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Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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## Safety Officers Average Weekly Wage Presumption Issues in Post Active Service Injuries

Labor Code section 4458.5 states:

"If a member suffers 'an injury' following termination of active service, and within the time prescribed in Sections 3212, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7 or 3213, then irrespective of his remuneration from any post active service employment, the average weekly earnings for the purposes of determining temporary disability indemnity, permanent total disability indemnity, and permanent partial disability indemnity, shall be taken at the maximum fixed for each such disability, respectively, in Section 4453."

On first read, the statute appears to apply to safety officers whose injuries fall under any of the mentioned presumptions of compensability of injury. Applicant attorneys have made the argument that this statute applies to all injuries sustained by safety officers, regardless of whether the injury falls under one of the enumerated statutes. The WCAB has been asked this question multiple times and a clear split of authority exists. Following is a summary of some cases that have addressed the issue:

### City of Covina v. WCAB (Alvarez) 67 Cal.Comp.Cas. 1044 (2002)

Applicant, a police officer, voluntarily retired from employment. He suffered a stroke, which the AME stated was the sequela of his hypertension. The WCJ found the applicant was not entitled to temporary disability and that the applicant's stroke was not



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"heart trouble" under the presumption of Labor Code section 3212.

The WCAB reversed the trial judge and focused on whether the applicant's period of temporary disability was caused by an injury that allowed him the maximum rate under Labor Code section 4458.5. The court first found that the applicant's injury was presumed compensable under Labor Code section 3212.5. The WCAB went on to state that even if the applicant's injury did not fall under Labor Code section 3212.5, he would still enjoy a maximum temporary disability rate under section 4458.5. The WCAB felt that the intent of the legislature was to mention the presumptive statutes only to incorporate the time provisions, which are 60 months post-retirement. According to the WCAB nothing in the language of section 4458.5 expressly provided that the benefits are limited only to those retired active members whose injuries are presumed under the presumptive statutes. Defendant's Writ for review was denied.

**Bachant v. City of Fresno 2007 Cal. Wrk. Comp. P.D. LEXIS 96**

Applicant, a firefighter, voluntarily retired for non-disability reasons. Nine years after retirement, he was diagnosed with cancer, which was determined to be industrial in nature. The judge found that Labor Code section 4458.5 applied and the applicant was entitled to maximum permanent disability rates.

The WCAB reversed and held that even though applicant's injury could have fallen under Labor Code section 3212.1, since it is not mentioned in section 4458.5, the applicant was not entitled to maximum benefits under the statute. Moreover, the applicant was well beyond the 60 month timeframe for which section 3212.1 would apply.

**Goslin v. City of Avalon 2009 Cal. Wrk. Comp. P.D. LEXIS 121**

Applicant, a firefighter, sustained injury to his heart, as well as lung cancer and hypertension. His date of injury as found by the WCJ was 4 years after his retirement. The judge found that the applicant's earnings at the time of injury were statutorily maximum.

Defendant, represented by Trovillion, Inveiss & Demakis partner Daniel Trovillion, filed for reconsideration, contending that the judge erred in applying Labor Code section 4458.5 because the presumption of Labor Code section 3212.1 is not expressly enumerated in the statute, and that applicant's

earnings must be taken at minimum for purposes of awarding permanent disability.

The WCAB agreed with defendant's contention and held that because section 3212.1 was not mentioned as an enumerated statute in section 4458.5, the applicant could not avail himself to its benefits of maximum permanent disability rates. The applicant's rate was taken at the time of injury, which was found to be at statutory minimum. The Board narrowly interpreted section 4458.5 to only apply to applicants that are within the specific statutes mentioned.

**Sillers v. City of Pleasant Hill 2018 Cal. Wrk. Comp. P.D. LEXIS 77**

Applicant, a police officer, sustained injuries to his cervical spine, lumbar spine, and bilateral cubital carpal tunnels. The judge further found that the applicant was entitled to the statutory maximum permanent disability rate pursuant to Labor Code section 4458.5. Defendant petitioned for reconsideration.

The WCAB, in a split panel decision, upheld the findings of the judge with respect to Labor Code section 4458.5. The commissioners found that the *Alvarez* holding was controlling. They concluded that in the absence of clear and unambiguous legislative intent, they were bound to liberally construe Labor Code section 4458.5 in favor of the applicant. The dissenting commissioner opined that the holding that the majority adhered to was dicta. The commissioner found *Goslin* and *Bachant* to be controlling.

**City of Pinole v. WCAB (Field) 2018 Cal Wrk. Comp. LEXIS 130**

Applicant, a firefighter, was taken off work with an industrial heart condition. He went on disability retirement before returning to work. He then claimed injury to his bilateral upper extremities in the form of carpal tunnel syndrome and the date of injury was shown to have occurred after the applicant's retirement. The applicant argued that under *Alvarez*, he should be entitled to the maximum permanent disability rate. The WCJ found that the applicant was not entitled to the maximum permanent disability rate as his orthopedic injuries did not fall under the presumptive statutes cited in Labor Code section 4458.5.

The WCAB, in a split panel decision, reversed the WCJ. The majority finding the *Alvarez* case controlling, adopted the interpretation of the statute that stated that the mention of the

presumptive statutes by the legislature was merely to incorporate the time periods in these statutes, not make section 4458.5 applicable only to public safety officers whose claims are presumed industrial under the mentioned statutes. As the commissioners found that the legislative intent was not clear, Labor Code section 3202 mandates liberal interpretations of the Labor Code in favor of the injured worker.

The dissenting commissioner opined that Labor Code section 4458.5 did not apply here. She agreed with defendant that the language that applicant and the majority relied on from *Alvarez* was dicta and therefore not controlling. The commissioner instead found the *Goslin* and *Bachant* cases more persuasive and would follow those holdings. Defendant's writ for review was denied.

### **Conclusion**

Review of these cases reveals a clear and recent shift on the part of the WCAB commissioners towards holding that any injury involving a retired safety officer with no proof of post-retirement earnings, presumed compensable or not, qualifies for maximum disability rates pursuant to Labor Code section 4458.5. Commissioner Deidra Lowe was the lone dissent in both of the 2018 cases.

It is important to note that none of the above cases are *en banc* or designated a significant panel decision. Thus, a workers' compensation judge is not bound by the holding of any of these cases. Defendants in cases involving a retired safety officer with no earnings at the time of injury should continue to rely on *Goslin* and *Bachant* rather than *Alvarez*, *Sillers*, and *Field*. Defendants should continue to focus on the argument that the holding in *Alvarez* was dicta as the applicant's injury fell under the presumption and any further discussion by the WCAB had no bearing in the outcome of the case.

Until the WCAB takes up the issue *en banc*, the Court of Appeal finally grants a Writ of Review, or the legislature clarifies the statute, the workers' compensation judge can decide to follow the holdings of any of the above cases.

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