WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ARACELI URIBE, *Applicant*

vs.

TRI-STATE EMPLOYMENT SERVICES and CIGA for LUMBERMAN'S UNDERWRITING ALLIANCE, in liquidation, by its servicing facility, INTERCARE, AND TREASURY WINE ESTATES AMERICAS AND SENTRY INSURANCE, *Defendants*

Adjudication Number: ADJ10822761
Santa Rosa District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Pursuant to our authority, we accept applicant's supplemental pleading. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We caution applicant that "[a] party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading." (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) We expect applicant to comply with this requirement in the future.

By virtue of this decision, the caption of the February 22, 2021 Findings, Order and Award is corrected to reflect that the third-party administrator for CIGA is Intercare Claim Services and not Sedgwick Claims Management Service, Inc.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 13, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

ARACELI URIBE
WRIGHT & FALLS
MULLEN & FILIPPI
PATRICO HERMANSON & GUZMAN

PAG/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *o.o*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Applicant, Araceli Uribe, acting through her attorney Grady Wright, filed a timely, verified Petition for Reconsideration challenging the Findings and Award dated February 21, 2021. An Amended Petition for Reconsideration was filed on March 22, 2021.

Ms. Uribe suffered an industrial injury on August 24, 2014 to her left wrist, forearm and elbow, during the course of her employment as a bottling line temp worker for the general employer, Tristate Employment Services/Accountabilities and special employer, Treasury Wine Estates. The applicant sustained an injury when her left hand was caught in a machine during an earthquake. She was age 37 on the date of injury.

In a Findings, Order and Award dated February 21, 2021, the undersigned WCJ found the applicant's injury caused 35% permanent disability and the weekly rate was $239.67 based on her actual earnings at the time of injury. There was insufficient evidence to support a higher average weekly wage and permanent disability rate consistent with Labor Code §4453(c)(4).

Petitioner contends:

a. Applicant's earnings at the time of injury are not a reasonable or accurate reflection of her earning capacity for purposes of calculating her permanent disability rate given her total work history. (Petition, p. 3, line 21-p. 6, line 25.)

II.

FACTS

Applicant sustained an injury to her left wrist, forearm, and elbow on August 24, 2014 during the course of her employment as a temporary bottle line worker for the general employer, Tristate Employment Services/Accountabilities and the special employer, Treasury Wine Estates. The injury occurred while the

applicant's hand got jammed in a bottling machine.

The defendant subsequently paid temporary disability benefits commencing on August 26, 2014 through July 18, 2016 at the weekly rate of $271.27. (Def, CIGA Exh. H.) Permanent disability was paid at the weekly rate of $239.67 for over three years, from July 19, 2016 through August 14, 2019. (Def. CIGA Exh. G.) At trial, the parties stipulated that the employee has been adequately compensated for all periods of TD claimed through the present. (MOH, p. 2)

The permanent disability rate was derived from the applicant's wage statement. (Def. CIGA Exh. I.) The period spam1ed from the date of hire of March 27, 2014 through the date of injury August 14, 2014. (Def. CIGA Exh. I.) The total amount of earnings, reflecting both hourly wages and overtime was listed as $6,111.63. (Id.) The applicant's hourly rate was $11.30.

According to her Social Security Statement, the applicant did not earn wages during the three years preceding her injury, in 2011, 2012 and 2013. (Def. Sentry Exh. DD.) The following year, when the applicant sustained her industrial injury, she earned a total of $6,707. (Id.) Subsequently, from 2015-2019, no earnings were recorded. (Id.)

This matter proceeded to trial on December 14, 2020 on issues of general/special employment, change of administrator, earnings, permanent disability and attorney fees. At trial, the applicant testified in substance as follows: She worked in a management position at Wendy's for four years ending in 2009. (MOH/SOE, p. 5, lines 31-32.) In 2009, she changed jobs to Bergin Glass Impressions where she worked for a year. (MOH/SOE, p. 5, lines 34-35.) The applicant received steady earnings from 1997 to 2010 and received no earnings in 2011, 2012, and 2013. (MOH/SOE, p. 5, lines 38-39.) In December of 2010, the applicant was unable to continue working due to depression after finding her deceased girlfriend in her house. (MOI-VSOE, p. 5, lines 41-42.)

A Findings, Order, and Award issued finding the applicant was entitled to 35% permanent disability at the weekly indemnity rate of $239.67. Based on the record, it was found that that there was insufficient evidence to support a higher average weekly wage and permanent disability rate consistent with Labor Code

§4453(c)(4).

It is from this Findings and Award that petitioner seeks reconsideration.

III.

DISCUSSION

A. THERE IS NO REASON TO DEPART FROM LABOR CODE §4453(C)(l).

Labor Code § 4453(c), which governs the calculation of average weekly earnings, states in pertinent part:

> The average weekly earnings ... shall be arrived at as follows:
>
> (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.
>
> (4) Where the employment is for less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

Petitioner claims that Labor Code §4453(c)(4) applies because"... she was in a temporary position, working 5 or 6 days per week without a set number of hours, without any indication of how long the job would last, clearly none of the first three methods to determine average weekly earnings of Labor Code §4453 fairly or reasonably apply; therefore, her "earning capacity" should be determined by looking to her actual earnings from all sources and employments." (Petition, p. 4, line 25-p. 5, line 5.) The court finds this argument unpersuasive.

The mere fact that the applicant was not yet a permanent employee does not automatically warrant an earning capacity analysis per LC §4453(c)(4). The applicant's permanent disability rate was based on her actual earned wages during the span of her employment for Treasury Wine Estates. (Def. CIGA Exh. I.) At the time of her injury, she was not a part-time employee. She worked five or six days a week at Treasury Wine Estates. (MOH/SOE, p, 6, line 29.) Based on her wage

statement, the applicant regularly worked over 30 hours a week, often a full 40 hours a week. (Def. CIGA, Exh. I).

The appropriate application of Labor Code§ 4453(c)(4) earning capacity method is limited to situations where for any reason the application of the actual earnings method does not yield a fair result. Based on the above, that showing was not made here. Instead, the court determined that permanent disability weekly rate equates to $239.67, consistent with applicant's unrebutted wage statement.

B. EVEN ASSUMING LC §4453(C)(4) APPLIES, THE RECORD IS LACKING SUFFICIENT DETAIL TO SUPPORT AN AWARD BASED ON EARNING CAPACITY.

When the employer has presented evidence of the employee's earnings at the time of injury, the applicant has had the burden of proving higher earning capacity. As the Supreme Court has explained, "[a]n estimate of earning capacity is a prediction of what an employee's earnings would have been had she not been injured." (*Argonaut Ins. Co. v. Ind. Acc. Comm.* (*Montana*) (1962) 57 Cal.2d 589,594 [27 Cal.Comp.Cases 130].)

Here, the petitioner alleges that the applicant's "Social Security statement and her testimony show that she had the willingness, ability, and opportunity to work steadily prior to the tragic loss of her significant other in 2011". (Petition, p. 5, lines 17-18.) In asserting the maximum permanent disability rate of $290, the petitioner relied solely on earnings from 2005 through 2010, which averaged $31,481.50 per year or $605.41 per week. (Petition p. 5, lines 13-16.)

It is found that merely adding the applicant's intermittent earnings from 5 of the last 10 years does not provide a fair prediction of what the applicant would have earned had she not been injured. At the time of injury, the applicant was solely working for Treasury Wine Estates. There is no evidence of earnings from concurrent employment or post-injury earnings. The applicant testified that although she has looked for work, but has not been employed by anyone since the industrial injury. (MOH/SOE, p. 6, lines 10- 12,) Further, while there is evidence that the applicant was offered a full time position, there is nothing to show a wage increase was scheduled or would be reasonably anticipated at the time of the

applicant's industrial injury.

Finally, in relying solely on past wages, petitioner seemingly ignores that earning capacity for the purposes of LC §4453(c)(4) is not limited to actual or pre-injury earnings. "Earning capacity" is used to estimate the monetary effects of a disability on future earnings, The appeals board cannot support an award under LC §4453(c)(4) when it does not explore the employee's ability to work, willingness to work and opportunities for employment. (*W.M Lyles Co, v. WCAB* (*Butz*) (1969) 34 CCC 652.)

The above factors are not sufficiently addressed by either the Social Security Earnings Record or the applicant's trial testimony. Absent elaboration, it does not constitute specific demonstrable evidence that the applicant would have received increased earnings, if not for the injury.

Based on the above, nothing in the petition disrupts the court's finding that there was insufficient evidence to support a higher permanent disability rate based on earning capacity.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: March 29, 2021

Respectfully submitted,

KATIE F. BORIOLO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE