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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RUBEN SILVA,

Applicant,

vs.

**LSG SKY CHEFS; LIBERTY MUTUAL
INSURANCE COMPANY,**

Defendants.

Case Nos. **ADJ7812017**
ADJ7813152
(Los Angeles District Office)

**OPINION AND DECISION AFTER
RECONSIDERATION**

DOCUMENT #1
BEGINS HERE

→ We previously granted reconsideration in this matter in order to further study the issues raised by defendant's Petition for Reconsideration. This is our Decision After Reconsideration¹.

Defendant seeks reconsideration of the two Findings and Awards (F&As), issued on October 14, 2014, by a workers' compensation administrative law judge (WCJ). In case ADJ812017, the WCJ found applicant sustained injury on April 16, 2010 to his left shoulder, cervical spine and psyche, with temporary disability due for the period of April 26, 2010 through August 4, 2011, and for an additional period of March 13, 2012 through October 25, 2012, resulting in permanent disability of 25%, with a need for future medical treatment, and awarded a supplemental job displacement benefit voucher (Voucher) of up to \$6,000.00 pursuant to Labor Code section 4658.5². In case ADJ7813152, the WCJ found that applicant sustained a cumulative trauma injury from April 26, 2009 through April 26, 2010 to his left shoulder, left wrist, cervical spine, and psyche, with temporary disability which can concurrently with the periods awarded in ADJ7812017, resulting in permanent disability of 30%, with a need for future medical treatment and awarded a voucher of up to \$8,000.00. The WCJ also ordered defendant to

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¹ Commissioner Frank Brass, who was on the panel that issued the Order Granting Reconsideration, is currently unavailable to participate further in this decision. Another panel member was assigned in his place.

² All further statutory references are to the Labor Code.

1 reimburse the lien of the Employment Development Department along with interest, for benefits it paid
2 applicant, with specifics to be adjusted by the parties and jurisdiction reserved in case of a dispute.

3 Defendant contends that the WCJ incorrectly rated the 3% whole person impairment add on for
4 pain, as found by the orthopedic agreed medical evaluator, Clive Segil, M.D., and that the WCJ
5 incorrectly awarded two separate vouchers, one for each of the two dates of injury, claiming it is an
6 improper double recovery.

7 Applicant filed an answer. The WCJ filed a Joint Report and Recommendation on Petition for
8 Reconsideration (Report), recommending reconsideration be denied.

9 We have considered defendant's Petition for Reconsideration, applicant's answer, and the
10 contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below,
11 as well as the reasons set forth in that Report, which we adopt and incorporate, as our Decision After
12 Reconsideration, we will affirm both F&As.

13 In affirming the WCJ, we address defendant's contention that issuing two separate vouchers
14 constitutes an improper "double recovery" by applicant. The WCJ found applicant sustained two distinct
15 dates of injury: a specific injury on April 16, 2010, and a cumulative trauma injury through April 26,
16 2010. Section 4658.5 provides that if certain conditions are met, injured workers who sustain an
17 industrial injury on or after January 1, 2004 and before January 1, 2013, are entitled to a supplemental
18 job displacement benefit, in the form of a non-transferrable voucher, which can be used to pay for
19 educational retraining or skills enhancement at state approved schools. These conditions are: (1) that
20 the injury causes permanent partial disability; (2) that the employer does not timely offer modified or
21 alternative work; and (3) the employee does not return to work within 60 days after the termination of
22 temporary disability. (Lab. Code §§ 4658.5(b), 4658.6, and Cal. Code Regs., tit. 8, § 10133.5³.) When
23 an applicant qualifies for a voucher, the employer must provide it within 25 calendar days from the
24 issuance of a permanent partial disability award by the WCJ. (Administrative Director Rule
25 10133.56(c).) The purpose of this benefit is to assist injured workers in returning to the work force by
26 providing them with job retraining or skill enhancement options. For injuries prior to January 1, 2013,

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³ All further references to administrative rules are to the California Code of Regulation.

1 the value of a voucher for a given date of injury is determined by section 4658.5(b), using a sliding scale,
2 from \$4,000.00 up to \$10,000.00, depending on the level of permanent partial disability award.⁴

3 The language and provisions of section 4658.5 detailing an applicant's potential entitlement to
4 supplemental job displacement benefits are clear and unambiguous. In construing a statute, our first task
5 is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to
6 the legislative intent, we look no further and simply enforce the statute according to its terms. (*DuBois v.*
7 *Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289].) In this case,
8 given the timing of the dates of injury, section 4658.5 controls and governs applicant's right to potential
9 supplemental job displacement benefits. Section 4658.5(b) and the related Administrative Director's
10 Rule 10133.56(b)(1), discuss eligibility and each refers to "the injury", and provide that if the requisite
11 criteria are met, the employee "shall be eligible" for the benefit. Since the benefit is associated with and
12 triggered by each qualifying "injury", each injury claim is judged on its own merits in terms of
13 applicant's entitlement to a voucher. Given the context of the statutory scheme and the explicit language
14 of the statute and related rule, there is no basis or reason to interpret this section and rule as merging
15 multiple injuries into one for purposes of awarding a single, as opposed to multiple vouchers. In this
16 case, the WCJ found two distinct injuries with separate dates of injury, which resulted in concurrent
17 periods of temporary disability. The second injury also involved a new body part, the left wrist. We
18 interpret the language of section 4658.5 and related Administrative Director Rule 10133.56, to entitle
19 qualifying applicants to a voucher at the applicable value, for each injury they sustain.

20 Defendant's petition cites two cases in support of its argument that applicant is only entitled to
21 one voucher, at the higher rate for which he qualifies, asserting that the award of two is a "double
22 recovery" and a "duplication of benefits," and is therefore an impermissible "unjust enrichment."
23 However, those cases, *Travelers Insurance Co. v. Industrial Accident Commission (Grace)* (1966) 240
24 Cal.App.2d 804 [31 Cal.Comp.Cases 72] and *State Compensation Ins. Fund. V. Industrial Accident*
25 *Commission (Hunter)* (1941) 43 Cal.App.2d 236 [6 Cal.Comp.Cases 52], predate the supplemental job
26

27 ⁴ We note that the Legislature modified the nature of this benefit in SB863 by adopting section 4658.7, applicable to injuries on or after January 1, 2013, although that section does not apply to this case.

1 displacement benefit scheme by decades and do not stand as authority for the proposition argued by
2 defendant.

3 *Grace* involved issues of jurisdiction and associated liability as between two insurance companies
4 when an employment contract was executed in California but applicant was injured in Alaska and three
5 years later filed a workers' compensation claim for that injury in California. The employer's Alaska
6 insurer, Travelers, voluntarily paid workers' compensation benefits to applicant pursuant to Alaskan law,
7 which issued long before applicant filed his claim in California. As part of the resulting California
8 Findings and Award, the WCJ issued a joint and several award as to both Travelers and the employer's
9 California insurer, State Compensation Insurance Fund. the Court of Appeal ultimately rescinded the
10 joint and several award as to Travelers on the basis that its explicit coverage and liability was limited to
11 obligations under Alaska workers' compensation law. Although the court allowed the California insurer
12 a credit for the benefits the Alaska insurer had paid, it concluded that the Alaska insurer's liability
13 pursuant to its policy was limited to obligations under Alaskan workers' compensation law. In short,
14 *Grace* involved a single injury, and not as here, two separate injuries, and it does not stand as authority
15 for the claim that the award of separate vouchers for two distinct and qualifying injuries pursuant to
16 Labor Code section 4658.5, is in any way improper or unlawful.

17 *Hunter* involved duplicated temporary disability awards which covered the same period of time.
18 The WCJ issued the same temporary disability award in each of two cases, without credit, when there
19 was a period of overlapping temporary disability, arising from and related to two different body parts.
20 The Court of Appeal rescinded the duplicate award, holding the temporary disability award payments
21 made in one case should have been credited to defendant in the other on a theory applicant was not
22 entitled to payment for each of two overlapping, identical temporary disability awards covering the same
23 period of time. As with *Grace*, this holding is not relevant to the issue of a defendant's liability for
24 vouchers in separate injury claims. The award of two vouchers, for which applicant separately qualified
25 pursuant to the statutory criteria, and which are meant in part to ameliorate the fact that his injuries
26 precluded him from returning to work with this employer, is in no way equivalent to a case where a
27 credit is denied for duplicate and overlapping temporary disability awards.

1 On the face of the statute, since applicant sustained two separate injuries with qualifying levels of
2 awarded permanent disability, and because in each case applicant did not return to work within 60 days
3 of the termination of temporary disability, and the employer did not offer modified or alternative work
4 within the time frame outlined by Labor Code section 4658.5, he is entitled to the two separate vouchers
5 awarded by the WCJ. To hold otherwise would be to ignore the plain text and meaning of the statute and
6 related rules. Defendant has provided no relevant authority to the contrary. We will therefore affirm the
7 F&As.

8 For the foregoing reasons,

9 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
10 Board, that the Finding and Award in ADJ7812017 issued on October 14, 2014, by the WCJ is
11 **AFFIRMED**, and

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1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board, that the Finding and Award in ADJ7813152 issued on October 14, 2014,
3 by the WCJ is AFFIRMED.

5 WORKERS' COMPENSATION APPEALS BOARD

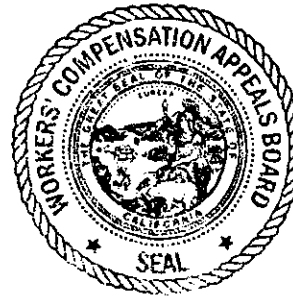
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8 RONNIE G. CAPLANE

8 I CONCUR,

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11 DEPUTY ANNE SCHMITZ



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14 MARGUERITE SWEENEY

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16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 JUL 15 2015

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

- 20 GRAIWER & KAPLAN, LLP
21 MANNING & KASS, ELLROD, RAMIREZ, TRESTER, LLP
22 RUBEN SILVA
STATE OF CA-EDD LOS ANGELES

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24
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27 TR:ebc 

CASE NO.: ADJ7812017- MF; ADJ7813152

RUBEN SILVA

vs.

**LSG SKY CHEFS; LIBERTY
MUTUAL 29073 GLENDALE**

WORKERS' COMPENSATION JUDGE:

JOHN HERNANDEZ

DATES OF INJURY:

**04/16/2010;
CT 04/26/2010 - 10/25/2012**

DATE OF ORDER:

10/14/2014

**DOCUMENT #2
BEGINS HERE**

**JOINT REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

This matter involves an admitted specific injury to the applicant's left shoulder and cervical spine and an admitted continuous trauma injury to the applicant's left shoulder, left wrist and cervical spine. At the time of the specific injury, the applicant was 59 years old and employed as a sanitation worker (Group 340) in Los Angeles, California. By the last day of the CT period, he was 62 years old.

Defendant has filed a timely and verified Petition for Reconsideration of this Judge's Findings and Award dated 10/14/2014. Petitioner asserts that: 1) this WCJ acted without or in excess of his powers, 2) that the evidence did not justify the findings of fact, and 3) that the Findings of Fact do not support the Order.

**II
FACTS**

The facts in this case are for the most part undisputed. The applicant sustained an injury AOE/COE to his left shoulder and cervical spine as a result of the specific and

to his left shoulder, left wrist and cervical spine as a result of the continuous trauma injury. Defendants disputed that applicant's psychiatric and internal medical conditions were AOE/COE.

The parties proceeded to AME's in the field of orthopedics (Clive Segil, M.D.), psychiatry (Arnold Gilberg, M.D.), and Internal (Edward O'Neill, M.D.) After several hearings the matter ultimately proceeded to trial on 05/13/2014. At that time the parties framed the stipulations and issues for trial. At trial, the parties stipulated to a variety of things including: 1) which body parts were admitted and 2) the final rating of the Orthopedic AME report pursuant to *Benson v. Workers' Comp Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], the date the applicant reached MMI status. A multitude of issues were raised, five joint exhibits (all AME reports) were submitted and applicant submitted one sole exhibit, a medical report from the primary treating physician. The matter was submitted on the documentary record and no testimony was provided.

On 07/28/2014 a Joint Order Vacating Submission issued to develop the record on the supplemental job displacement voucher issue. The matter was set for a conference on 08/13/2014. FileNet does not contain the correct Minutes of Hearing for that conference, but it is this WCJ's recollection that the parties stipulated that the employer employed more than 50 employees and the matter was then resubmitted at that hearing.

On 10/14/2014 a Findings and Award in each case issued along with a joint Opinion on decision. It is from this decision that the Petitioner seeks relief.

III DISCUSSION

APPLICANT IS ENTITLED TO THE 3% PAIN ADD-ON AND ADDITIONAL PSYCHIATRIC PD PER THE AME

Petitioner argues that the court erred when it awarded applicant PD based on both the 3% add on for pain related stress and the psychiatric impairment. Defendant cites *Raishell & Cottrell, Inc. v. WCAB* (1967) 249 Cal.App.2d 991, 58 Cal.Rptr.159 for the proposition that as a result of this WCJ's decision applicant has been unjustly enriched and that duplicate benefits have issues. However, *Raishell* decision is not on-point. The *Raishell* court addressed an issue where an applicant settled his case via Compromise and Release and discharged from all liability a number of defendants other than Argonaut Insurance. As an affirmative defense in the proceedings, Argonaut sought to assert the compromise and release applicant executed with the other defendants for the same date of injury as evidence that applicant's claim was barred or was proof of satisfaction of the claim against them. The referee in that case declined to do allow Argonaut the opportunity to present that argument and order Argonaut to pay the full award. At the appeal level, the matter was remanded back to the trial level so that Argonaut would be provided an opportunity to raise collateral issues of fact and law.

This is not the issue in this case. Here, there are two distinct dates of injury. There is no prior settlement either by C&R or Award. In the instant case, the parties stipulated to apportionment of permanent disability between the two dates of injury pursuant to *Benson v. WCAB* (2009) 170 Cal.App.4th 1535. In addition, Petitioner

conveniently fails to mention that the parties *stipulated* to the rating of the orthopedic report which included the 3% add on after taking the Benson decision into account. Specifically, the parties stipulated that pursuant to *Benson*, the AME report of Dr. Segil rated 14% for the specific injury and 20% for the CT after adjusting for age and occupation “before any consideration for potential psyche injury.” (MOH & SOE, 05/13/2014, p. 5, lines 13-17).

Regarding the psychiatric issue, the psychiatric findings were not solely based on the “pain” component as argued by Petitioner. Dr. Gilbert, in his AME evaluation did conduct a battery of psychological testing including MMPI-2, Epworth Sleepiness Scale and a Pain Patient Profile. (Exhibit 4, p.14). According to his evaluation, the applicant showed signs of not only pain but also mild depression (*Id.* at p. 15). In sum, Dr. Gilbert's final opinion was that the applicant had industrial psychiatric causation which was a result of the orthopedic pain *and* sleep problems. (*Id.* at p. 8).

Based on substantial medical evidence this WCJ chose to rate the psyche and orthopedic component by utilizing the combined values chart rather than a simply adding each impairment. Accordingly, utilizing the combined chart, a lower level of disability was reached which this WCJ believes to be a more accurate measure of the applicant's overall level of permanent disability.

APPLICANT IS ENTITLED TO A SUPPLEMENTAL JOB DISPLACEMENT VOUCHER FOR EACH CASE

There is no dispute that there are two dates of injury for this case. Labor Code §4658.5(b) states:

“[I]f the injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability, the injured employee shall be eligible for a supplemental job displacement benefit in the form of a nontransferable voucher allows for a voucher depending on the level of the permanent partial disability award...”

This section allows for the issuance of a voucher based on the level of permanent disability awarded. In the instant case, this court award permanent disability in two distinct cases and at two distinct levels. Accordingly, the applicant is entitled to two vouchers. Pursuant to Petitioner’s argument, if there had been two separate defendants only one would be liable for the voucher. That is not what the law intended. In conclusion, the applicant is entitled to a voucher for each of his injuries based on the levels of permanent disability for each case.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Respectfully submitted,



JOHN HERNANDEZ
WORKERS' COMPENSATION JUDGE

Date: November 13, 2014