

# INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: JOE TRUCE

DATE: February 27, 2002

RE: APPLICATION OF LABOR CODE §4661.5 (INCREASE IN TEMPORARY DISABILITY PAYMENTS EVERY TWO YEARS) TO A 100% PERMANENT DISABILITY AWARD

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In the enclosed decision of the Appeals Board after my Petition for Reconsideration, the Appeals Board addressed the issue of whether or not a permanent and total award (100%) was subject to the two year increase rule pursuant to Labor Code §4661.5, since a 100% award is "payable" at the temporary disability rate.

In the enclosed case of Andrew Jones v. Los Angeles County Metropolitan Transit Authority the Workers' Compensation Judge held that the applicant's 100% permanent disability award was payable at the rate in effect when the benefit was paid (\$490 per week).

However, in our Petition for Reconsideration we argued that a 100% permanent disability award was not subject to the two year increases as provided by Labor Code §4661.5 and contended that the 100% permanent disability award was payable at the maximum temporary disability rate in effect as of the date of injury (\$336 per week).

In reversing the decision of the Workers' Compensation Judge, the Board framed the threshold issue as follows:

**"Since the weekly benefit for a 100% award is paid at the temporary disability rate, the question before us is whether the applicable rate is the rate in effect at the time of injury or the rate in effect when the benefit is paid out."**

In a well-reasoned opinion, the board addressed the clear meaning of Labor Code §4661.5 as follows:

**"...when payment of temporary disability is made two years or more from the date of the injury and the payments represent an amount due for a period of disability within that two year period, the indemnity is paid out in accordance with the law in effect when the payment is actually made, rather than in accordance with the rate in effect on the date of injury. (Hoffmeister v. Workers' Comp. Appeals Bd. (1984) 156 Cal. App. 3rd 848, 49 CCC 438..."**

MEMO TO ALL ATTORNEYS/ALL OFFICES/CLIENTS  
RE: APPLICATION OF LABOR CODE §4661.5  
February 27, 2002  
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In holding that a permanent and total award is payable at the temporary disability rate in effect at the time of injury the Board stated as follows:

**"However, although statutory rate increases are applicable to temporary disability payments paid out two years after an injury, it does not follow that payments of permanent total disability indemnity also increase in a likewise fashion. We previously addressed this issue in Duncan v. The Singer Corporation (1978) 43 CCC 467 (WCAB en banc)..."**

In quoting from Duncan the board observed as follows:

**"The legislature did not say that permanent total temporary disability indemnity is to be considered the same as temporary disability indemnity but rather provided different species of compensation to be paid at the same rates. The legislature further clarified its intent by expressly referring to temporary disability indemnity and permanent total disability indemnity in Labor Code §4453..."**

The board ordered that this case be returned to the Workers' Compensation Judge and that the applicant's attorney's fee be recalculated - on the basis of the reduced rate of \$336 per week for life as opposed to the higher rate of \$490 per week.

WJT:dab  
Enclosure - Andrew Jones decision

cc list attached

WJ

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. LAO 0600973; LAO 0715903;  
LAO 0715908; LAO 0715909

ANDREW JONES,

*Applicant,*

vs.

LOS ANGELES COUNTY METROPOLITAN  
TRANSIT AUTHORITY,

*Defendants.*

OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION

On August 1, 2001, defendant sought reconsideration of the Findings, Award and Order, issued July 20, 2001, wherein the Workers' Compensation Administrative Law Judge (WCJ) found, in pertinent part, that applicant, while employed as a bus operator, sustained industrial injury to his back, neck, psyche, hypertension, diabetes and right leg on June 5, 1992, June 28, 1992, and for a cumulative period from May, 1980 through May 11, 1982, resulting in 100 % permanent disability, with no apportionment, and need for future medical care.

Defendant contended that applicant's heart disability and hypertension should have been apportioned 50 percent to non-industrial causation. In her Report and Recommendation on Petition for Reconsideration (Report) the WCJ recommended that defendant's petition be granted and that the matter be remanded her so that she could continue with the process of rating the injury and preparation of the Opinion on Decision and Findings and Award. On September 24, 2001, we granted reconsideration and rescinded to the WCJ's decision, returning the matter for further proceedings and decision by her.

Subsequently, on November 19, 2001 the WCJ issued her second Findings, Award and Order, in which she reiterated the findings enumerated above, except that she also found that the

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28.2

1 applicant, who was a maximum earner when injured, is entitled to weekly disability payments.  
2 payable at the current temporary disability rate of \$490 per week with a present value of  
3 \$203,323.68. She awarded applicant's attorney a fee of \$30,498.00, to be commuted off each  
4 payment, in the amount of \$52.50 per week, thereby reducing applicant's weekly benefit to a net of  
5 \$437.50.

6 Defendant now seeks reconsideration of the WCJ's November 19, 2001 Findings, Award  
7 and Order. Defendant's current sole contention, however, is that Labor Code Section 4661.5  
8 increases are inapplicable to an award of permanent total disability and that the maximum  
9 temporary disability rate in effect at the time of applicant's 1992 injuries (S336) is the appropriate  
10 rate. We have received no answer from applicant.

11 In her most recent Report, the WCJ states that, on September 27, 1996, the parties  
12 stipulated that applicant was temporarily disabled and was entitled to payments at \$490 per week,  
13 which was the maximum temporary disability rate in effect at that time. Since permanent total  
14 disability is payable at the temporary disability rate, the WCJ concluded that applicant is entitled to  
15 a permanent disability award of 100 % payable at the stipulated \$490 per week amount.

16 Upon careful review of the record, we find that applicant is not entitled to Labor Code  
17 Section 4661.5 increases to his total permanent disability award and that defendant's stipulation to  
18 a temporary disability rate of \$490 does not apply to applicant's permanent total disability award.  
19 Therefore, we will grant reconsideration and return this matter to the trial level for the parties to  
20 readjust applicant's attorney's fee.

## 21 BACKGROUND

22  
23 The WCJ issued an Opinion on Decision on May 12, 1994, finding 60 % permanent  
24 disability to applicant's back, neck, psyche and hypertension. On March 17, 1995, applicant filed a  
25 Petition to Reopen for New and Further Injury, alleging that his condition had deteriorated. WCJ  
26 Young, on March 29, 1996, found that applicant had sustained new and further injury to his neck,  
27 back and bilateral shoulders and was now 67:2% disabled on an industrial basis.

1 In his June 29, 1999 report, Robert Shorr, M.D., (the agreed medical examiner in  
2 neurology) indicated that applicant submitted to mammary artery grafting during July, 1996.  
3 Defendant paid for this, since applicant already had an award of future medical care for his  
4 hypertension. Unfortunately, due to complications during surgery, applicant sustained injury to the  
5 saphenous, posterior tibial and perennial nerves of his right lower extremity. Eventually, he  
6 became wheelchair bound.

7 Applicant filed a second Petition to Reopen for New and Further Disability, on or about  
8 August 12, 1996, alleging that, as result of his nerve damage, his condition destabilized, rendering  
9 him temporarily totally disabled. He also alleged industrial injury to his right lower extremity as a  
10 compensable consequence of his hypertension. On September 27, 1996, the parties stipulated that  
11 applicant was temporarily totally disabled and entitled to temporary disability indemnity at the rate  
12 of \$490 per week, which was the maximum rate in effect for temporary disability at that time.

13 A defense evaluator, Dr. Schapira, found applicant to be permanent and stationary and 100  
14 % disabled as of his June 9, 2000 examination. The parties have stipulated that all of applicant's  
15 injuries became permanent and stationary on that date. They have also utilized agreed medical  
16 examiners in the fields of psychiatry and neurology. In his above-mentioned report, Dr. Shorr also  
17 indicated that applicant was 100 % permanently totally disabled and was precluded from working  
18 in the open labor market.

### 19 DISCUSSION

20 The Labor Code defines "permanent total disability" as "permanent disability with a rating  
21 of 100 % permanent disability only." (Lab. Code Section 4452.5(a).) An injured worker who is 100  
22 % permanently disabled is entitled to weekly indemnity payments for the rest of his life, since he  
23 can no longer compete in the open labor market. Labor Code Section 4659(b) provides that: "[i]f  
24 the permanent disability is total, the indemnity based upon the average weekly earnings determined  
25 under section 4453 shall be paid during the remainder of life." In pertinent part, Labor Code  
26 Section 4453 reads as follows:

27 ///

JONES, A.

1       “(a) In computing average annual earnings *for the purposes of*  
2       *temporary disability indemnity and permanent total disability*  
3       *indemnity only*, [emphasis added] the average weekly earnings shall  
4       be taken at:

5       “....

6       “(4) Not less than one hundred sixty-eight dollars (\$168) for  
7       permanent total disability, and for temporary disability, not less than  
8       the lesser of one hundred eighty-nine dollars (\$189) or 1.5 times the  
9       employee’s average weekly earnings from all employers, nor more  
10      than five hundred four dollars (\$504), for injuries occurring on and  
11      after January 1, 1991.

12      “....

13      “( c) ...[T]he average weekly earnings... shall be arrived at as  
14      follows:

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

19               Labor Code Section 4653 provides that temporary total disability is paid at two-thirds of the  
20      average weekly earnings during the period of such disability. Taken together, Labor Code Sections  
21      4453 and 4653 provide that permanent total disability indemnity is payable to an applicant at the  
22      temporary disability rate, i.e., two-thirds of his average weekly wage, subject to statutory maximum  
23      rates.

24               Since the weekly benefit for a 100 % award is paid at the temporary disability rate, the  
25      question before us is whether the applicable rate is the rate in effect at the time of the injury or the  
26      rate in effect when the benefit is paid out.

27               Labor Code Section 4661.5 provides the following:

      “Notwithstanding any other provision of this division, when any  
      temporary total disability indemnity payment is made two years or  
      more from the date of injury, the amount of this payment shall be  
      computed in accordance with the temporary disability indemnity

1 average weekly earnings amount specified in Section 4453 in effect  
2 on the date each temporary total disability payment is made unless  
3 computing the payment on this basis produces a lower payment  
4 because of a reduction in the minimum average weekly earnings  
5 applicable under Section 4453."

6 Consequently, when payment of temporary disability is made two years or more from the  
7 date of the injury and the payment represents an amount due for a period of disability within that  
8 two-year period, the indemnity is paid out in accordance with the law in effect when the payment is  
9 actually made, rather than in accordance with the rate in effect on the date of the injury.  
10 (*Hoffmeister v. Workers' Comp. Appeals Bd.* (1984) 156 Cal.App.3d 848, 49 Cal.Comp.Cases  
11 438.) Subsequent to December 31, 1989, there have been five statutory rate increases. Currently,  
12 and since July 1, 1996, the maximum rate for temporary disability is \$490.

13 When successive injuries all become permanent and stationary on the same date, and the  
14 dates of injury straddle statutory disability rate increases, the Court of Appeals has held that an  
15 injured worker is entitled to disability payments at the rate in effect as of the last date of injury.  
16 (*Nuelle v. Workers' Comp. Appeals Bd.* (1979) 92 Cal.App.3d 239, 44 Cal.Comp.Cases 439.)  
17 Although *Nuelle, supra* dealt with permanent disability rates, its rule is still applicable here. As  
18 indicated, the parties stipulated that applicant became permanent and stationary for all of his  
19 injuries on June 9, 2000. Applicant's last injury occurred on June 28, 1992, when the temporary  
20 disability maximum rate was \$336. The parties also stipulated, on September 27, 1996, that  
21 applicant was temporarily totally disabled. On that date, the maximum temporary disability rate in  
22 effect was \$490. Consequently, it was appropriate for the parties to "bump up" his temporary  
23 disability payments by paying him \$490 per week, rather than \$336 per week, as more than two  
24 years had elapsed since June 28, 1992.

25  
26 ///

1           However, although statutory rate increases are applicable to temporary disability payments  
2 paid out two years after an injury, it does not follow that payments of permanent total disability  
3 indemnity also increase in a likewise fashion. We previously addressed this issue in *Duncan v. The*  
4 *Singer Co.* (1978) 43 Cal.Comp.Cases 467 (WCAB en banc) in which we noted as follows:  
5

6           "Applicant argues that since the Legislature placed a small class of  
7 workers who are totally and permanently disabled in the same  
8 payment category as those temporarily and totally disabled, Labor  
9 Code Section 4661.5 is applicable to permanent total disability  
10 indemnity. This contention of the applicant is not borne out by the  
11 clear language of the statutes quoted above. Labor Code Section  
12 4659 provides that if the permanent disability is total the indemnity  
13 will be determined under Labor Code Section 4453. The Legislature  
14 did not say that permanent total disability indemnity is to be  
15 considered the same as temporary disability indemnity but rather  
16 provided different species of compensation to be paid at the same  
17 rates. The Legislature further clarified its intent by expressly  
18 referring to temporary disability indemnity and permanent total  
19 disability indemnity in Labor Code Section 4453.

20           "Labor Code Section 4661.5 was passed in 1974 while the other  
21 Code sections referred to above were passed in 1973. Had the  
22 Legislature intended to include permanent total disability indemnity  
23 they would have added the term 'permanent total disability  
24 indemnity' to Labor Code Section 4661.5 in the same manner in  
25 which they have added the term 'permanent total disability  
26 indemnity' to Labor Code Section 4453. Instead the Legislature  
27 chose to specify temporary total disability indemnity in Labor Code  
Section 4461.5, clearly demonstrating its intention that temporary  
disability indemnity and permanent total disability indemnity are not  
interchangeable for the purposes of Labor Code Section 4453."

28           As a general rule, the words of the statute to be construed are the best indication of  
29 legislative intent, especially when the words are clear and unambiguous. (*DuBois v. Workers'*  
30 *Comp. Appeals Bd.* (1993) 5 Cal.4<sup>th</sup> 382, 58 Cal.Comp.Cases 286, 289; *Rhiner v. Workers' Comp.*  
31 *Appeals Bd.* (1993) 4 Cal.4<sup>th</sup> 1213, 58 Cal.Comp.Cases 172, 182.) Inasmuch as Labor Code  
32 Section 4661.5 makes no mention of statutory increases in payment of permanent total disability,  
33

1 but instead only mentions increases in payment of temporary total disability, its language is clear  
2 and unambiguous: permanent total disability payments are not subject to increases.

3 In *Casteel v. Workers' Comp. Appeals Bd.* (1985) 50 Cal.Comp.Cases 589 (writ denied), it  
4 was also held that, although the payment of applicant's temporary disability increased, he was not  
5 entitled to the same increase in his payments of permanent total disability. (See also *Crutcher v.*  
6 *Workers' Comp. Appeals Bd.* (1981) 46 Cal.Comp.Cases 843 (writ denied); *Smith v. Workers'*  
7 *Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 133 (writ denied); and *Tucker v. Workers' Comp.*  
8 *Appeals Bd.* (1979) 44 CalComp.Cases 643 (writ denied.) Similarly, in *Goulart v. Workers' Comp.*  
9 *Appeals Bd.* (1983) 48 Cal.Comp.Cases 296 (writ denied) although expected wage increases at  
10 applicant's employer would result in increases in her temporary disability rate, this did not mean  
11 that her permanent total disability award would also increase.

12  
13 Here, in light of the clear and unambiguous language of Labor Code Section 4661.5, as  
14 well as *Duncan, supra*, and its progeny, we are not persuaded that, when the parties stipulated to  
15 temporary disability payable at \$490 per week, they were also agreeing that applicant's permanent  
16 total disability payments were to be subject to Labor Code Section 4661.5 rate increases.  
17 Accordingly, we find that applicant's permanent total disability payments are to be paid out at the  
18 rate in effect at the time of his 1992 injuries, i.e.. \$336 per week, without future Labor Code  
19 Section 4661.5 increases.

20  
21 Lastly, in finding that that applicant's appropriate permanent total disability rate is \$336,  
22 and not \$490, we note that this will alter the present value of applicant's lifetime award, as  
23 previously calculated by the WCJ and, consequently, it will also alter applicant's attorney's fee. We  
24 will allow an attorney's fee at the same rate as allowed by the WCJ, 15% of the present value, but  
25 to be adjusted by the parties. A Disability Evaluation Specialist can assist the parties in applying  
26 the appropriate formula for a horizontal commutation, or commutation through the award.

27 JONES, A.

1 For the foregoing reasons,

2 **IT IS ORDERED** that reconsideration of the Findings of Fact, Award and Order of  
3 November 19, 2001 be, and it hereby is, **GRANTED**.

4 **IT IS FURTHER ORDERED** that, as the Decision After Reconsideration of the  
5 Workers' Compensation Appeals Board, the Findings of Fact, Award and Order of November 19,  
6 2001 be, and it hereby is, **AFFIRMED**, except that Findings of Fact Numbers (19), (20) and (24)  
7 are **AMENDED** as follows:  
8

9 **FINDINGS OF FACT**

10 .....

11 "(19) Defendants have paid the applicant temporary disability at the rate of \$490.00 per  
12 week plus 10% penalty for a total of \$539.00 per week. The applicant's actual compensation rate  
13 would be at the temporary disability compensation rate in effect on the date of injury or \$336.00  
14 per week for 100% disability. There was a stipulation that the applicant was permanent and  
15 stationary on June 9, 2000, and therefore defendant is entitled to the difference between applicant's  
16 PD compensation rate (\$336.00) and the amount defendant paid (\$539.00) to the applicant with  
17 this amount to be commuted from the weekly payments, effective 6/9/00.  
18

19 "(20) Applicant's injury caused permanent disability of 100%, entitling applicant to an  
20 indemnity rate of \$336.00 per week with a present value to be adjusted by the parties, less  
21 attorney's fees, less PD & TD advances, and less EDD payments, if any, all to be commuted  
22 through the weekly payments in amounts to be adjusted by the parties.  
23

24 .....

25 "(24) The reasonable value of services and disbursements of applicant's attorney is 15% of  
26 the present value of the permanent disability indemnity in an amount to be commuted and adjusted  
27

1 by the parties payable to Diana Sparagna, as well as reimbursement for costs in the civil action,  
2 from the award."

3  
4 WORKERS' COMPENSATION APPEALS BOARD

5  
6 *James C. Cuneo*  
7  
8 JAMES C. CUNEO

9 I CONCUR,

10  
11 *C. Casey*  
12 COLLEEN S. CASEY

13  
14 *William K. O'Brien*  
15 WILLIAM K. O'BRIEN



16 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

17 FEB 04 2002

18 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED  
19 ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

20 csl *Administrative*