# WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERIC KRUSE,

*Applicant,*

vs.

CITY OF SAN RAFAEL, Permissibly Self-Insured,

*Defendant.*

Case No. ADJ6884562

## OPINION AND DECISION AFTER RECONSIDERATION

On April 14, 2010, we granted defendant's petition for reconsideration in order to allow sufficient opportunity to further study the factual and legal issues in this case. This is our decision after reconsideration.

Applicant, while employed as a parking enforcement officer on April 11, 2008, sustained an industrial injury to his neck and right elbow. He was temporarily totally disabled from December 19, 2008, through December 21, 2008, after which he returned to his regular job. His treating physician found his condition to be permanent and stationary on June 11, 2009. On July 10, 2009, his employer made an offer of regular work pursuant to Labor Code section 4658(d)((3)(A).[1]

On October 27, 2009, applicant, who is not represented by an attorney, submitted amended Stipulations with Request for Award, stipulating that his permanent disability was 6%. The issue of the amount of his permanent disability indemnity was submitted to the workers' compensation administrative law judge (WCJ) for decision on the record. In a Findings and Award dated January 27, 2010, the WCJ found that applicant was entitled to permanent disability indemnity of $4140.00, without reduction pursuant to section 4658(d)(3)(A). In his Opinion on Decision, the WCJ stated that all of the permanent indemnity was due prior to the employer's offer of regular

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[1] Unless otherwise specified, all statutory references are to the Labor Code.

employment; thus, there were no payments "remaining to be paid" to which the reduction in section 4658(d)(3)(A) could be applied.

On reconsideration, defendant contends that no permanent disability indemnity was payable until applicant's condition became permanent and stationary because defendant had no notice that applicant had sustained any permanent disability prior to that time. Therefore, all permanent indemnity payments were payable after the employer's offer of regular employment, and the employer is entitled to a 15 percent reduction of all permanent disability indemnity to which the parties stipulated. We have not received an answer from applicant.

Section 4658(d)(3)(A) provides:

> "If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work . . . in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent."

Section 4650(b) provides:

> "If the injury causes permanent disability, the first payment shall be made within 14 days after the date of payment of temporary disability indemnity. When the last payment of temporary disability indemnity had been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability due has been paid, and if the amount of permanent disability has been determined, until that amount has been paid" (emphasis added).

Section 4658(d)(3)(A) provides:

> "If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, . . . each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in

> accordance with paragraph (1) and decreased by 15 percent" (emphasis added).

In this case, applicant was temporarily totally disabled from December 19, 2008, through December 21, 2008. Thereafter, he returned to his regular employment. According to the medical records, the employment may have been temporarily modified, but there is no record as to whether that modification was actually implemented. In any case, prior to the treating physician's permanent and stationary report dated June 11, 2009, there is no indication of permanent disability in the medical records submitted with the Stipulations with Request for Award. Therefore, there was no indication that "the injury cause[d] permanent disability" within the meaning of section 4650(b) until the claims administrator's receipt of the report dated June 11, 2009.

For this reason, we hold that on the date that the employer sent its written offer of regular work, all of the permanent disability indemnity in this case "remain[ed] to be paid" within the meaning of section 4658(d)(3)(A). Of course, once it was determined that the injury caused permanent disability, weekly indemnity payments were payable retroactive to 14 days after the last payment of temporary disability indemnity, pursuant to section 4650(b). As the WCJ correctly stated in his Opinion on Decision, all of the permanent disability awarded in this case was payable at the time of the first payment (page 1). However, because the first payment was not payable until there was evidence that the injury caused permanent disability, pursuant to section 4658(d)(3)(A), the employer is entitled to a reduction of 15% in the permanent indemnity awarded herein.

For the foregoing reasons.

**IT IS ORDERED**, as the decision after reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award dated January 27, 2010, is **AMENDED** as follows:

**FINDINGS OF FACT**

1. As a result of his six percent (6%) permanent disability level, applicant Eric Kruse is to be paid the sum of $3519.00.

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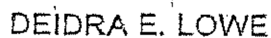
## AWARD

A. Permanent disability indemnity at six percent (6%) for which indemnity is to be paid forthwith in the amount of $3519.00, less credit to the defendant for all amounts paid on account thereof.

*WORKERS' COMPENSATION APPEALS BOARD*

JAMES C. CUNEO

*I CONCUR,*



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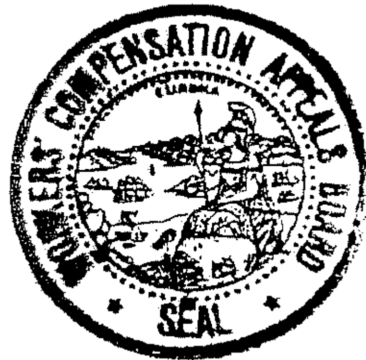
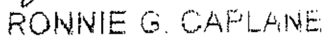



*I DISSENT (See attached Dissenting Opinion),*



RONNIE G. CAPLANE

*DATED AND FILED IN SAN FRANCISCO, CALIFORNIA*

OCT 04 2010

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

*MULLEN & FILIPPI*
*ERIC KRUSE*

MR/rm

## DISSENTING OPINION OF COMMISSIONER CAPLANE

I dissent. It is apparent from the language of section 4658(d)(3)(A) that it provides employers with an incentive to return permanently disabled employees to work. Yet if, as here, the employee loses minimal time from work due to an industrial injury and thereafter returns to his regular work, the notion of offering work to one who never left it loses sensible meaning, as does the notion of an incentive. Here, the employer formally offered to return applicant to his regular employment almost six months after he had already done so. Under these circumstances, it cannot be said that the employer is responding to the statute's incentive. Therefore, I agree with the WCJ that the employer is not entitled to the 15% reduction in permanent disability indemnity.

Moreover, even if section 4658(d)(3((A) does apply to this case, I would still find that the employer is not entitled to the 15% reduction in permanent disability indemnity. The statute specifies that the reduction applies to "each disability payment remaining to be paid" at the time of the employer's offer. I read this phrase to apply to weekly disability payments that remain to be paid after the offer, not to benefits that may have accrued prior to the offer. In this case, the majority and I agree with the WCJ that all of the permanent disability awarded was payable at the time of the first payment. Since there were no weekly payments remaining to be paid after the employer's offer, there can be no reduction in applicant's award because of the offer.

For the foregoing reasons, I dissent.

*WORKERS' COMPENSATION APPEALS BOARD*

*RONNIE G. CAPLANE, COMMISSIONER*

*DATED AND FILED AT SAN FRANCISCO, CALIFORNIA*
OCT 04 2010

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

*MULLEN & FILIPPI*
*ERIC KRUSE*

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

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Mullen and Filippi
Santa Rosa
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4 DEBORAH PAINE,

5 *Applicant,*

6

7 vs.

8 CITY OF SEBASTOPOL, Permissibly
9 Self-Insured,

10 *Defendant(s).*

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Case No. ADJ6671476

OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

12 Defendant seeks reconsideration of the August 23, 2010 Findings and Award issued by
13 the workers' compensation administrative law judge (WCJ) wherein the WCJ found, based on
14 the parties' prior stipulations, that applicant, while employed as an administrative assistant on
15 July 6, 2007, sustained industrial injury to her right shoulder causing 7% permanent disability.
16 The WCJ further found that all permanent disability indemnity was due and payable prior to the
17 permanent and stationary date and, essentially, found that defendant was not entitled to reduce
18 permanent disability indemnity pursuant to Labor Code[1] section 4658(d)(3)(a). Based on these
19 findings, the WCJ awarded permanent disability indemnity in the amount of $4,830.00.

20 Defendant contends that the WCJ erred in failing to reduce the permanent disability
21 indemnity award pursuant to section 4658(d)(3)(a) arguing that it complied with sections
22 4061(a)(2) and 4650(b).

23 Applicant, who is in pro per, did not file an answer. The WCJ issued a Report and
24 Recommendation on Petition for Reconsideration (Report) recommending that we deny
25 reconsideration.

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[1] All further statutory references are to the Labor Code, unless otherwise noted.

Based on our review of the record and for the reasons discussed below, we will grant reconsideration and amend the WCJ's decision to find that defendant is entitled to a 15% reduction of the permanent disability indemnity as permitted by section 4658(d)(3)(a). We will otherwise affirm the August 23, 2010 Findings and Award.

This matter was first tried on August 11, 2009. At that time, the parties stipulated that, on July 6, 2007, applicant sustained industrial injury to her right upper extremity and right shoulder causing 7% permanent disability; that temporary disability indemnity was paid for the period from July 7, 2007 through April 13, 2008; that applicant's earnings were sufficient to warrant a permanent disability indemnity rate of $230.00 per week; that applicant returned to her regular job on April 14, 2008; that defendant received the November 26, 2008 report of the primary treating physician, Bruce Bragonier, M.D., on or about that date; that defendant made an offer of regular work to applicant on December 4, 2008; that defendant's administrator received the panel qualified medical examination (QME) report of Dr. Trieb on March 9, 2009; that defendant made the first permanent disability indemnity advance of $2,932.50 on March 12, 2009 and a second permanent disability advance of $1,173.00 on April 30, 2009; that defendant paid permanent disability indemnity advances at the rate of $195.50 per week for the period from April 14, 2008 onward, and that defendant paid a total of $4,105.50 in permanent disability advances.

Following the initial trial, the WCJ issued a November 19, 2009 Findings, Award, and Orders, essentially finding that defendant was not entitled to reduction of permanent disability pursuant to section 4658(d)(3)(a). Defendant sought reconsideration. On February 8, 2010, we issued an Opinion and Order Granting Reconsideration and Decision After Reconsideration granting defendant's Petition for Reconsideration and remanding the matter back to the trial level. In that Decision, we noted that:

> "Dr. Bragonier's treatment reports were admitted into evidence as Court Exhibit 2. In an October 31, 2007 report, Dr. Bragonier stated that applicant was 16 weeks post-injury, that she continued with physical therapy making slow progress but with "significant improvement in her pain" and "some strides with regards to her stiffness." He noted that she returned to full duty on October 22, 2007 and directed her to continue with physical therapy and her exercise program.

"In March 2008, Dr. Bragonier took applicant off work again for the purpose of right shoulder surgery. Thereafter, on April 10, 2008, he returned her to work with a 10 pound lifting restriction. He noted that applicant need to be allowed time off work to attend physical therapy appointments.

"In an April 17, 2008 report, Dr. Bragonier indicated that applicant was nine days post right shoulder manipulation under anesthesia and that she had resumed physical therapy immediately after her procedure "with good early improvement in her motion...." Under the heading "Recommendations," he stated that "I am quite pleased with her early progress. She is to continue her diligent physical therapy course and home exercise program...."

"Medical reports dated June 19, 2008 and July 21, 2008 indicate that applicant continued with the course of physical therapy and exercise. Dr. Bragonier reported again on November 26, 2008 noting that he would "consider injection if [the] shoulder [symptoms] recur or worsen. If there is no improvement or if condition worsens, consider surgical treatment: shoulder arthroscopy- acromioplasty and capsular release."

"Dr. Trieb's March 9, 2009 panel QME report was admitted as Court Exhibit 3. Therein, Dr. Trieb stated:

"'At the time Dr. Bragonier saw her on November 26, 2008 she was seven months since the manipulation and sixteen months since the injury. She had reached maximum medical improvement at that time and was discharged from Dr. Bragonier's care. I believe that the date of November 26, 2008 is appropriate for the date to be declared permanent and stationary having reached maximum medical improvement.' (Court Exhibit 3, Dr. Trieb's 3/9/09 report at p. 10.)

"In relevant part, section 4658(d)(3)(a) provides that:

"'If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.' (Lab. Code, § 4658(d)(3)(a).)

"In his Report, the WCJ argued that defendant was not entitled to a section 4658(d)(3)(a) reduction of permanent disability due to its failure to make a reasonable estimate of applicant's permanent disability at any one of three occasions: at the time she returned to work on October 22, 2007, at the time she returned to work on April 14, 2008, or at the time Dr. Bragonier issued

> his November 26. 2008 report. The WCJ also referenced an Appeals Board panel decision in *Pena v. City of Santa Rosa* (ADJ6413657) February 26. 2009. In *Pena*. the defendant sought a section 4658(d)(3)(a) reduction of permanent disability but had failed to comply with requirements of sections 4061(a)(2)[2] and 4650(b)[3]. The *Pena* panel stated that: 'defendant is not entitled to a 15% reduction on all permanent disability payments under section 4658 where it failed to comply with sections 4061 and 4650 and thus exposed itself to a penalty (increase) on permanent disability. Simply stated, it would be unjust to allow defendant to gain from the provisions of one statute where it ignored others designed to benefit the injured worker.'
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> "We do not agree with the WCJ that the medical record put defendant on notice as to applicant's permanent and stationary status prior to Dr. Trieb's March 9. 2009 panel QME report. Dr. Bragonier never explicitly declared applicant permanent and stationary and. throughout his reports. he consistently prescribed physical therapy and exercise. His October 31. 2007 report was too early for defendants to estimate or guess at any amount of permanent disability given that the completion of the physical therapy could well have eliminated any residual permanent disability. Dr. Bragonier's April 17. 2008 report indicated that applicant was recovering from surgery and still undergoing physical therapy. Moreover. the November 26. 2008 made no reference to a permanent and stationary status and proposed additional treatment for any worsening symptoms. Thus. we are not persuaded that defendant had any obligation to advance permanent disability prior to Dr. Trieb's March 9. 2009 panel QME report."

Thus. we remanded this matter back to the trial level with instructions that the WCJ should conduct further proceedings to develop the record on the issue of whether defendant complied with the requirements of sections 4061(a)(2) and 4650(b). We noted that if defendant

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[2] Section 4061(a)(2) states. "Notice that permanent disability indemnity may be or is payable. but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary. The notice shall advise the employee that his or her medical condition will be monitored until it is permanent and stationary. at which time the necessary evaluation will be performed to determine the existence and extent of permanent impairment and limitations for the purpose of rating permanent disability and to determine the need for continuing medical care. or at which time the employer will advise the employee of the amount of permanent disability indemnity the employer has determined to be payable. If an employee is provided notice pursuant to this paragraph and the employer later takes the position that the employee has no permanent impairment or limitations resulting from the injury. or later determines permanent disability indemnity is payable. the employer shall in either event. within 14 days of the determination to take either position. provide the employee with the notice specified in paragraph (1)."

[3] Section 4650(b) states. "If the injury causes permanent disability. the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656. and regardless of whether the extent of permanent disability can be determined at that date. the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid. and if the amount of permanent disability indemnity due has been determined. until that amount has been paid."

had done so, then it is entitled to a section 4658(d)(3)(a) decrease of permanent disability.

Section 4061(a)(2) states that:

> "Notice that permanent disability indemnity may be or is payable, but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary. The notice shall advise the employee that his or her medical condition will be monitored until it is permanent and stationary, at which time the necessary evaluation will be performed to determine the existence and extent of permanent impairment and limitations for the purpose of rating permanent disability and to determine the need for continuing medical care, or at which time the employer will advise the employee of the amount of permanent disability indemnity the employer has determined to be payable. If an employee is provided notice pursuant to this paragraph and the employer later takes the position that the employee has no permanent impairment or limitations resulting from the injury, or later determines permanent disability indemnity is payable, the employer shall in either event, within 14 days of the determination to take either position, provide the employee with the notice specified in paragraph (1)." (Lab. Code, §4061(a)(2).)

In turn, section 4650(b) states that:

> "If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid." (Lab. Code, §4650(b).)

At the March 30, 2010 Mandatory Settlement Conference, defendant submitted documentary evidence establishing that applicant was provided notices pursuant to 4061(a)(2) and 4650(b). (See Defendant's Exhibits C, D, E, F, G, H, I, J, and K.) Based on this documentary evidence, we are persuaded that defendant complied with sections 4061(a)(2) and 4650(b). Moreover, we disagree with the WCJ's assessment that Dr. Bragonier's November 26, 2008 report put defendant on notice regarding the extent of permanent disability applicant would

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have based on findings of loss of range of motion.[4] In fact, in our recent en banc decision in *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc), we described the physician's role in assessing an injured worker's disability as follows:

> "Under the AMA Guides, a physician performs an evaluation to determine the WPI(s) for the injured employee's medical condition(s), expressed as a percentage. (AMA Guides, § 2.1, at p. 18.) The impairment evaluation includes a discussion of the employee's history and symptoms, the results of the physician's examination, the results of various tests and diagnostic procedures, the diagnosis, the anticipated clinical course, the need for further treatment, and the residual functional capacity and ability to perform activities of daily living (ADLs). (*Id.*, §§ 2.6a.1-2.6a.8, at pp. 21-22; Sample Report, at pp. 23-24.) After considering all of these factors, the physician compares the medical findings for each condition with the impairment criteria listed within the Guides and then calculates the appropriate impairment rating(s) for the condition(s). (*Id.*, § 2.6b, at p. 22; see also §§ 2.5, 2.6c.1, 2.6c.2, at pp. 19-20, 22.) The physician's report should include a summary list of the impairments and impairment ratings by percentage, together with a calculation of the final WPI, and a statement of the rationale underlying the WPI opinion. (*Id.*, § 2.6c.2, at p. 22; Sample Report, at p. 24 ["Impairment Rating and Rationale" section].)
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> "It is essential for a medical report to state the physician's actual WPI rating for each medical condition because WPI ratings cannot be mechanically assigned merely by reviewing the medical findings contained in the report. This is in part because many medical conditions listed in the AMA Guides have a range of WPI percentages that can be assigned, depending on the

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[4] In his Report, the WCJ stated that: "Defendants' Exhibit J is a letter from the defendant to applicant dated December 10, 2008 indicating that the defendant disagreed with the finding in Dr. Bragonier's report dated November 26, 2008 regarding the extent of permanent disability and need for medical care. [¶] "Exhibit J indicates that applicant is to go through the Panel QME process. [¶] "Defendants' Exhibit K is a December 2, 2008 letter regarding permanent disability benefits. At the second paragraph, the defendant stated, 'While your doctor has determined your condition is permanent and stationary on November 26, 2008, and has advised that there is need for medical care, we do not have factors of disability.' [¶] "While the record presented to the WCAB Panel at the time of the earlier Petition for Reconsideration did not include defendant's Exhibits J and K, it is apparent from these letters that the defendant did consider applicant to be permanent and stationary and advised the applicant (Exhibit J) that it disagreed with the extent of permanent disability and inconsistently [noting the contents of Exhibit K], said there were no factors of disability. The statement in Exhibit K concerning no factors of disability is not true. Dr. Bragonier set forth various ranges of motion. These ranges of motion showed loss of flexion (limited by pain), abduction, and external rotation. These losses of motion are ratable factors of permanent disability per pages 474 through 479 of the Guides to the Evaluation of Permanent Impairment. The statement to the applicant in the second paragraph of December 2, 2008 Notice Regarding Permanent Disability Benefits is definitely not accurate. 'Further, it is quite apparent that the defendant considered applicant to be permanent and stationary as of November 26, 2008. [¶] "According to the August 11, 2009 Minutes of Hearing, at Stipulation #9, the defendant received Dr. Bragonier's November 26, 2008 report on or about that date. In light of the fact that there is a fixed disability set forth in that report, some permanent disability was extant prior to the time the defendant made the job offer to the applicant on December 4, 2009." (WCJ's Report, at pp. 6-7, emphasis omitted.)

factors listed in the paragraph above. (Footnote omitted.)

> "It is also because the Guides does not address all medical conditions. (AMA Guides, § 1.5, at p. 11.) If a condition is not covered by the Guides, the physician compares measurable impairment resulting from the non-covered condition to the measurable impairment resulting from other conditions with similar impairment of function in performing ADLs. (AMA Guides, § 1.5, at p. 11.) Accordingly, for both these reasons, the WPI percentage to be assigned to a condition is dependent, to some extent, on the physician's judgment, training and experience. (AMA Guides, §§ 1.2a, 1.2b, 1.5, 2.3, 2.5c, at pp. 5, 8, 11, 18, 19.)" (*Blackledge, supra,* 75 Cal.Comp.Cases at pp. 619-620.)

Here, Dr. Bragonier's November 26, 2008 report did not provide a final WPI rating for applicant's condition. Moreover, because a physician's judgment, training and experience are necessary in determining the final WPI, we are not persuaded that defendant had sufficient notice regarding the extent of permanent disability.

Accordingly, we will grant reconsideration and amend the WCJ's decision to find that defendant is entitled to a reduction of the permanent disability awarded pursuant to section 4658(d)(3)(a). We will otherwise affirm the August 23, 2010 Findings and Award.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the August 23, 2010 Findings and Award be, and the same hereby is **GRANTED**.

**IT IS FURTHER ORDERED** as the Appeals Board's Decision After Reconsideration that the August 23, 2010 Findings and Award be, and the same hereby is **AFFIRMED, EXCEPT** as **AMENDED** below.

## FINDINGS OF FACT

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7. Defendant is entitled to a 15% reduction of permanent disability indemnity as permitted by Labor Code section 4658(d)(3)(a).

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2 ## AWARD

3 a. Permanent disability indemnity in the total amount of $4,830.00 payable
4 forthwith, less credit for any sums heretofore paid on account thereof, less
5 reduction as permitted by Labor Code section 4658(d)(3)(a), with
jurisdiction reserved at the trial level if there is any dispute.

6 b. All further medical treatment reasonably required to cure or relieve from
the effects of the injury herein.

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8 *WORKERS' COMPENSATION APPEALS BOARD*

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11 *I CONCUR,* DEIDRA E. LOWE

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14 FRANK M. BRASS

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17 ALFONSO J. MORESI

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20 *DATED AND FILED IN SAN FRANCISCO, CALIFORNIA*

21 NOV 1 5 2010

22 *SERVICE BY MAIL ON SAID DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE OFFICIAL ADDRESS RECORD:*

23 *DEBORAH PAINE*

24 *MULLEN & FILIPPI*

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27 *PAG/csl*

Santa Rosa
JAN 10 2011
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1
2 **WORKERS' COMPENSATION APPEALS BOARD**
3 **STATE OF CALIFORNIA**

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5 **FIDEL QUINTERO,**
6 *Applicant,*
7 vs.
8 **CITY OF SEBASTOPOL; REMIF,**
9 *Defendant(s).*

**Case No. ADJ7219770**

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

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11 Defendant seeks reconsideration of the Findings, Award and Order of October 19, 2010, in
12 which the workers' compensation judge (WCJ) found, in relevant part, that on November 20,
13 2008, applicant sustained industrial injury to his low back, that defendant paid temporary
14 disability from May 11, 2009 through May 13, 2009 and permanent disability at rate of $195.50
15 per week (a discount of 15%) from May 14, 2009 through April 1, 2010, that defendant made an
16 offer of regular work on October 22, 2009, that applicant accepted the offer on October 26, 2009,
17 that applicant's condition did not reach permanent and stationary (P&S) status until February 23,
18 2010, that defendant's offer of regular work was not made within 60 days of P&S status, and that
19 "permanent disability should be paid at $264.50 per week [an increase of 15%]." In addition, the
20 WCJ ordered defendant to pay a 25% penalty on the delayed permanent disability award.
21 Defendant contends, in substance, that it is entitled to the Labor Code section
22 4658(d)(3)(A) reduction on all permanent disability payments "based on its compliance with the
23 legislative purpose behind the statute," that even if defendant is liable for an increase under
24 section 4658(d)(2), permanent disability indemnity should be paid at the "neutral" rate of
25 $230.00 per week from May 14, 2009 until 60 days from the P&S date, and that the WCJ erred in
26 imposing a 25% penalty on the delayed permanent disability award under Labor Code section
27 5814.

It appears that the unrepresented applicant did not file an answer.

The WCJ describes the relevant facts in his Report and Recommendation as follows:

> "This matter originally came before this judge with the filing of Stipulations with Request for Award by defendant. The stipulations seemed reasonable and fair with the exception that defendant had requested a Labor Code section 4658(d) reduction. On May 24, 2010, the parties were served my Order Suspending Action re: Stipulations with Request for Award, noting the inclusion of a Labor Code section 4658(d) reduction, and noting that the offer of regular work documentation submitted was made in October of 2009, yet applicant did not reach permanent and stationary status until an exam of February 23, 2010. This judge noted this was clearly not within the statutory sixty (60) days set forth, asked defendant to agree to amend the Stipulation to delete the reduction, to add the increase and to pay a ten percent (10%) increase for the delayed amount of permanent disability.
>
> "On June 17, 2010, defendant filed a timely Response to my Order Suspending Action, again requesting the fifteen percent (15%) reduction in permanent disability. They note that applicant received two days of temporary disability and they provided modified work until applicant was released to perform his regular work. They admit that on October 22, 2009 they forwarded the Notice of Offer of Regular Work. Applicant accepted this work and continues to work in his usual and customary occupation for the City of [Sebastopol]. They admit that the Offer of Regular Work was sent prior to applicant reaching permanent and stationary status. They requested this judge to use common sense in applying Labor Code section 4658(d), and that this judge could consider the employer's provision of modified and regular work over this whole time period. They suggest that they have met the intent of the Labor Code section 4658(d).
>
> "Upon receipt of this letter, this judge set the matter for hearing, and at the hearing the defendants raised their same arguments, but agreed to have the matter submitted on the record. Based upon that submittal, a Findings and Award issued on October 19, 2010..."

Labor Code section 4658(d)(3)(A) states as follows:

> "If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent."

In the decision disputed here, the WCJ disallowed the 15% reduction in permanent disability indemnity sought by defendant and increased the permanent disability award by 15%. In

addition, the WCJ imposed a 25% penalty on permanent disability pursuant to Labor Code section 5814.

We conclude that the WCJ erred on both issues. The language of section 4658(d)(3)(A) gives employers an incentive to return permanently disabled employees to work, and that is what the employer did in this case. Applicant sustained an industrial injury on November 20, 2008 and immediately was assigned to modified duties. He continued working in the modified duties until May 11, 2009, when he became temporarily totally disabled for three days. After May 13, 2009, applicant returned to modified duties until he was released to full duties by his treating physician and returned to regular work on October 16, 2009. According to the WCJ's findings, the employer made an offer of regular work on October 22, 2009 and applicant accepted the offer on October 26, 2009. As of February 23, 2010, applicant's condition was declared permanent and stationary (P&S) by his treating physician. The foregoing chronology indicates that the employer returned the permanently disabled employee to work at the earliest opportunity. Therefore, the employer is entitled to the incentive offered by section 4658(d)(3)(A).

In addition, we disagree with the WCJ's reasoning that because defendant offered regular work before applicant's condition became P&S, the offer was not made "within 60 days of [the] disability becoming permanent and stationary" as set forth in the statute. The 60-day provision encourages the employer to timely determine whether it can offer to re-employ the injured employee given his or her permanent disability. In this case, there is no question that the employer acted timely, upon applicant's clearance for full duty by his treating physician. Moreover, the offer and acceptance already had been made by the time applicant was declared P&S on February 23, 2010. There was nothing left for the employer to do to comply with the statute. Therefore, we conclude that the WCJ erred in using the 60-day provision to penalize defendant for offering regular employment at the earliest opportunity.

In reference to the 25% penalty on permanent disability, there is no indication in the Electronic Adjudication Management System (EAMS) that Labor Code section 5814 was ever raised as an issue, until the WCJ unilaterally did so in his Opinion on Decision. On grounds of due

process alone, the WCJ erred in imposing a penalty. Furthermore, there is no basis for the WCJ's conclusion that defendant "knew" its offer of regular work did not comply with the 60-day requirement. Therefore, we will grant reconsideration and rescind the 5814 penalty. In addition, we will approve the Stipulations with Request for Award submitted by the parties on or about April 14, 2010.

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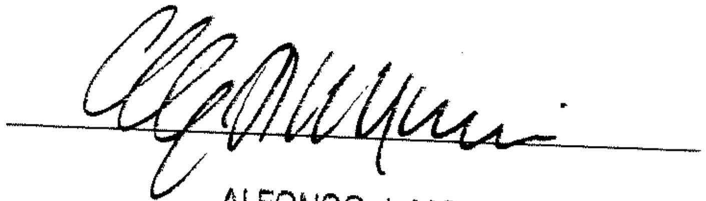
For the foregoing reasons,

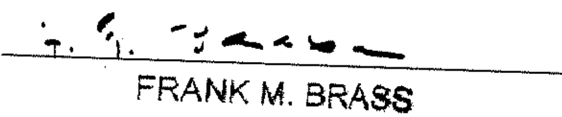
**IT IS ORDERED**, that reconsideration of the Findings, Award and Order of October 19, 2010 is **GRANTED**, and that as the Appeals Board's Decision After Reconsideration, said decision is **RESCINDED AND VACATED**, and the Stipulations with Request for Award submitted by the parties on or about April 14, 2010 is hereby **APPROVED**.

*WORKERS' COMPENSATION APPEALS BOARD*



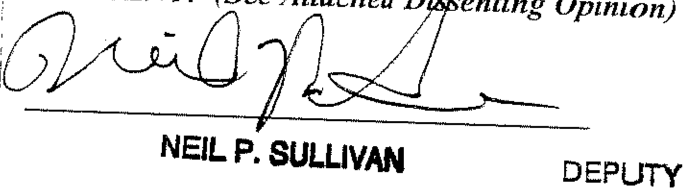
ALFONSO J. MORESI

*I CONCUR,*



FRANK M. BRASS

*I DISSENT. (See Attached Dissenting Opinion)*



NEIL P. SULLIVAN DEPUTY

*DATED AND FILED IN SAN FRANCISCO, CALIFORNIA*

JAN 07 2011

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

*CITY OF SEBASTOPOL*
*FIDEL QUINTERO*
*MULLEN & FILIPPI*

*JTL/ebc*

## DISSENTING OPINION

I dissent. I would deny defendant's petition for reconsideration for the reasons stated below.

The relevant statutory provisions are found in paragraphs (2) and (3) of subdivision (d) of Labor Code section 4658. They state as follows:

> "(2) If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.
>
> "(3)(A) If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.
>
> "(B) If the regular work, modified work, or alternative work is terminated by the employer before the end of the period for which disability payments are due the injured employee, the amount of each of the remaining disability payments shall be paid in accordance with paragraph (1) and increased by 15 percent. An employee who voluntarily terminates employment shall not be eligible for payment under this subparagraph. This paragraph shall not apply to an employer that employs fewer than 50 employees."

Based on the language of the statute, it is clear that Labor Code section 4658(d) provides employers with an incentive to return permanently disabled employees to work.

However, section 4658(d)(3)(A) also contemplates that the offer of regular, modified or alternative work is to be made <u>after</u> the P&S date because both the employer and the injured employee will know at that time what the employee's actual permanent disability is. In that event, the employer will know whether its offer of regular/modified/alternate work is appropriate, and the employee will know whether it is appropriate for him or her to accept it. This is particularly significant for the injured employee because an employee's rejection or failure to accept an offer

of modified/alternate work can mean that the employee loses supplement job displacement benefits under Labor Code section 4658.6. Furthermore, section 4658(d)(3)(A) contemplates that the offer of regular/modified/alternate work is to extend for 12 months after the P&S date. In this case, the offer of regular duties was made approximately four months before the P&S date. I disagree with the majority that the timing of defendant's offer of regular duties is acceptable in this instance, because applicant could be terminated some eight months after his P&S date and have no recourse for a 15% increase under section 4658(d)(3)(B). I also disagree that it is acceptable for defendant to make an offer of regular work within 60 days after the employee has been released to full duties - even if the employee has not yet been declared P&S. Defendant's approach presupposes that, upon the employee's return to full duties, there is no possibility that the employee's condition could deteriorate upon resumption of the duties which gave rise to the injury.

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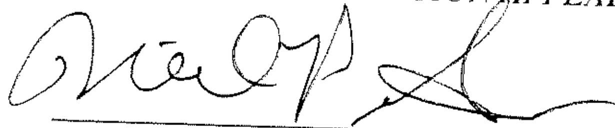
It can be reasonably inferred that one of the purposes of the requirement to make the offer within 60 days after the P&S date is that the employer and employee can have a trial of regular/modified/alternate work while the employee is still temporarily disabled, in order to determine whether the employee will be able to perform the work without further problems. This inference is supported by the Court of Appeal's approach in *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689 [74 Cal.Comp.Cases 419], which involved the 15% "bump" in permanent disability under section 4658(d)(2) where there is no offer to return to work. In *Bontempo*, the Court stated that "[p]ermanent disability benefits are payable at the regular rate immediately *once the applicant is permanent and stationary.* Subdivision (d)(2) allows the employer 60 days *after issuance of the medical report declaring the applicant permanent and stationary to decide whether to offer employment* and does not require payment of the additional amount until that period has expired. [...]" (74 Cal.Comp.Cases at 432, italics added.)

***WORKERS' COMPENSATION APPEALS BOARD***



***NEIL P. SULLIVAN, DEPUTY COMMISSIONER***

***DATED AND FILED IN SAN FRANCISCO, CALIFORNIA***

JAN 07 2011

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

*CITY OF SEBASTOPOL*
*FIDEL QUINTERO*
*MULLEN & FILIPPI*

*JTL/ebc*

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Santa Rosa
JAN 10 2011
RECEIVED

# WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

| | |
|---|---|
| JANICE HILPERT, *Applicant*, vs. CITY OF SANTA ROSA; REMIF, *Defendant(s).* | Case No. ADJ7306545 |
| | **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION** |

Defendant seeks reconsideration of the Findings, Award and Order of October 19, 2010, in which the workers' compensation judge (WCJ) found, in relevant part, that on July 29, 2009, applicant sustained industrial injury to her left shoulder, that defendant paid temporary disability from August 26, 2009 through November 24, 2009 and permanent disability at rate of $195.50 per week (a discount of 15%) beginning November 25, 2009, that the injury caused permanent disability of 10% for which indemnity is payable beginning November 25, 2009, that defendant made an offer of regular work on December 4, 2009, that applicant accepted the offer on January 8, 2010, that applicant's condition did not reach permanent and stationary (P&S) status until March 29, 2010, that defendant's offer of regular work was not made within 60 days of P&S status, and that permanent disability should be paid at $230.00 per week beginning November 25, 2009 and increased to $264.50 per week beginning January 25, 2010. In addition, the WCJ ordered defendant to pay a 25% penalty on the delayed permanent disability award.

Defendant contends, in substance, that the WCJ's decision "contravenes the legislative purpose behind Labor Code section 4658(d)(3)(A)," that even if the 15% increase under section 4658(d)(2) is appropriate, it should take effect on May 27, 2010 and not on January 25, 2010, and that the WCJ erred in imposing penalties of 25% on the delayed permanent disability award.

It appears that the unrepresented applicant did not file an answer.

The WCJ recounts the relevant facts in his Report and Recommendation, as follows:

"This matter originally came before this judge with the filing of Stipulations with Request for Award on June 10, 2020. The Stipulations appeared adequate except for the issue of a Labor Code section 4658(d) adjustment [a 15% reduction taken by defendant]. This judge issued an Order Suspending Action regarding the Stipulations with Request for Award on June 30, 2010 and noting that per the medical reports attached, applicant had not reached permanent and stationary status until March 29, 2010, but defendants' offer of work was made December 4, 2010 and therefore not within the 60-day requirement under Labor Code section 4658(d). This judge indicated that defendant should amend the Stipulations to $230.00 per week for a period and then an increase to $264.50 per week for an additional period resulting in a gross amount of $7,705.46.

"On July 20, 2010, defendants filed a Response. Defendants note that applicant suffered injury on July 29, 2009 and received temporary disability through November 17, 2009 and returned to full duty on November 18, 2009. On December 4, 2009, defendant forwarded an offer of regular work to applicant, which [s]he signed on January 8, 2010. Defendant admits applicant's treating physician issued a permanent and stationary report [dated] March 31, 2010 [which found applicant P&S as of March 29, 2010]. Defendants admit they made an initial payment of permanent disability on April 22, 2010 and continued to pay permanent disability until it was paid out on June 24, 2010. Defendant then suggests that there is no understandable reason why a Labor Code section 4658(d) [offer] need be sent after applicant's permanent and stationary status is found. They suggest an identical or duplicative offer need not be made after applicant becomes permanent and stationary. They again claim that they are entitled to the fifteen percent (15%) reduction but state that if not, then the increase should only apply after May 31, 2010.

"The matter was set for hearing and at the Mandatory Settlement Conference the case was submitted on the current record for decision. A Findings and Award issued October 19, 2010, and from that Findings and Award defendant has filed a timely Petition for Reconsideration on November 10, 2010. It is from that Petition for Reconsideration that this Report and Recommendation is made."

Labor Code section 4658(d)(3)(A) states as follows:

"If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent."

1 In the decision disputed here, the WCJ found that under section 4658(d)(3)(A), permanent
2 disability indemnity should be paid at $230.00 per week beginning November 25, 2009 and then
3 increased 15% to $264.50 per week beginning January 25, 2010. In addition, the WCJ imposed a
4 25% penalty on permanent disability pursuant to Labor Code section 5814.
5 We conclude that the WCJ erred on both issues. The language of section 4658(d)(3)(A)
6 gives employers an incentive to return permanently disabled employees to work, and that is what
7 the employer did in this case. Applicant sustained an industrial injury on July 29, 2009 and
8 received temporary disability through November 17, 2009. The very next day, on November 18,
9 2009, she returned to full duty. On December 4, 2009, defendant forwarded an offer of regular
10 work to applicant, which she signed on January 8, 2010. The foregoing chronology indicates that
11 the employer returned the permanently disabled employee to work at the earliest opportunity.
12 Therefore, the employer is entitled to the incentive offered by section 4658(d)(3)(A).
13 In addition, we disagree with the WCJ's reasoning that because defendant offered regular
14 work before applicant's condition became P&S, the offer was not made "within 60 days of [the]
15 disability becoming permanent and stationary" as set forth in the statute. The 60-day provision
16 encourages the employer to timely determine whether it can offer to re-employ the injured
17 employee given his or her permanent disability. In this case, there is no question that the employer
18 acted timely, soon after the applicant's period of temporary disability ended. Moreover, the offer
19 and acceptance already had been made by the time applicant was declared P&S on March 29, 2010
20 by her treating physician in his report dated March 31, 2010. There was nothing left for the
21 employer to do to comply with the statute. Therefore, we conclude that the WCJ erred in using the
22 60-day provision to penalize defendant for making an immediate offer of employment.
23 In reference to the 25% penalty on permanent disability, there is no indication in the
24 Electronic Adjudication Management System (EAMS) that Labor Code section 5814 was ever
25 raised as an issue, until the WCJ unilaterally did so in his Opinion on Decision. On grounds of due
26 process alone, the WCJ erred in imposing a penalty. Furthermore, there is no basis for the WCJ's
27 conclusion that defendant "knew" its offer of regular work did not comply with the 60-day

requirement. Therefore, we will grant reconsideration and rescind the 5814 penalty. In addition, we will approve the Stipulations with Request for Award submitted by the parties on or about June 10, 2010.

For the foregoing reasons,

**IT IS ORDERED**, that reconsideration of the Findings, Award and Order of October 19, 2010 is **GRANTED**, and that as the Appeals Board's Decision After Reconsideration, said decision is **RESCINDED AND VACATED**, and the Stipulations with Request for Award submitted by the parties on or about June 10, 2010 is hereby **APPROVED**.

*WORKERS' COMPENSATION APPEALS BOARD*

FRANK M. BRASS

*I CONCUR,*

ALFONSO J. MORESI

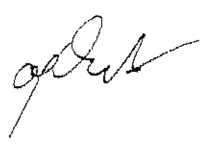
JAMES C. CUNEO

*DATED AND FILED IN SAN FRANCISCO, CALIFORNIA*

JAN 06 2011

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

*MULLEN & FILIPPI*
*JANICE HILPERT*



*JTL/ebc*

HILPERT, Janice