

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **XYZZX SJO2,**

5 *Applicant,*

6 **vs.**

7 **SUBSEQUENT INJURIES BENEFITS**
8 **TRUST FUND,**

9 *Defendant.*

Case No. ADJ1510738 (SJO 0251902)

**OPINION AND DECISION
AFTER RECONSIDERATION**

10 On October 28, 2008, the Director of Industrial Relations as Administrator of the
11 Subsequent Injuries Benefits Trust Fund (SIF) filed a Second Petition for Reconsideration,
12 contending that it is newly aggrieved by our Opinion and Order Dismissing Petition for
13 Reconsideration, wherein we dismissed SIF's petition for reconsideration dated August 7, 2008, as
14 untimely filed. The petition had requested reconsideration of the Findings and Award dated July
15 14, 2008. SIF contends that its petition was filed at the San Jose district office on August 8, 2008,
16 but that it was not date-stamped because the clerks at that office were absent for training. We have
17 not received an answer from applicant.

18 After review of the second petition and the documents attached thereto, we find that the
19 first petition was timely filed. Therefore, we rescind our Opinion and Order Dismissing Petition
20 for Reconsideration, and we address SIF's contentions in its first petition for reconsideration on the
21 merits.

22 Applicant, while employed as an accountant/controller/program director on January 20,
23 2004, sustained an industrial injury to his hearing, psyche, right hand, spine, post concussion
24 headache, dizziness, and jaw. On June 19, 2007, he and his employer stipulated that his permanent
25 disability was 69 ½ percent. Applicant then filed an application for SIF benefits, contending that
26 he had a pre-existing disability caused by an HIV condition, first diagnosed in 1994, Hepatitis B,
27 and various other problems.

1 At trial on July 8, 2008, applicant and SIF stipulated that his combined permanent disability
2 was 100% and that "permanent and stationary date/permanent disability payment commencement
3 date of 10/20/06 at an initial rate of \$728 per week on a case with a 1/20/04 date of injury for
4 which the industrial permanent disability rated 69.5 percent, paying out at \$200 a week for 422
5 weeks commencing 10/20/06" (Minutes of Hearing, page 2). The issues were: "1. On what date
6 do the increases in permanent total disability provided for in Labor Code section 4659¹ begin in
7 this case? 2. Was application of the 4659 increase retroactive to the 3/25/08 Award unreasonably
8 delayed?" (Minutes of Hearing, page 3).

9 In the Findings and Award dated July 14, 2008, the workers' compensation administrative
10 law judge (WCJ) found that increased payments to applicant pursuant to section 4659(c) should
11 have begun on January 1, 2005 and that SIF had unreasonably delayed payments to applicant in the
12 amount of \$3585.56; and awarded increases to applicant's permanent total disability indemnity
13 consistent with section 4659(c) beginning as of January 1, 2005, and a penalty pursuant to section
14 5814 in the amount of \$358.56.

15 In its petition for reconsideration, SIF contends that section 4659(c) provides for future
16 annual increases in total permanent disability payments, not an increase in the total permanent
17 disability rate, and that the WCJ had confused the method for computing rates for the payment of
18 total temporary and total permanent disability indemnity with the provision for further annual
19 increases in total permanent disability payments. SIF did not contend that it was aggrieved by the
20 penalty. We have received an answer from applicant.

21 Section 4659(c) provides: "For injuries occurring on or after January 1, 2003, an employee
22 who becomes entitled to receive a life pension or total permanent disability indemnity . . . shall
23 have that payment increased annually commencing January 1, 2004, and each January 1 thereafter,
24 by an amount equal to the percentage increase in the 'state average weekly wage' as compared to
25 the prior year. For purposes of this subdivision, 'state average weekly wage' means the average
26 weekly wage paid by employers to employees covered by unemployment insurance as reported by

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

1 the United States Department of Labor for California for the 12 months ending March 31 of the
2 calendar year preceding the year in which the injury occurred" (emphasis added).

3 In this case, the WCJ found that applicant was entitled to increased payments pursuant to
4 section 4659(c) commencing January 1, 2005, the first January 1 after the date of injury. In his
5 Report and Recommendation, he stated that "it seems clear that the Legislature intended to
6 increase benefits to severely injured workers by enacting protection against inflation" (page 3).
7 We concur.

8 First, we note that section 4659(c) provides that for injuries on or after January 1, 2003,
9 where an employee becomes entitled to total permanent disability indemnity or a life pension, that
10 payment shall be increased annually commencing on January 1, 2004. We construe this to mean
11 that each payment of total permanent disability indemnity or life pension that is received on or
12 after the January 1 following the date of injury shall be increased, no matter when the first such
13 payment is received. This ensures that severely injured workers are protected from inflation, no
14 matter when they receive their first payment. In some cases there may be years of litigation before
15 there is a determination that an employee is entitled to receive a life pension or total permanent
16 disability indemnity award. In the case of a life pension, the first payment will ordinarily be made
17 years after the date of injury. Nonetheless, the injured worker will have been protected against any
18 inflation that may have ensued between the date of injury and the date of first payment of the life
19 pension or total permanent disability indemnity.

20 This holding is also consistent with the second sentence of section 4659(c). The state
21 average weekly wage which is the basis of the increased payments is determined initially by data in
22 the "calendar year preceding the year in which the injury occurred," not the year in which the first
23 payment is made. This is further evidence of legislative intent that the increased payments be
24 calculated from the January 1 following the date of injury, not from the date of first payment.

25 Finally, our holding is not inconsistent with provisions of sections 4453 and 4659(a).
26 Those sections specify the minimum and maximum earnings for determining the indemnity rates
27 for total permanent disability and life pension based on date of injury. Section 4659(c) provides

1 for increases to those rates, where appropriate. There was not dispute as to applicant's temporary
2 disability rate at the time of his injury. Because he is now totally permanently disabled, section
3 4659(c) provides for increases to the rates at which those payments made, commencing the January
4 1 after the date of injury.

5 Therefore, we affirm the Findings and Award dated July 14, 2008, except that we correct a
6 clerical error in paragraph 2 of the Award.

7 For the foregoing reasons,

8 **IT IS ORDERED**, as the decision after reconsideration of the Workers' Compensation
9 Appeals Board, that the Opinion and Order Dismissing Petition for Reconsideration dated October
10 10, 2008, is **RESCINDED**.

11 **IT IS FURTHER ORDERED** that the Findings and Award dated July 14, 2008, is
12 **AFFIRMED**, except as **AMENDED** below:

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

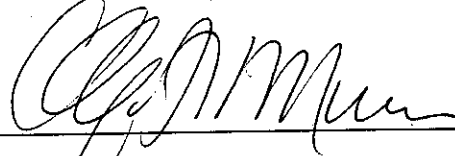
26 ///

27 ///

AWARD


2. Increases to applicant's permanent total disability indemnity consistent with Labor Code section 4659(c) beginning as of January 1, 2005.

WORKERS' COMPENSATION APPEALS BOARD



ALFONSO J. MORESI

I CONCUR,


RONNIE G. CAPLANE
JAMES C. CUNEO

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 13 2009

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

XYZZX SJ02
BUTTS & JOHNSON
OFFICE OF THE DIRECTOR-LEGAL UNIT
STATE COMPENSATION INS. FUND-LEGAL



MR/rmm