Board
22 cannot look behind the reason for the payment. Preliminarily we note that *Morris* is a writ denied
23 panel decision and is not binding on the Appeals Board. Furthermore, *Morris*, as in the other cases
24 cited by defendant, involves actual temporary disability of the applicant. In the present case,
25 applicant was not being paid temporary disability under Section 4650 et seq. Rather, he was being
26 paid at the temporary disability *rate* to compensate him for lost wages to attend a medical-legal
27 examination with a QME.

1 Defendant contends that to make a distinction between temporary disability paid per Labor
2 Code section 4658 and reimbursement for wage loss for attending a medical-legal examination
3 pursuant to Labor Code section 4600(e)(1) will lead to an applicant being double paid when
4 required to attend a medical-legal examination while temporarily disabled. This is not an issue here
5 and we will not comment on it except to note that the payment required by Section 4600(e)(1) was
6 added in 1959, and we are not aware of any problems with double payments to applicants.

7 We conclude that the payment to applicant of \$64.71 on September 11, 2007, was not a
8 payment of temporary disability within the meaning of Labor Code section 4656(c)(1) and did not
9 trigger the commencement of the 104 week limitation period. The \$64.71 payment to applicant was
10 paid pursuant to Labor Code section 4600(e)(1) to compensate him for his wage loss due to
11 attending a medical-legal QME exam.

12 On this record, we cannot determine the date defendant did in fact commence payment of
13 temporary disability, pursuant to Labor Code section 4656(c)(1), as required by *Hawkins, supra*.
14 Therefore we shall return this matter to the trial level for a determination of the date temporary
15 disability was commenced, to trigger the 104 week limitation on payment of temporary disability.

16 Accordingly, we shall grant applicant's petition for reconsideration, rescind the WCJ's
17 Findings of Fact and Order and return this matter for a new finding with regard to the date
18 defendant commenced payment of temporary disability benefits, and whether applicant is entitled
19 to temporary total disability benefits from March 17, 2009 and continuing.

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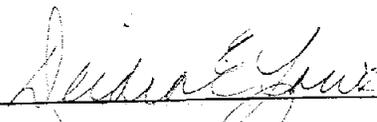
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For the foregoing reasons,

IT IS ORDERED that the May 19, 2010 Petition for Reconsideration be, and hereby is, **GRANTED**, and as our Decision After Reconsideration, the May 11, 2010 Findings of Fact and Order is **RESCINDED**, and the matter shall be **RETURNED** to the trial level for further proceedings as set forth above and for a new final decision on applicant's claim for temporary disability indemnity.

WORKERS' COMPENSATION APPEALS BOARD

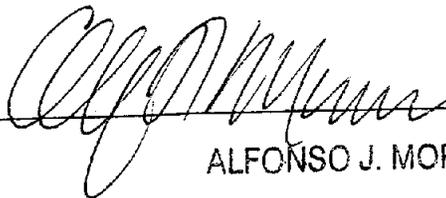


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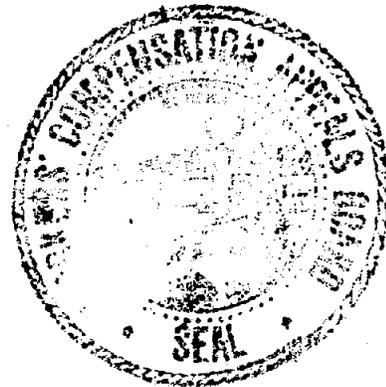
I CONCUR,



RONNIE G. CAPLANE



ALFONSO J. MORESI



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

JUL 19 2010

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Salem Najjar
Mastagni, Holstedt, Amick, Miller & Johnsen
Lenahan, Lee, Slater & Pearse

SV/jp

