

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

DIANA Y. ADAMS
CHIEF DEPUTY CITY ATTORNEY

ROXANNE STORY PARKS
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: January 4, 2016

TO: Julio Canizal, Director, Risk Management Department
Estella Montoya, Deputy Director, Risk Management Department
Jill Degnan, Workers' Compensation and Insurance Manager

FROM: City Attorney

SUBJECT: Payment of Workers' Compensation Benefits to Public Safety Officers
Retiring Out of the Deferred Retirement Option Program

BACKGROUND

The issue addressed in this memorandum is what, if any, workers' compensation benefits¹ are available to a firefighter, police officer, or lifeguard who completes five years in the City of San Diego's Deferred Retirement Option Program (DROP), and is required to retire. Police officers and lifeguards must retire from City service at the end of their five-year DROP periods. San Diego Municipal Code (Municipal Code or SDMC) §§ 24.1402(b)(8), 24.1403(b)(1). But, firefighters have the option of remaining in DROP beyond five years, while they run out their unused annual leave accrued after June 30, 2002 (DROP Terminal Leave). SDMC § 24.1403(b)(1). All City employees (including firefighters) are prohibited from returning to City service after completing five years in DROP.

QUESTIONS PRESENTED

1. Is a police officer or lifeguard who has completed five years in DROP, or a firefighter who is running out DROP Terminal Leave, eligible to take a leave of absence without loss of pay under California Labor Code (Labor Code) section 4850?
2. If not, is the firefighter, police officer, or lifeguard eligible to receive temporary total disability (TTD) benefits under Labor Code section 4653 while he or she is receiving a service or disability retirement, or in the case of a firefighter, running out his or her DROP Terminal Leave?

¹ The workers' compensation benefits discussed in this memorandum include California Labor Code sections 4850 (leave of absence without pay) and 4653 (temporary total disability benefits).

3. May an employee who is granted an industrial disability retirement based on the same injury that qualifies the employee for TTD benefits, receive both benefits simultaneously?

SHORT ANSWERS

1. Once a firefighter, police officer, or lifeguard completes his or her five-year DROP period, he or she is no longer entitled to “full pay” benefits under Labor Code section 4850. This is true even as to a firefighter who is running out DROP Terminal Leave. Labor Code section 4850 provides for a “leave of absence” during the period of disability without loss of salary, in lieu TTD payments. The courts have held that a “leave of absence” under Labor Code section 4850 contemplates that the employee will return to work after his or her period of disability. Since an employee who has completed five years in DROP is legally prohibited from returning to work, the employee would no longer be eligible for Labor Code section 4850 benefits.

2. Although a firefighter, police officer, or lifeguard who has completed DROP is no longer eligible for benefits under Labor Code section 4850, he or she may still be eligible to receive TTD benefits while receiving either DROP Terminal Leave or service retirement benefits. An employer cannot take a credit for workers’ compensation benefits against an employee’s earned annual leave. Annual leave is payment for past services that the employee has already earned. The employee would also be eligible for TTD benefits after he or she begins receiving his or her service retirement benefits, provided the employee remains disabled and can prove he or she intended to stay in the labor market after retirement. To qualify for TTD benefits, an employee must establish by a preponderance of the evidence that he or she intended to remain in the labor market after retiring from the City.

3. Absent a statutory or contractual provision prohibiting employees from receiving workers’ compensation and disability retirement benefits concurrently, or requiring an offset of workers’ compensation benefits against disability retirement benefits, an employee who qualifies for both benefits based on the same injury is entitled to receive both benefits.

ANALYSIS

I. A FIREFIGHTER, POLICE OFFICER OR LIFEGUARD WHO COMPLETES FIVE YEARS IN DROP IS NOT ELIGIBLE TO CONTINUE RECEIVING BENEFITS UNDER LABOR CODE SECTION 4850.

Under Labor Code section 4850, when a regular, full-time, “city, county or district firefighter” is disabled “by injury or illness arising out of and in the course of his or her duties,” he or she is “entitled to a leave of absence . . . without loss of salary in lieu of temporary disability payments . . . for the period of the disability.” Labor Code section 4850 also applies to “City police officers” and “Lifeguards employed year round on a regular, full-time basis by a county of the first class or by the City of San Diego.” Cal. Lab. Code §§ 4850(b)(1), (b)(2), (b)(9).

Case law has interpreted the phrase “leave of absence” to mean that the employee is expected to resume the employment relationship after his or her period of disability. *Collins v. County of Los Angeles*, 55 Cal. App. 3d 594, 597 (1976). A “leave of absence” is defined as a temporary absence from duty with the intention to return. *Id.*, citing *McCoy v. Board of Supervisors*, 18 Cal. 2d 193, 198 (1941), and Black’s Law Dictionary 1036 (4th ed. 1951). If an employee unconditionally ends the employment relationship, he is not eligible for a leave of absence under Labor Code section 4850 or otherwise. *Id.* at 597. Thus, an employee who resigns and defers his retirement is not entitled to a leave of absence under Labor Code section 4850. *Id.* at 598. Section 4850 benefits are also not awarded for a period of disability that occurs after a nonmedical resignation, either voluntary or involuntary. *County of San Mateo v. Workers’ Comp. Appeals Bd. (Warren)*, 133 Cal. App. 3d 737, 745 (1982).

A police officer or lifeguard at the end of his or her five-year DROP period must retire. SDMC § 24.1403(b)(1). A firefighter at the end of DROP must either retire or begin receiving his or her DROP Terminal Leave. *Id.* Before entering DROP, an employee must sign an agreement to leave City employment on or before the end of five years (extended DROP Terminal Leave, in the case of a firefighter). SDMC § 24.1402(b)(8). Once the employee completes his or her five years in DROP, he or she is no longer eligible to return to work. After an employee retires, the City cannot pay the retired employee for any service rendered as an officer or employee of the City, except as a non-benefited hourly employee for a maximum of 90 days per fiscal year, or an elected officer. SDMC § 24.1001. Therefore, as of the date a public safety officer completes five years in DROP, he or she is no longer entitled to benefits under Labor Code section 4850 because the public safety officer is legally prohibited from returning to work for the City.

II. INJURED WORKERS ON WORKERS’ COMPENSATION LEAVE MUST RECEIVE THE SAME PAY AND BENEFITS AS NON-INJURED WORKERS TO AVOID DISCRIMINATION.

Employers must give injured employees the same benefits they would have received if they hadn’t been injured to avoid discrimination. Under Labor Code section 4850, an eligible firefighter, police officer, or lifeguard is entitled to a leave of absence for up to one year “without loss of salary.” In the phrase “without loss of salary,” the term “salary” includes sick pay and other fringe benefits to which an employee is entitled. *Los Angeles County Prof. Peace Officers’ Assoc. v. County of Los Angeles*, 115 Cal. App. 4th 866, 870 (2004), citing *Mannetter v. County of Marin*, 62 Cal. App. 3d 518, 524 (1976). Based upon this provision, and equal protection rights under the Fourteenth Amendment to the U.S. Constitution and Labor Code section 132a, the courts are concerned with whether an injured worker has been deprived of any benefits he would have received had he not become disabled. To make this determination, the courts will generally look to employment contracts, policies and past history. For instance, the investigators in the Los Angeles County District Attorney’s Office sued the county and the county’s retirement system claiming that an employment policy prohibiting employees on work-related disability leaves from cashing out excess vacation time constituted unlawful discrimination under Labor Code section 4850. Had the injured investigators been allowed to cash out their leave, the pensionable salary used to calculate their retirement benefits would have been increased.

The court concluded there was no discrimination against the injured investigators, because the District Attorney's Office attempted to have all its employees take enough vacation time each year to keep their accrued vacation under the established limit. Cash-outs of unused excess vacation time occurred in only a few exceptional cases. The court held that under these circumstances, granting disabled employees the right to cash out excess leave would not cure discrimination, but would grant those employees additional benefits which nearly all of the nondisabled employees would not receive. *Los Angeles County Prof. Peace Officers' Assoc.*, 115 Cal. App. 4th at 873.

In contrast, four years later, the same court found discriminatory Los Angeles County's policy denying deputy sheriffs the option of cashing out accrued vacation pay when they retired immediately following a paid disability leave. *Los Angeles County Prof. Peace Officers' Assoc. v. County of Los Angeles*, 165 Cal. App. 4th 63 (2008). Unlike the previous case involving the investigators, the county had no policy or practice of forcing the deputy sheriffs who weren't on disability leave to use their excess hours. The court found that the county compensated deputies who retired following a Labor Code section 4850 leave differently for their excess vacation hours, than it did either non-injured deputies or deputies who returned to work after their disability leaves, and that this reduced pensionable income for deputies retiring after a Labor Code section 4850 leave.

These principles apply to City benefits, including the DROP program. All participants in the City's DROP program, regardless of workers' compensation status, must retire from City service after a maximum of five years in DROP (extended by DROP Terminal Leave in the case of firefighters). They must agree to do so in writing before they begin participating in DROP. As with all employees who participate in DROP, employees receiving workers' compensation benefits cannot return to City service after completing five years in DROP. The section 4850 salary continuation benefit is contingent on an employee remaining in City employment. There is no discrimination against injured workers in terms of DROP benefits if the City stops section 4850 benefits when an employee completes a DROP contract.

III. A FIREFIGHTER, POLICE OFFICER, OR LIFEGUARD IS STILL ELIGIBLE FOR TEMPORARY TOTAL DISABILITY BENEFITS AFTER HIS OR HER DROP PERIOD ENDS, IF HE OR SHE INTENDED TO PURSUE OTHER WORK IN THE LABOR MARKET AFTER RETIREMENT.

Temporary total disability benefits are awarded to employees who are temporarily unable to work at their jobs during the period of medical recovery after an industrial injury. The TTD benefits help replace lost income. Cal. Lab. Code §§ 4650, 4652; *Chavira v. Workers' Comp. Appeals Bd.*, 235 Cal. App. 3d 463, 473 (1991). The purpose of the TTD benefit is to provide wage replacement. *Dept. of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)*, 30 Cal. 4th at 1291.

Under Labor Code section 4653, if an injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of the disability, with consideration being given to the ability of the injured employee to compete in the market. The amount of the weekly TTD benefit is subject to a cap, which changes yearly according to the amount of the state average weekly wage. Cal. Lab. Code §§ 4653, 4453(a)(10). Temporary disability benefits are generally paid to employees until their medical condition becomes permanent and stationary, or until they return to work or are deemed able to return to work. *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)*, 30 Cal. 4th 1281, 1291 (2003). In addition, there are caps on the length of time TTD benefits are paid. The length of time depends of the date of injury; currently the maximum period is 104 weeks within a period of five years from the date of injury. Cal. Lab. Code § 4656.

Temporary total disability benefits are generally not owed if the injured worker has retired for all purposes from the labor market. If the worker is not willing to work, then the earning capacity is zero. *Gonzales v. Workers' Comp. Appeals Bd.*, 68 Cal. App. 4th 843, 848 (1998). However, if the job-related injury causes the worker to retire for all purposes or interferes with plans to continue working elsewhere, then benefits are owed. *University of Southern California v. Workers Comp. Appeals Bd. (Miller)*, 48 Cal. Comp. Cas. 477 (1983). The worker may establish by preponderance of the evidence an intent to pursue other work interrupted by the job-related injury. Cal. Lab. Code §§ 3202.5, 5705; *West v. Industrial Acc. Com.*, 79 Cal. App. 2d 711, 726 (1947) (burden on worker to explain reason for periods of unemployment). To determine whether the injured worker intended to work elsewhere after retirement, the courts will look at the worker's ability to work, age and health, willingness and opportunity to work, skill and education, and the general condition of the labor market. *Argonaut Ins. Comp. v. Ind. Acc. Com. (Montana)*, 57 Cal. 2d 589, 595 (1962).

The purpose of the TTD benefit is to provide wage replacement. *Dept. of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)*, *supra*, 30 Cal. 4th at 1291. There is a question of whether an employee may collect TTD while receiving terminal leave payments, which are paid in the same manner as salary. Sick leave and vacation time are contractual benefits earned by the employee, and the employer's liability for workers' compensation cannot be reduced or affected by other benefits due to or received by the employee, except as the Labor Code provides. Cal. Lab. Code § 3752.

An employer is not relieved of the obligation to pay disability indemnity during a period that the employee uses accrued sick leave or vacation time. Cal. Lab. Code § 3752; *Oddone v. Hotel Oakland*, 9 Cal. Comp. Cas. 117 (1943). In *Oddone v. Hotel Oakland*, the Industrial Accident Commission (precursor to the Workers' Compensation Appeals Board), held that an employee was entitled to TTD benefits during a vacation period because the vacation pay was earned before the period of disability and therefore could not be used as an offset against disability indemnity.

In another case, the City of Santa Monica deducted a day of accumulated sick leave for each day that workers' compensation was paid. The court found that the city took from the plaintiff a part of his compensation for services, thereby compelling him to contribute to his Labor Code section 4850 workers' compensation benefits in violation of Labor Code sections 3751 and 3752.² The court reasoned that sick leave, like wages payable in money, is earned simply by remaining in the service of the city and is proportioned to the length of service. Attempting to take away sick leave benefits already earned by continuous service is in direct violation of Labor Code sections 3751 and 3752. All earnings and benefits to which the employee is entitled must be paid to him without deduction, either directly or indirectly, to cover the whole or any part of the cost of workers' compensation. *Austin v. City of Santa Monica*, 234 Cal. App. 2d 841, 845-46 (1965). Therefore, a firefighter receiving DROP terminal leave benefits is being remunerated for past service. Pursuant to sections 3751 and 3752, the City cannot terminate the DROP terminal leave or the temporary disability benefit when both are owed to the employee.

Even when an employee has begun receiving a pension, he or she may still be eligible to receive TTD benefits. Employees may continue to receive TTD benefits after they retire, so long as they intended to stay in the labor market. *Gonzales v. Workers' Comp. Appeals Bd.*, 68 Cal. App. 4th 843, 850 (1998).

In a recent case, the Fourth District Court of Appeal held that the plaintiff was not precluded from receiving TTD concurrently with his or her disability pension under the County Employees Retirement Law of 1937 (CERL). *Porter v. Bd. of Ret. of the Orange County Employees Ret. Sys.*, 222 Cal. App. 4th 335, 350 (2013). The issue in that case was the effective date of plaintiff's disability retirement. Plaintiff wanted her retirement to start after her last day of full pay; the County wanted it to start after her last day of TTD. The court found for the plaintiff and noted that "when annual leave is taken as time off, the employee simply continues to receive regular salary or wages without the necessity of performing services. Receipt of that pay is part of the employee's remuneration for past services and is compensation." *Id.* at 341, quoting *Ventura County Deputy Sheriffs' Assoc. v. Bd. of Ret. of Ventura County Employees' Ret. Assoc.*, 16 Cal. 4th 483, 497 (1997). But, compensation under the Workers' Compensation Act is not synonymous with wages or salary for services performed. While salary is payment for work done, workers' compensation benefits are indemnification for injury sustained. *Porter*, 222 Cal. App. 4th at 342, citing *Burnelle v. Continental Can. Co.*, 193 Cal. App. 3d 315, 320 (1987).

Thus, a firefighter, police officer, or lifeguard may be entitled to TTD benefits while receiving either DROP Terminal Leave (in the case of a firefighter) or a pension, provided the employee intended to stay in the labor market after retiring from the City. The amount the employee receives will be determined by the amount of the employee's wages, with a maximum cap, and the length of time benefits are paid will be determined by the employee's doctor, until the employee reaches the maximum length of time under the Labor Code.

² Labor Code sections 3751 and 3752 forbid the employer from receiving from the employee any contribution, or taking any deduction from the earnings of any employee, to cover the cost of workers' compensation benefits.

Finally, there is no prohibition against an employee from receiving both workers' compensation benefits and disability retirement benefits concurrently.

IV. A CITY EMPLOYEE MAY CONCURRENTLY RECEIVE BOTH INDUSTRIAL DISABILITY RETIREMENT BENEFITS AND TTD BENEFITS BASED ON THE SAME INJURY, BECAUSE THERE IS NO RETIREMENT PLAN PROVISION THAT EXPRESSLY PROHIBITS IT.

Absent a statutory or contractual provision prohibiting employees from receiving workers' compensation and disability retirement benefits concurrently, or requiring an offset of benefits, an employee who qualifies for both benefits based on the same injury is entitled to both benefits.

In *Porter v. Bd. of Ret. of the Orange County Employees Ret. Sys.*, 222 Cal. App. 4th 335 (2013), the defendants argued that the State appellate courts have repeatedly held that a city may protect itself against paying twice (through workers' compensation benefits and its own retirement system) for the same industrial disability. The court noted that the general policy is against double recovery for permanent disability, but only when the charter or statutory provisions expressly so provide. *Id.* at 348-49. It was the employer's obligation to produce a charter, statutory or contractual provision preventing double disability payments to the same person. *Id.* at 349. Since the employer did not produce any such provision, the court concluded that "plaintiff is not precluded in this case from receiving temporary total disability concurrently with her disability pension . . ." *Id.* at 350.

For a brief period of time, the City's retirement plan provided that industrial disability retirement benefits could not be paid cumulatively with workers' compensation benefits. Municipal Code section 24.0515 was enacted on August 28, 1978, by San Diego Ordinance O-12430. For employees hired on or after October 1, 1978, it mandated that workers' compensation benefits be offset against disability retirement benefits, stating that disability retirement and workers' compensation benefits could not be cumulative. However, this provision was repealed as to safety members effective December 7, 1987, and as to general members effective July 1989. With respect to safety members, Municipal Code section 24.0515 currently states:

[T]he requirement to set off any compensation received in the nature of workers compensation shall not be applicable to safety members from and after January 1, 1988. All set-off requirements and actions previously imposed upon safety members pursuant to this section, shall, as of January 1, 1988 be discontinued such action to be prospective only.

Since the City currently has no provision requiring an offset of workers' compensation benefits against disability retirement benefits, there is nothing to prevent an employee from receiving both benefits concurrently.

CONCLUSION

A firefighter, police officer, or lifeguard who has completed DROP must retire from City service, and is no longer eligible for Labor Code section 4850 salary continuation benefits, because the employee is no longer on a leave of absence with the intent to return to City service. Although firefighters may elect to run out DROP Terminal Leave at the completion of DROP, they are not eligible for Labor Code section 4850 benefits while on DROP Terminal Leave for the same reason.

Safety officers are eligible for TTD benefits while receiving DROP Terminal Leave, or a service or disability pension, provided they intend to remain in the labor market after retirement. TTD benefits terminate when a medical doctor determines the injured worker is eligible to return to work or is permanent and stationary. In addition, section 4656 also imposes maximum periods for TTD payments, which depend on the date of injury. Courts will look at employment contracts, policies, and past history to determine whether an injured worker has been deprived of any benefits he or she would have received had the employee not become disabled.

JAN I. GOLDSMITH, City Attorney

By /s/Diana Y. Adams
Diana Y. Adams
Chief Deputy City Attorney

By /s/Roxanne Story Parks
Roxanne Story Parks
Deputy City Attorney