

CASE #: D072648

**COURT OF APPEAL, STATE OF
FOURTH APPELLATE DISTRICT
DIVISION ONE**

COUNTY OF SAN DIEGO,)	4th Civil No.
)	
Petitioner,)	(Workers' Compensation Appeals
)	Board No. ADJ7811907)
v.)	
)	
THE WORKERS' COMPENSATION)	
APPEALS BOARD OF THE STATE OF)	
CALIFORNIA; KYLE PIKE,)	
)	
Respondents.)	
_____)	

On Review from an Order of the
Workers' Compensation Appeals Board
State of California

PETITION FOR WRIT OF REVIEW

THOMAS E. MONTGOMERY, County Counsel
County of San Diego
DAVID E. SHAMSKY, Senior Deputy
(California State Bar No. 205027)
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Tel. (619) 531-5649; Fax. (619) 531-6005

Attorneys for Petitioner County of San Diego

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 8.208(e)(3))

The County of San Diego is not an “entity” as defined by Rule 8.208(c)(2).
Nevertheless, the County of San Diego knows of no entity or person that
must be listed under Rule 8.208(e) subsections (1) or (2).

THOMAS E. MONTGOMERY, County Counsel

By: 

DAVID E. SHAMSKY, Senior Deputy
Attorneys for Petitioner County of San Diego
E-mail: david.shamsky@sdcounty.ca.gov

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATES
JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION
ONE:

COMES NOW Petitioner, County of San Diego (hereinafter
“County”), defendant in that certain proceeding entitled “*Kyle Pike v.
County of San Diego*”, Workers’ Compensation Appeals Board case
number ADJ7811907, and requests that a Writ of Review issue in this
matter for the purpose of having this honorable Court review the “Opinion
and Order Denying Reconsideration” (Exhibit 1, hereinafter “Appeals
Board Decision”) issued by the Workers’ Compensation Appeals Board
(hereinafter “Appeals Board”) on July 10, 2017 and by this Petition
respectfully asserts the following grounds for review:

1. The Appeals Board acted without or in excess of its powers;
2. The Appeals Board’s decision is unreasonable;
3. The findings of fact fail to support the decision; and
4. The County has no right of appeal from said Appeals Board
Decision, nor has it any plain, speedy, or adequate remedy other than by
Writ of Review. The County herein is a party beneficially interested in
these proceedings. The parties whose rights will be affected by this
Petition are the Petitioners and Respondents named herein. This Petition is
filed by the County pursuant to the provisions of the California Labor
Code, Division 4, Part 5, Chapter 7, Article 2, section 5950 et. seq., within
the statutory period of 45 days after the issuance by the Appeals Board of
its Opinion and Order Denying Reconsideration.

I. INTRODUCTION

This case presents an important workers' compensation issue relative to the rights and responsibilities of employers and injured workers under Labor Code section 4656(c)(2). The issue can be simply stated as follows: for dates of injury after January 1, 2008, are there any circumstances in which Labor Code section 4656(c)(2) would permit an award of temporary disability for periods exceeding five years after the date of injury? Although this important statute applies to all dates of injury on or after 2008, no binding precedent exists on the important issue presented by this Petition. In the instant case, a Panel of the Appeals Board, while finding for the Applicant, did so in a split 2-1 decision (*see*, Exhibit 1, at p. 5). As this specific issue has not been addressed by binding case law (*en banc* level Appeals' Board decision or higher)¹, this is an important issue which needs appellate clarification.

The pertinent facts are not in dispute. The Applicant suffered an admitted industrial right shoulder injury July 31, 2010. After settling his case by way of Stipulations with Requests for Award and filing a timely Petition to Reopen, he had an additional period of temporary total disability commencing within five years from the date of injury. His temporary total disability from a medical standpoint then continued past the period ending five years from the date of injury. The only issue before the Appeals Board was whether the Trial Judge was correct in finding that County had further

¹ *See*, Appeals Board Decision, which correctly explains that Appeals Board panel decisions are not binding on other Appeals Boards panels or Workers' Compensation judges, but are citable as persuasive authority. (Exhibit 1, n 1.) *See also*, *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, n. 7 (Appeals Board *En Banc*).

liability for temporary disability benefits/Labor Code section 4850 benefits² for periods past five years from the date of injury under Labor Code section 4656(c)(2).

II. QUESTION(S) PRESENTED

Did the Appeals Board err in finding, for a date of injury on or after January 1, 2008, that Labor Code section 4656(c)(2) permits an award of temporary total disability for periods beyond five years from the date of injury, where Applicant timely reopened his case, and the temporary total disability commenced prior to five years from the date of injury?

III. STATEMENT OF MATERIAL FACTS

1. Applicant Kyle Pike (Applicant), while in the course and scope of his employment at the County of San Diego, permissibly self-insured, suffered an admitted injury to his right shoulder on July 31, 2010. (See, Minutes of Hearing dated December 14, 2016, Exhibit 2, at p. 2.)

2. The County paid Labor Code section 4850 benefits to the Applicant for the periods October 27, 2010 to February 20, 2011. (Exhibit 2, at p. 2.)

3. Applicant and the County entered into Stipulations with Request for Award at 12 percent permanent disability. This agreement was approved by the WCAB by way of Award dated May 31, 2011. (Exhibit 2, at p. 3.)

² The parties at trial used temporary disability and 4850 benefits similarly, treating them the same for the purposes of the Application of Labor Code section 4656(c)(2) for the issue at hand. Also, it is settled law that 4850 benefits are included in the aggregate disability benefits which count towards the 104 -week limit in Labor Code section 4656(c)(2). *County of Alameda v. Workers' Compensation Appeals Bd.*, (Knittel) (2013) 213 Cal. App 4th 278, 286.

4. Subsequent to the above stipulations, Applicant timely filed a Petition to Reopen on May 26, 2015. (Exhibit 2, at p. 3.)

5. The County paid additional Labor Code section 4850 benefits for the periods from April 30, 2015 to June 19, 2015. (Exhibit 2, at p. 2.)

6. The parties at trial stipulated that the County had paid all temporary total disability/4850 benefits through the period ending five years from the date of injury. (Minutes of Hearing dated March 22, 2017, Exhibit 3, at p. 2.)

7. Applicant at trial sought additional Labor Code section 4850 and temporary disability benefits for periods after five years from the date of injury, including a claim for Labor Code section 4850 benefits from September 15, 2015 to March 28, 2016, and temporary total disability benefits from March 29, 2016 to August 18, 2016. (Exhibit 2, at p. 3.)

8. The parties agreed to waive testimony and submit the matter on the record at trial on March 21, 2017. (Exhibit 3, at p. 2.)

9. On April 21, 2017, the trial judge issued his Findings, Award and Order; Opinion On Decision (hereinafter "Trial Judge's Decision", Exhibit 4). The trial judge found Applicant was entitled to the additional temporary total disability/Labor Code section 4850 benefits sought. The trial judge reasoned that, as Applicant had filed a timely petition to reopen, and the temporary disability benefits had commenced before five years from the date of injury, the WCAB had continuing jurisdiction under Labor Code section 5410 to award temporary total disability benefits beyond five years from the date of injury, so long as the total temporary disability benefits did not exceed the 104 –week aggregate limit in Labor Code section 4656(c)(2). (Exhibit 4, at pp. 2-4.)

10. On May 10, 2017, the County filed a Petition for Reconsideration (Exhibit 5). While conceding Applicant was medically temporarily disabled during the benefit periods in question, the County

challenged the trial judge's decision, contending Labor Code section 4656(c)(2) prohibited the Award of any temporary disability benefits for periods more than five years from the date of injury (Exhibit 5, at pp. 3-7).

11. On May 24, 2017, the trial judge issued his Report and Recommendation on Petition for Reconsideration (Exhibit 6). The trial judge found, based upon prior case law, and Labor Code section 3202's liberal construction requirements, that "the statutory language of Labor Code section 4656(c)(2) intends to discuss only those benefits that are due and payable within five years from the date of injury. The statute is silent as to what shall occur once the five years have expired. Had the legislature intended otherwise, they could have easily provided that no temporary disability benefits shall be payable more than five years subsequent to an industrial injury." (Exhibit 6, at p. 4.)

12. On July 10, 2017, a panel of WCAB judges issued an Opinion and Order Denying Petition for Reconsideration. Noting a split of non-binding decisions on the issue for dates of injury after January 1, 2008 at the panel level, the Appeals Board, by a 2-1 majority decision, found the [trial judge]... "properly concluded that where the Appeals Board is acting upon a timely filed Petition to Reopen and is exercising the Appeals Boards' continuing jurisdiction..." that the trial judge was "authorized to award temporary disability indemnity within the five year period, to continue until the 104 week limitation is exhausted or applicant's period of temporary disability ends..." (Exhibit 1, at pp. 3-5.)

13. In dissent, Commissioner Razo opined that the language of Labor Code section 4656(c)(2) "is not susceptible of an interpretation that permits an award of temporary disability more than five years after July 31, 2010, the date of applicant's injury." (Exhibit 1, at p. 6.)

14. For completeness sake, it is noted that the Appeals Board issued an “Order Correcting Clerical Error” July 25, 2017 which does not appear to affect the substantive ruling (Exhibit 7).

IV. ARGUMENT AND AUTHORITIES

A. Labor Code Section 4656(c)(2) Specifically and Clearly Prohibits Any Award of Temporary Disability For Periods After Five Years From the Date of Injury.

Labor Code section 4656(c)(2) in its entirety reads as follows:

“Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.”

It is undisputed that the date of injury in this case is July 31, 2010 (and therefore after January 1, 2008). Under a plain reading of the statute, the temporary disability payments “shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.” (Labor Code section 4656(c)(2)).

The trial judge reasoned that Labor Code section 4656(c)(2) was “silent as to what shall occur once the five years has expired. Had the legislature intended otherwise, they could have easily provided that no temporary disability benefits shall be payable more than five years subsequent to an industrial injury.” (Exhibit 6, at p. 4). However, such a reading would render superfluous the legislature’s inclusion of the phrase “within a period of five years from the date of injury.” Legislative intent usually is discerned by “...the words of the statute, because they generally provide the most reliable indicator of legislative intent.” *Hsu v. Abbata*, (1995) Cal. App 4th 863, 871. Had the Legislature intended that 104 weeks

of payments be available regardless of the passage of time since the date of injury, the Legislature would have had no reason to include a date limitation within the statute. Instead, a commonsense reading of the statute reveals two separate and distinct limitations: first, temporary disability payments cannot exceed 104 aggregate weeks (*See*, Labor Code section 4656(c)(2) as well as Exhibit 6, at p. 4.); second, the five-year limitation is stated in absolute language. Accordingly, contrary to the trial judge's interpretation, the statute is not silent on what is to occur after five years, but instead plainly prohibits an Award of Labor Code section 4850 or temporary disability benefits past July 31, 2015.

Stated in other words, Labor Code section 4656(c)(2) contains limiting language. The language purposely dictates the disability payments "shall not extend for more than 104 weeks within a five-year period." (Labor Code section 4656(c)(2).) Had the legislature instead intended the trial judge and Appeals Board's interpretation, the legislature could have provided such payments shall not extend for more than 104 weeks commencing within a five-year period. The legislature put no such language in the statute, and the Appeals Board has not provided a compelling reason to read such a provision into the statute.

B. The History of Labor Code Section 4656 and the Case Law Do Not Justify the Appeals Board Decision.

The recent history of Labor Code section 4656 has been incorporated by the most recent version of the Labor Code. The statutory scheme has different rules for dates of injury, as follows:

[Labor Code] §4656. Maximum period for temporary disability payments:

- “(a) Aggregate disability payments for a single injury occurring prior to January 1, 1979, causing temporary disability, shall not extend for more than 240 compensable weeks within a period of five years from the date of injury.
- (b) Aggregate disability payments for a single injury occurring on or after January 1, 1979, and prior to April 19, 2004, causing temporary partial disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury.
- (c)(1) Aggregate disability payments for a single injury occurring on or after April 18, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.
- (c)(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.”

(Labor Code section 4656(a),(b),(c)(1), and (c)(2).)³

The statutory scheme above shows the changes intended by the legislature. For instance, from 1979 to April of 2004, the limitation allows many more compensable weeks of temporary disability, and applied only to temporary partial disability. For later dates of injury, there was an intentional change to the Statute. Labor Code section 4656(c)(1), dealing with injuries from April 19, 2004 up until January 1, 2008, and 4656(c)(2), applying to injuries occurring on or after January 1, 2008, intentionally

³ Exceptions allowing up to 240 compensable weeks of temporary disability within 5 years for certain types of conditions, are discussed by Labor Code section 4656(c)(3). However, none of those exempt conditions are applicable to the injury at issue.

apply to all types of temporary disability. Furthermore, for the instant case, only Labor Code section 4656(c)(2) is applicable based upon the date of injury. Importantly, however, the Labor Code section, regardless of subsection, expressly outlines the “Maximum Period for Temporary Disability Payments.” (See the heading/title of Labor Code section 4656). Such language expressly applies to all subsections, and, as a result, extending payments past five years under Labor Code section 4656(c)(2) should be considered impermissible. The Appeals Board decision has allowed an Award which extends past the maximum period, and past the period within five years. As stated by the Appeals Board panel’s dissenting opinion, the language in Labor Code section 4656(c)(2) “...is not susceptible of an interpretation that permits an award of temporary disability more than five years after July 31, 2010, the date of Applicant’s injury.” (Exhibit 1, at p. 6.)

The County, and, presumably the Appeals Board, could not locate binding authority (*en banc* level or above decisions) that deals with this exact issue for dates of injury after January 1, 2008. Two lower level cases, which do not have precedential value but do discuss the issue of Labor Code section 4656(c)(2) and the five-year limitation language, appear to conflict. In the case of *Caroline Hardman v Veterinary Centers of America* (2014), ADJ7755855, a WCAB panel found that previous case law correctly found an injured worker could be entitled to temporary disability after five years from the date of injury, for dates of injury prior to January 1, 2008. However, the panel noted that Labor Code section 4656(c)(2) precludes a similar award of said payments after five years from the date of injury for dates of injury after January 1, 2008. (*see, Hardman*, at pp. 2-3). While there is no indication *Hardman* dealt with a Petition to Reopen, the distinction regarding dates of injury pre- and post-January 1, 2008, is instructive. However, *Carrie Spellings v. Pacific Pulmonary Services*

(2015), ADJ8825215, presented a contrary view. In *Spellings*, a WCAB panel found the WCAB, exercising original jurisdiction over a claim for temporary disability pursuant to a stipulation by the parties to continue discovery regarding Applicant's entitlement to temporary disability, could award such benefits past five years from the date of injury.

The County does not dispute that the WCAB may reopen an Award for additional permanent disability, and for additional periods of temporary disability/Labor Code section 4850 benefits, provided they are allowed by the Labor Code. For dates of injury prior to January 1, 2008, applying the applicable subsections of Labor Code section 4656, where a Petition to Reopen is filed and temporary disability commenced within five years of the date of injury, temporary disability could be awarded past five years from the date of injury (*see, Sarabi v. WCAB*, (2007) 151 Cal. App. 4th 920 [72 Cal. Comp. Cases 778, 781-783].) However, these cases use a different set of rules which applied for dates of injury prior to January 1, 2008.

Other cases, dealing with pre-2008 dates of injury, are also distinguishable as they too use a different rule. For instance, in *Oakland Unified School District v. WCAB, (Little)* (2009) 74 Cal. Comp. Cases 1399, the decision turned on Labor Code section 4656(b), applicable to an earlier date of injury. The dates of injury at issue were May 14, 2000 and August 18, 2000. *Id.*, at 1400. *Little* distinguished between temporary partial disability and temporary total disability, noting that then-changes to section 4656 were designed to "eliminate the time limit on awards of total temporary disability" and the limitation applied only to temporary partial disability (*Id.*, at 1400-1401). However, unlike the Labor Code section 4656(b) rules used in *Little*, Labor Code section 4656(c)(2), applicable to the instant matter, does not distinguish between temporary total and temporary partial disability benefits. As a result, Labor Code section

4656(c)(2) intends to bar all temporary disability for periods after five years from the date of injury.

C. Labor Code Section 3202 Does Not Support the Appeals Board Decision.

The Appeals Board, citing the trial judge's decision, notes the liberal construction provisions in Labor Code section 3202 in further support of the finding that Applicant is entitled to additional temporary disability benefits past five years from the date of injury. (Exhibit 1, at p. 4.) However, for the date of injury at issue in this case, Labor Code section 4656(c)(2) intends to and does prohibit all temporary disability benefits more than five years from the date of injury. The concept of liberal construction of the Labor Code cannot supersede the plain language of Labor Code section 4656(c)(2) or proper interpretation of such statutes.⁴

**V.
CONCLUSION**

The issue on review here is a pure legal dispute regarding interpretation of Labor Code Section 4656(c)(2) and the application of the five-year limit in that statute.

The statute uses limiting language and the title of the Labor Code section at issue is "Maximum Period for Temporary Disability Payments." (Labor Code section 4656.) The Appeals Board's Decision awards further Labor Code section 4850 and temporary disability benefits without any binding precedent guiding it to do so. The Appeals Board and the trial judge point to case law using prior statutes in partial support of their

⁴ "...[T]he policy underlying [Labor Code] section 3202 cannot supplant the intent of the Legislature as expressed in a particular statute." *Fuentes v. Workers' Compensation Appeals Bd.* (1976) 16 Cal. 3d 1, 8; (citing *Ruiz v. Industrial Acc. Com.* (1955) 45 Cal. 2d 409, 413 [289 P.2d 229].)

decision. While there is use of non-binding WCAB panel decisions in support as well, to the extent case law addressing pre-2008 dates of injury unaffected by Labor Code section 4656(c)(2) are used, they should not be relied on.

The legislature's intent should be gleaned from the statute itself. Labor Code section 4656(c)(2) expressly states the "aggregate disability payments shall not extend for more than 104 weeks within a period of five years from the date of injury." The statute defines the maximum periods in which temporary disability payments are payable; therefore, the trial judge did not have the authority to exceed those maximum limits. The plain and commonsense reading of Labor Code section 4656(c)(2) is that payments are not to exceed 104 weeks or be paid outside five years from the date of injury. As a result, the Award of Labor Code section 4850 and temporary disability payments should be rescinded.

VI.

PRAYER

1. That a Writ of Review issue from this Court to the Appeals Board, commanding it to certify fully to this Court at a specified time and place, the records of proceedings in this cause, in order that the records of proceedings may be inquired into and determined by the Court and that the matters and record be fully heard and considered by the Court;

2. That following such inquiry and determination by this Court, it be ordered, adjudged, and decreed that the Opinion and Order Denying Reconsideration be annulled, vacated, and reversed;

3. That Petitioner be granted such other and further relief as may be deemed proper and just on the circumstances.

Dated: ~~08/18/2017~~ Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By

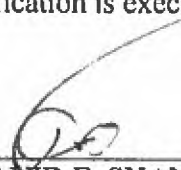


DAVID E. SHAMSKY, Senior Deputy
Attorneys for Petitioner County of San Diego

VERIFICATION

I, DAVID E. SHAMSKY, declare under penalty of perjury that I am an employee of the County of San Diego Office of County Counsel and am authorized to and do execute this Verification for and on behalf of said defendant; that I have read the foregoing PETITION FOR WRIT OF REVIEW, and know the contents thereof; that I am informed and believe that the matters stated therein are true and correct and on that ground, I state that the matters stated therein are true.

I further declare that this Verification is executed on 08/18/2017, in San Diego, California.



DAVID E. SHAMSKY
Senior Deputy County Counsel


CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.201(c)(1), I certify that the text of this brief consists of 3,480 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

DATED: ~~08/18/2017~~ Respectfully submitted,

THOMAS E. MONTGOMERY, County Counsel

By


DAVID E. SHAMSKY, Senior Deputy
Attorneys for Petitioner County of San Diego

PROOF OF SERVICE B'
(CCP 1013a(3) & 2015.

CASE #: D072648

I, ANNE SCHIEVELBEIN, declare that: I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following: **PETITION FOR WRIT OF REVIEW and EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF REVIEW** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Law Offices of Matthew D. Hill
18100 Von Karman Avenue, Ste 850
Irvine, CA 92612
(via U.S. Mail and e-service)

Laura Estrella, WC Adjuster
5530 Overland Avenue, #210
San Diego, CA 92123
(via email)

Workers' Compensation Appeals Board
7575 Metropolitan Drive, 2nd Floor
San Diego, CA 92108
(via U.S. Mail)

Cici McKee, WC Adjuster
5530 Overland Avenue, #210
San Diego, CA 92123
(via email)

Secretary of the Workers' Compensation
Appeals Board
P.O. Box 429459
San Francisco, CA 94142-9459
(via U.S. Mail)

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2016


ANNE SCHIEVELBEIN

Re: Kyle Pike v. County of San Diego
WCAB Case No. ADJ7811907