

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. ADJ6790437**

5 **CHRISTOPHER PECKHAM (Dec'd)**
6 **LISA FALVO-PECKHAM (Widow)**

7 *Applicant,*

8 *vs.*

9 **RESOLUTION LAW CORP AND REPUBLIC**
10 **INDEMNITY CO. OF AMERICA,**

11 *Defendants.*

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

12
13 Applicant, Lisa Falvo-Peckham, widow of decedent Christopher Peckham, seeks
14 reconsideration of the Findings and Award, issued April 8, 2010, in which a workers'
15 compensation administrative law judge (WCJ) found applicant's decedent's earnings on the date of
16 injury were \$1,780.54 per week, and ordered defendant to pay death benefits to applicant and her
17 daughter of \$916.33 per week until June 21, 2008, and then adjusted to the lower of \$1,187.03 per
18 week or 2/3rds of the then-current State Average Weekly Wage (SAWW) per week, to be re-
19 adjusted accordingly on the first of January of each year until September 21, 2026, less a
20 commutation to pay a 15% attorney's fee.

21 Applicant contends the WCJ erred in capping her benefits at \$1,187.03 per week, where
22 Labor Code section 4453(a)(10) provides that such benefits are to be adjusted annually according
23 to the SAWW, where there was substantial evidence of a high likelihood that the decedent's future
24 earnings would have increased at a rate greater than the SAWW. Applicant further argues that the
25 WCJ erred in concluding expert testimony was necessary to determine future earning capacity, as
26 there is a statutory mechanism in place for annual adjustments. No answer to the petition for
27 reconsideration was received.

1 For the reasons set forth herein, we shall affirm the WCJ's determination and deny
2 applicant's petition for reconsideration.

3 Background

4 The parties entered into a stipulated award on August 18, 2009, finding Christopher
5 Peckham, sustained injury arising out of and occurring in the course of his employment resulting
6 in his death on June 21, 2008, leaving his wife as a partial dependent and his daughter, born
7 September 16, 2008, as a total dependent. The parties stipulated that the decedent's weekly
8 earnings were \$1,780.54, paying a benefit of \$916.33 per week, but disputed the amount of the
9 death benefit with regard to the COLA issue. The parties further stipulated in a written addendum
10 that defendant would pay a \$916.33 weekly death benefit for decedent's minor child from June 22,
11 2008 to the date of the stipulated award, less a 15% attorney's fee. The parties further stipulated
12 that the "cola increase issue as to death benefit is deferred," and that issues not specified are
13 "deferred and reserved."

14 Applicant then sought an increase in the award of death benefits, which came on for
15 hearing on April 5, 2010. Applicant sought to litigate the decedent's earning capacity, to which
16 defendant objected in view of the parties' stipulation as to her actual earnings.

17 Applicant testified that her husband earnings while employed by defendant since 2004 had
18 increased at an annual rate of 30.9%. Over the period of his employment his salary increased by
19 124%. After his death, his employer hired consultants to replace him and paid them between \$120
20 and \$140 per hour. Applicant testified that her husband was valued by his employer and had a
21 bright future with the firm. She testified that she believed his earnings would have continued to
22 increase and he would receive annual bonuses.

23 The employer's financial controller, Betty Stone, was called by applicant to testify, after
24 applicant accepted defendant's offer of proof as to how she would testify. The offer of proof stated
25 that she would testify that the decedent was an at will employee, and that at the time of his death
26 he was not scheduled by the firm's shareholders to receive a raise after that date. The shareholders
27 make a determination each January, after reviewing employee salaries, and considering their

1 performance, market conditions and firm profits.

2 In her trial testimony, Ms. Stone indicated that applicant's testimony regarding her
3 husband's wages was accurate. However, she testified that in the past two years not every
4 employee received a salary increase, including herself, despite good performances. Because of that
5 fact, she was not certain that Mr. Peckham's salary would have continued to increase over the past
6 two years, as it had in prior years. She testified that she has no present expectation that she will
7 receive a future bonus. Based upon her past experience, she was uncertain whether her earnings
8 would keep up with inflation. As for the cost of the consultants brought in to perform the
9 decedent's work, Ms. Stone did not know whether his salary would have been adjusted to be
10 comparable to the cost of a consultant.

11 Discussion

12 Applicant contends that her minor dependent daughter is entitled to annual increases in
13 death benefits based upon the application of Labor Code section 4453(a)(10), which provides for
14 an annual adjustment of the temporary disability rate based upon the SAWW. She argues that the
15 WCJ erred in using the decedent's earnings at the time of injury as a cap on the award of death
16 benefits.

17 Applicant's minor child is entitled to the payment of a death benefit until she reaches the
18 age of 18, "in the same manner and amount as temporary total disability indemnity would have
19 been paid" to her father, pursuant to Labor Code section 4703.5. Temporary disability benefits are
20 calculated as two-thirds of the average weekly earnings, which were stipulated here to be
21 \$1,780.54, thus providing the weekly benefit of \$1,187.03, as awarded as a cap herein.

22 Section 4453 provides the methods used to determine the average weekly earnings for
23 purposes of calculating temporary disability and permanent disability benefits. The section relied
24 upon by applicant provides:

25
26 " (a) In computing average annual earnings for the purposes of
27 temporary disability indemnity and permanent total disability
indemnity only, the average weekly earnings shall be taken at:

1 ...
2 “(10) Not less than one hundred eighty-nine dollars
3 (\$189), nor more than one thousand two hundred
4 sixty dollars (\$1,260), for injuries occurring on or
5 after January 1, 2005. For injuries occurring on or
6 after January 1, 2006, average weekly earnings shall
7 be taken at not less than one hundred eighty-nine
8 dollars (\$189), nor more than one thousand two
9 hundred sixty dollars (\$1,260) or 1.5 times the state
10 average weekly wage, whichever is greater.
11 *Commencing on January 1, 2007, and each January 1*
12 *thereafter, the limits specified in this paragraph shall*
13 *be increased by an amount equal to the percentage*
14 *increase in the state average weekly wage as*
15 *compared to the prior year.* For purposes of this
16 paragraph, "state average weekly wage" means the
17 average weekly wage paid by employers to
18 employees covered by unemployment insurance as
19 reported by the United States Department of Labor
20 for California for the 12 months ending March 31 of
21 the calendar year preceding the year in which the
22 injury occurred.” (Italics added.)

23 Thus, applicant argues that she is entitled to the future adjustment of death benefits based
24 upon the SAWW.

25 Section 4453(c) also applies to the determination of earnings for the purpose of calculating
26 benefits, and provides in part:

27 “(c) Between the limits specified in subdivisions (a) and (b), the
 average weekly earnings, except as provided in Sections 4456 to
 4459, shall be arrived at as follows:

 “(1) Where the employment is for 30 or more
 hours a week and for five or more working days a
 week, the average weekly earnings shall be the
 number of working days a week times the daily
 earnings at the time of the injury.”

 This provision is used to determine average weekly earnings for injured workers who work
 full time.

 As noted by the WCJ, applicant’s argument is predicated upon an overly expansive reading
 of Labor Code section 4453(a)(10). That section provides for the determination of the maximum
 rate at which temporary disability benefits may be paid. It does not mandate a higher rate for the

1 rate at which temporary disability benefits may be paid. It does not mandate a higher rate for the
2 payment of death benefits beyond that which it is determined by the calculation of average weekly
3 earnings, which still requires evidence of actual earnings or "earning capacity."

4 Here, to the extent applicant seeks to establish an entitlement to higher death benefits based
5 upon her testimony that her husband's earning capacity was greater than his actual earnings, she
6 carries the burden to establish her husband's earnings would have increased. (*Grossmont Hospital*
7 *v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348 (62 Cal.Comp.Cases
8 1649).)

9 A pay increase that was previously scheduled or reasonably anticipated to occur *after* an
10 injury may be considered in determining the injured worker's average weekly earnings, pursuant to
11 section 4453, and the corresponding temporary disability rate. (*Kyllonen, supra.*) However, the
12 WCJ properly found applicant's testimony was rebutted by the testimony of Ms. Stone, where she
13 testified that in the two years subsequent to Mr. Peckham's death the employer was not providing
14 raises and bonuses commensurate with past experience. Thus, there is no evidence to establish a
15 scheduled or reasonably anticipated post-injury increase upon which to make an increased award of
16 benefits.

17 Accordingly, we shall affirm the WCJ's determination and will deny applicant's petition
18 for reconsideration.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that the Petition for Reconsideration, filed May 3, 2010, is **DENIED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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6
7 Susan V. Hamilton **DEPUTY**
8 SUSAN V. HAMILTON

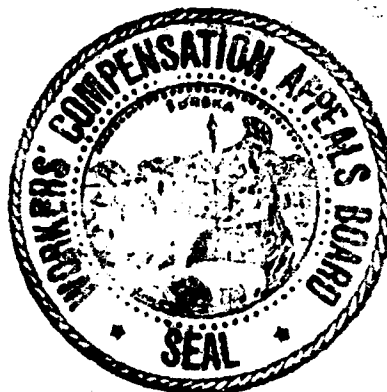
9 *I CONCUR,*

10
11 

12 JAMES C. CUNEO

13
14 CONCURRING, BUT NOT SIGNING

15 FRANK M. BRASS
16
17
18



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

20 **JUN 23 2010**

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

23 Lisa Falvo-Peckham
24 Butts & Johnson
25 Haworth, Bradshaw, Stallknecht & Barber
26



27 *SV/jp*