



California Workers' Compensation Institute
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September 16, 2019

Court of Appeal
Sixth Appellate District
333 W. Santa Clara St., #1060
San Jose, CA 95113

**Re: Skelton v. Workers' Compensation Appeals Board
H046249**

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE
SIXTH DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA:

On behalf of the membership of the California Workers' Compensation Institute (acting as *amicus curiae* herein) and pursuant to California Rules of Court 8.1120, I am writing to request that this Honorable Court order publication of the decision in this case, dated September 5, 2019.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$72.1B of annual payroll (31.7% of the state's total annual self-insured payroll). The Institute publishes research that is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI further serves as a liaison with employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal.¹

¹ CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB* (Stuart) (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000); *Lockheed Martin v. WCAB* (McCullough) (2002); *Wal-Mart v. WCAB* (Garcia) (2003); *Honeywell v. WCAB* (Wagner) (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB* (Scheftner) (2005); *Nabors*

The decision in this case is deceptively simple. The Court has applied the Supreme Court precedent of *Dept. of Corrections v. WCAB (Lauher)*,² and enforced the plain language of Labor Code section 4600(e)(1) (providing for indemnity while attending a medical-legal evaluation, as distinct from the treatment appointments at issue herein). Despite the apparent foregone conclusion of the decision herein, this case is nevertheless deserving of publication as a precedential decision.

1. The decision qualifies for publication under Rule 8.1105(c)(5) by applying an existing rule of law to a set of facts significantly different from those stated in published opinions.

In *Lauher*, the Supreme Court held that the injured worker was no longer entitled to TD payments because he was permanent and stationary.³

This pronouncement by the Supreme Court in *Lauher* has been repeatedly misconstrued by parties seeking to gain undue advantage by citing to binding precedent.⁴ Like the injured worker in this case, these parties have pointed to the *Lauher* decision's reference to that particular injured worker's permanent and stationary status – arguing that an

v. WCAB (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State Comp. Ins. Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB (X.S.)* (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker* (2014); *Contra Costa Co. v. WCAB (Dahl)* (2015); *State Comp. Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB (Calif. Dept. of Health Care Services)* (2017); *State Comp. Ins. Fund v. WCAB (Guzman)* (2017); *Co. of San Diego v. WCAB (Pike)* (2017); *Zuniga v. WCAB* (2018); *State Comp. Ins. Fund v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); *King v. CompPartners* (2018); *First Foursquare Church v. WCAB (Austin)* (2018); *City of Petaluma v. WCAB (Lindh)* (2018); *Travelers v. WCAB (Mastache)* (2019); *Co. of Santa Clara v. WCAB (Justice)* (2019); and *Universal Furniture v. WCAB (Morales)* (2019).

² *Dept. of Corrections v. Workers' Comp. Appeals Board (Lauher)* (2003) 30 Cal.4th 1281.

³ *Lauher*, *supra*, 30 Cal. 4th at 1297.

⁴ See, e.g., *Ward v. Workers' Comp. Appeals Bd.* (2004) 69 Cal. Comp. Cases 1179 (writ denied) (WCJ held that *Lauher* did not apply in absence of permanent and stationary status); *Edwards v. Co. of Sacramento*, 2008 Cal. Wrk. Comp. P.D. LEXIS 512 (WCJ found entitlement to wage replacement benefits for time missed from work for medical appointments, where applicant was provided with regular and/or modified work but was not permanent and stationary); *Torres v. Ades and Gish Nurseries*, 2010 Cal. Wrk. Comp. P.D. LEXIS 561 (stating that "[t]he general rule is that compensable temporary disability exists when the employee's injury is not yet permanent and stationary and it is causing a total or partial loss of wages") (emphasis in original).

absence of permanent and stationary status necessarily defeats application of the rule against TD payments for medical treatment appointments.⁵

But as this Court has confirmed in the present case, the Supreme Court made no such limitation. To the contrary, the *Lauher* decision actually cites at least three different bases upon which an injured worker's entitlement to TD indemnity ceases:

[The employer's] obligation to pay TDI ends when the injured employee either returns to work **or** is deemed able to return to work, **or** when the employee's medical condition achieves permanent and stationary status.⁶

As this Court clarifies in the current decision, these conditions are stated in the alternative not the conjunctive. This Court explained that the injured worker here made the same, taken-out-of-context arguments as others before her:

Skelton contended that under [*Lauher*], an employee is entitled to TDI unless the employee has returned to work **and** the employee's injury is permanent and stationary. Because her injury was not permanent and stationary, Skelton argued that she was entitled to compensation, including "full reimbursement of sick and vacation time used," for time spent attending medical treatment with her treating physicians and medical evaluations with the QME.⁷

...

Skelton contends that although she has returned to work full time, she still suffers from an injury that is not permanent and stationary. Under these circumstances, she argues that she is entitled to TDI for wage loss to attend appointments for medical treatment... **[W]e conclude that Skelton was not entitled to TDI after she returned to work full time....**⁸

In rejecting the injured worker's arguments in this case, this Court has confirmed that the correct rule from *Lauher* is that an injured worker is not entitled to TDI for wage loss to attend medical treatment following her return to work – regardless of her permanent and stationary status.⁹ Quoting from *Lauher*, this Court confirmed that:

⁵ Most of these arguments center on the following sentence from *Lauher*: "As we explain, because his industrial injury had become permanent and stationary, he was no longer entitled to receive TDI." These arguments rely on this sentence, taken out of context, and ignore the less favorable aspects of the decision that outline other circumstances that can defeat an injured worker's rights to temporary disability indemnity.

⁶ *Lauher*, *supra*, 30 Cal. 4th at 1292 (emphasis added, citations omitted).

⁷ Sl. Op. at p. 3.

⁸ Sl. Op. at p. 5 (emphasis added).

⁹ Sl. Op. at p. 12.

[A]lthough [temporary disability indemnity] is intended as a wage replacement while the injured worker is healing from his injury, once the injury becomes permanent and stationary and or the employee returns to work, any future benefits authorized by the workers' compensation scheme are not intended as wage replacement.¹⁰

By clarifying this critical distinction directly from *Lauher*, and by providing a full analysis of the oft-repeated, out-of-context arguments, the decision herein qualifies for certification for publication under Rule 8.1105(c)(5).

2. The decision in this case also qualifies for publication under Rule 8.1105(c)(6) because it involves a legal issue of continuing public interest.

As referenced in footnote 4, *supra*, the injured worker's arguments herein are only the latest in a continuing string of cases in which the injured worker has tried to distinguish *Lauher* solely on the basis of whether a permanent and stationary status is present. Indeed, it should be noted that even the Decision After Reconsideration from the Appeals Board included a dissent from one Commissioner, who would interpret *Lauher* as requiring p&s status before entitlement to TDI is denied.¹¹ But that is not what *Lauher* actually stands for, and this case clarifies that point – or, it could if it were published.

If this decision remains unpublished, parties in these continuing challenges will be precluded from citing or relying upon it – even though the decision directly, fully, and finally puts those challenges to rest.

Publication of the Court's decision in this case would put a stop to these unwarranted legal challenges, rather than leaving those arguments open for further litigation and appeals.

Thank you for your consideration of this request.

Very truly yours,

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¹⁰ Sl. Op. at p. 10, quoting *Lauher*, *supra*, 30 Cal. 4th at 1294 (emphasis added).

¹¹ Decision After Reconsideration, dated 8/20/18 (dissent by Commissioner M. Sweeney).