

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4 **KYLE PIKE,**

5 *Applicant,*

6 vs.

7 **COUNTY OF SAN DIEGO, Permissibly Self-Insured,**

8 *Defendant.*

Case No. **ADJ7811907**  
(San Diego District Office)

**OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

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11 Defendant, County of San Diego, permissibly self-insured, seeks reconsideration of the Findings,  
12 Award and Order, issued April 21, 2017, in which a workers' compensation administrative law judge  
13 (WCJ) awarded applicant, Kyle Pike, additional Labor Code section 4850 salary continuation and  
14 temporary disability benefits over the periods September 15, 2015 to March 28, 2016 and March 29, 2016  
15 to August 18, 2016, respectively. The WCJ held applicant was entitled to receive such benefits pursuant to  
16 a timely filed Petition to Reopen, as his temporary total disability commenced within five years of the date  
17 of his July 31, 2000 industrial injury. The WCJ also held that applicant was limited to 104 weeks of  
18 temporary disability indemnity benefits.

19 Defendant contests the WCJ's award, arguing that Labor Code section 4656(c)(2) expressly  
20 precludes an award of temporary disability more than five years from the date of injury, even though  
21 applicant was temporarily disabled during the periods such benefits were awarded. Defendant contends  
22 that the authority the WCJ cites to justify the award was superseded by the statutory changes to Labor Code  
23 section 4656 that placed a limit on payment of temporary disability benefits more than five year from the  
24 date of injury.

25 No answer has been received from applicant as of the date of this opinion. The WCJ has prepared  
26 a Report and Recommendation on Petition for Reconsideration, in which he recommends that defendant's  
27 petition be denied.

1 For the reasons set forth in the WCJ's Report, which we adopt and incorporate as the decision of  
2 the Board, and as discussed herein, we will affirm the WCJ's determination and will deny the Petition for  
3 Reconsideration.

4 Statement of Material Facts

5 The parties stipulated at a hearing on December 14, 2016, that while applicant was employed as a  
6 Deputy Sheriff Detention on July 31, 2010, he sustained an industrial injury to his right shoulder. Applicant  
7 received a combination of Labor Code section 4850 salary continuation benefits and permanent disability  
8 benefits between October 27, 2010 and November 15, 2011 and April 30, 2015 through June 19, 2015.  
9 Applicant received a Stipulated Award of 12% permanent disability on May 31, 2011, and filed a timely  
10 Petition to Reopen on May 26, 2015.

11 Applicant claimed an entitlement to Labor Code section 4850 benefits for the period September 15,  
12 2015 through March 28, 2016, and temporary total disability benefits from March 29, 2016 through August  
13 18, 2016.

14 Per the parties' March 21, 2017 amendments to their stipulations, defendant paid all temporary  
15 disability and 4850 benefits through the period ending five years from the date of injury.

16 The issue to be determined was whether applicant could receive additional benefits for periods of  
17 temporary disability that extended more than five years from his July 31, 2010 date of injury. The parties  
18 submitted the issue on the record without testimony.

19 As noted above, defendant does not dispute that applicant was temporarily disabled during the  
20 period for which he seeks payment of benefits. Defendant claims that applicant is statutory precluded from  
21 receiving temporary disability benefits more than five years from the date of injury.

22 The WCJ concluded that when acting upon a timely petition to reopen, the Appeals Board may  
23 award temporary disability benefits more than five years from the date of injury, provided that applicant is  
24 limited to an aggregate of 104 weeks of benefits.

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1 Discussion

2 Labor Code section 4656(c)(2) provides:

3 Aggregate disability payments for a single injury occurring on or after  
4 January 1, 2008, causing temporary disability shall not extend for more than  
5 104 compensable weeks within a period of five years from the date of injury.

6 As discussed in the WCJ's Report and Recommendation on Petition for Reconsideration, the WCJ  
7 was exercising the Appeals Board's continuing jurisdiction pursuant to section 5410, based upon  
8 applicant's timely filed Petition to Reopen for New and Further Disability. The WCJ concluded his exercise  
9 of jurisdiction was appropriate to award temporary disability benefits for a period of temporary disability  
10 that commenced within five years of the date of applicant's injury. Where such benefits are initiated within  
11 five years of the date of injury and do not exceed the 104 week limitation on receipt of such benefits, the  
12 WCJ held that applicant is entitled to receive the full amount of benefits notwithstanding the language that  
13 such benefits must be paid "within a period of five years from the date of injury." Because the statutory  
14 language does not provide that no temporary disability benefits may be paid more than five years from the  
15 date of injury, the WCJ concluded that the legislature did not intend to prohibit otherwise temporarily  
16 disabled injured workers from receiving the full 104 weeks of benefits where such temporary disability  
17 occurs within five years from the date of injury.

18 The WCJ's interpretation of the application of section 4656(c)(2) for dates of injury after January  
19 1, 2008, has been embraced by some panel decisions,<sup>1</sup> while others have followed the argument proffered  
20 by defendant and the dissenting opinion. For example, in *Spellings v. Pacific Pulmonary Services* (2014)  
21 ADJ8825215, a panel affirmed an award of temporary total disability that arose within five years of the  
22 date of injury, and extended beyond the five year period, as the parties entered into a stipulation within that  
23 five year period to continue discovery on the issue of applicant's entitlement to temporary disability  
24 indemnity, and the Appeals Board was exercising its original jurisdiction as applicant has not yet received

25 <sup>1</sup> The only discussion of Labor Code section 4656(c)(2) is found in recent Appeals Board panel decisions, which,  
26 unlike *en banc* decisions, are not binding on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp.*  
27 *Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are  
citeable authority and may be considered to the extent their reasoning is persuasive, particularly on issues of  
contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76  
Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209  
Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)



1 For the foregoing reasons,

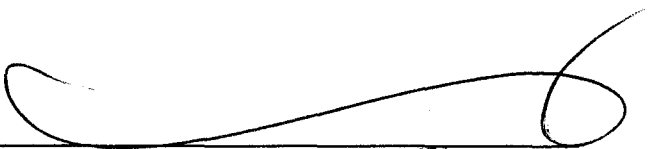
2 **IT IS ORDERED** that the Petition for Reconsideration, filed MAY 10, 2017, is **DENIED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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6 *F. M. Brass*

7 **FRANK M. BRASS**

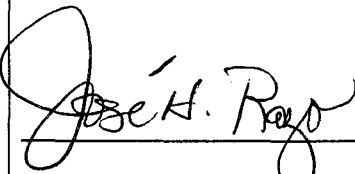
8 **I CONCUR,**

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12 **MARGUERITE SWEENEY**



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14 **I DISSENT (See Dissenting Opinion),**

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18 **JOSÉ H. RAZO**

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

21 **JUL 10 2017**

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

25 **KYLE PIKE**  
26 **MATTHEW HILL**  
27 **COUNTY COUNSEL, COUNTY OF SAN DIEGO**

*CS*

*SV/pc*

1 **DISSENTING OPINION**

2 I dissent. I would grant defendant's Petition for Reconsideration to rescind the award of temporary  
3 disability indemnity. I believe our ability to award temporary disability indemnity is constrained by the  
4 statutory language in Labor Code section 4656(c)(2), which expressly limits such an award to five years  
5 from the date of injury for injuries on or after January 1, 2008.

6 Aggregate disability payments for a single injury occurring on or after  
7 January 1, 2008, causing temporary disability shall not extend for more than  
8 104 compensable weeks within a period of five years from the date of injury.

9 Here, applicant sustained an industrial injury on July 31, 2010, and defendant paid Labor Code  
10 section 4850 salary continuation benefits and permanent disability benefits between October 27, 2010 and  
11 November 15, 2011 and April 30, 2015 through June 19, 2015.

12 Applying the terms of Labor Code section 4656(c)(2), applicant's entitlement to receive temporary  
13 disability "shall not extend for more than 104 weeks within a period of five years from the date of injury."  
14 This language is not susceptible of an interpretation that permits an award of temporary disability more  
15 than five years after July 31, 2010, the date of applicant's injury.

16 Recent panel decisions in *Hardman v. VCA* (2014) ADJ7755855, and *Woods v. North County Fire*  
17 *Protection District* (2016) ADJ10177344, have applied this interpretation of the five year period.

18 In *Hardman*, the panel noted that *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th  
19 920 [72 Cal.Comp.Cases 778], supported jurisdiction to award total temporary disability more than five  
20 years for a pre-2008 injury, when an applicant is continuously temporarily disabled beginning on a date  
21 that is within five years of applicant's injury, but concluded that for a post-2008 date of injury, the language  
22 of section 4656(c)(2) precludes such an award.

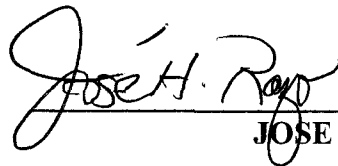
23 In *Woods*, the panel affirmed the WCJ's determination that the five year limitation on payment of  
24 temporary disability applied, where the defendant terminated temporary disability payments on the five  
25 year anniversary of the date of injury. The panel distinguished the *Spellings* panel decision on the grounds  
26 that the parties there stipulated to continue discovery beyond the five year period over whether applicant  
27 was entitled to continue to receive temporary disability indemnity.

Earlier cases that allowed payment of temporary disability more than five years after the date of

1 injury did not address the additional limitation in the current language in Labor Code section 4656(c)(2).  
2 For example, *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920 [72 Cal.Comp.Cases  
3 778] concerned the Appeals Board's power under pre-existing law to award benefits for new and further  
4 disability that arises within five years of the date of injury, while *Oakland Unified School District v.*  
5 *Workers' Comp. Appeals Bd. (Little)* (2009) 74 Cal.Comp.Cases 1399 (writ den.) involved the application  
6 of the limitation on temporary partial indemnity in Labor Code section 4656(b). Neither of these cases  
7 provide authority to override the statutory limitation that applies to all temporary disability for dates of  
8 injury after January 1, 2008.

9 Accordingly, I would grant reconsideration and rescind the WCJ's award of temporary disability.

10 **WORKERS' COMPENSATION APPEALS BOARD**

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13 **JOSE H. RAZO, COMMISSIONER**

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15  
16 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

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23 **COUNTY COUNSEL, COUNTY OF SAN DIEGO** 

24 *SV/pc*