

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**ELLA VAYMAN, *Applicant***

**vs.**

**MEDNAX INC.; PENNSYLVANIA MANUFACTURERS ASSOCIATION, *Defendants***

**Adjudication Number: ADJ15074831  
Oakland 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. 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 admonish defense attorney Asia Kowalski with the law offices of Albert and Mackenzie for attaching documents that are already part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).) Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

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**

**JOSÉ H. RAZO, COMMISSIONER**  
CONCURRING NOT SIGNING



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAY 9, 2022**

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

**ALBERT & MACKENZIE  
ELLA VAYMAN  
LAW OFFICES OF JOHN E. HILL**

**PAG/00**

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

## REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

### INTRODUCTION

- |                                |  |
|--------------------------------|--|
| 1. Identity of Petitioner:     | Defendant  |
| Timeliness:                    | Yes  |
| Verification:                  | Yes  |
| Additional Comments:           | Defendant's Petition does not comply with WCAB Rules 10940(d) and 10945(c) because it contains attachments, which were already introduced into evidence or which were not alleged to be newly discovered evidence. With the attachments, the Petition is over 60 pages long. In preparing this Report, I only considered evidence admitted into the record. ( <i>Hamilton v. Lockheed Corporation (Hamilton)</i> (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) |
| 2. Date of Findings and Award: | February 24, 2022  |
| 3. Defendants' Contentions:    | After October 9, 2021, applicant was no longer entitled to receive temporary disability indemnity payments at the weekly rate of \$1,356.31. Defendant argues that I should not have considered the wages that IHSS paid applicant to care for her mother because applicant and her husband were joint employees of applicant's mother, who died on October 9, 2021, and because applicant was not fully able to care for her mother before her injury.                      |
| 4. Occupation for Defendant    | Billing Specialist   |
| Applicant's Age:               | 62   |
| Date of Injury:                | Cumulative injury ending on August 21, 2021  |
| Parts of Body Injured          | Wrists, hands, and back.   |

### I.

### FACTUAL BACKGROUND

Applicant while employed by defendant as a medical billing specialist sustained injury arising out of and in the course of employment to her wrists, hands, and back during the period ending on August 21, 2021. During this period of injurious exposure, applicant was concurrently employed by IHSS to provide care to her mother.

On August 22, 2021, applicant became temporarily totally disabled and stopped working both of her jobs. (Exhibit 10, Pay Stubs from IHSS; Exhibit 11, Pay Stubs from Pediatrix Medical Group; Exhibit 1, Report of Raymond Y Chan, December 4, 2021, p. 2.)

On October 9, 2021, applicant's mother passed away.

On December 15, 2021, defendant deposed applicant, and as relevant herein, applicant testified as follows: She had concurrent employment with IHSS while working for defendant. (Exhibit A, Applicant's Deposition, December 15, 2021, p. 25:20-25:22.) She could not recall exactly when she started working for IHSS. (*Id.* at p. 25:23-25:25.) Her husband helped her care for her mother. (*Id.* at p. 26:9-26:13.) Her husband provided her mother with physical help, but her mother was "pretty much independent." (*Id.* at p. 27:1-27:16.) Her mother required help with medications, shopping, and meal preparation. (*Id.* at p. 26:14-26:23.)

On February 7, 2021, defendant filed its pre-trial brief arguing in relevant part that the matter was premature for hearing because applicant had failed to produce her "full wage statements from the job with IHSS" and that the death of applicant's mother affected applicant's temporary disability indemnity rate. (Pre-Trial Brief, February 7, 2021, p. 3:30-3:25.) Defendant further argued that after the death of applicant's mother, applicant only had one job and argued applicant was analogous to a seasonal employee. (*Id.* at pp. 4-5.)

On February 10, 2021, the matter proceeded to expedited hearing. During that hearing, defendant reviewed applicant's pay stubs from IHSS<sup>1</sup>, and then stipulated that while applicant's mother was alive, applicant was entitled to receive temporary total disability indemnity at the rate of \$1,356.31. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 10, 2021, p. 2:20-2:24; Exhibit 10; Exhibit 11.) The primary issue to be determined was:

Temporary disability, with applicant claiming that her average weekly wage is \$2,023.37, entitling her to receive temporary total disability indemnity at the maximum rate. Defendant argues that applicant's concurrent employment with the IHSS is akin to seasonal employment and that the death of applicant's mother on October 9, 2021, affects the calculations of applicant's average weekly wage after that date since applicant's job at IHSS was no longer available. (MOH/SOE, pp. 2:40 -3:2.)

During the Expedited Hearing, applicant testified in relevant part that: She began working for defendant in September of 2004, and she began working for IHSS in approximately 1998. At the time of her injury, her job with IHSS was to provide care to her mother, and she did that from approximately 2003 until August of 2021. She had to stop working both jobs because she was

---

<sup>1</sup> Defendant's review of this exhibit was part of the reason that the record began at 3:40 p.m. when the hearing began at 8:30 a.m. (Minutes of Hearing and Summary of Evidence, February 10, 2022, p. 1.)

disabled, and she would have continued working both jobs but for her injury. She previously provided care to two other patients through IHSS. Since her injury, she has declined offers from IHSS to care for other patients as she cannot work. After her injury, IHSS paid her husband to provide care to her mother, and he had previously assisted her with those job duties.

On February 24, 2022, I issued the Findings and Award, in which I determined in relevant part that applicant's employment was not analogous to that of a seasonal employee, and that after October 9, 2021, applicant was entitled to receive temporary total disability indemnity at the weekly rate of \$1,356.31. (Findings and Award, February 24, 2022, pp. 1-2.)

On March 9, 2022, defendant filed its Petition for Reconsideration.

### **III.**

#### **DISCUSSION**

##### *The Wages that IHSS paid to Applicant Were Properly Considered in determining Applicant's Average Weekly Wages*

Temporary disability indemnity is a workers' compensation benefit paid during the time an injured worker is unable to work because of a work-related injury, and it is primarily intended to substitute for lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) This benefit is paid at two-thirds of the applicant's average weekly earnings subject to statutory maximums. (Lab. Code, § 4653.) When an injured worker has more than one employer, the labor code mandates that the worker's average weekly wage "*shall be taken as the aggregate of these earnings from all employments* computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury." (Lab. Code, § 4453 (c)(2)<sup>2</sup>.)

Here, defendant stipulated that applicant was entitled to receive temporary disability indemnity payments at the weekly rate of \$1,356.31 while her mother was alive. (MOH/SOE, p. 2:20-2:24.) This stipulation was in accordance with the mandate in section 4453(c)(2) regarding how to calculate applicant's wages, and it was also based wages from defendant IHSS. (Exhibit 6, Emails, generally; Exhibit 7, Emails, generally; Exhibit 9 generally; Exhibit 10, generally, Pre-

---

<sup>2</sup> All statutory references are to the Labor Code unless otherwise stated.

Trial Brief at p. 2.) This is illustrated by the fact that if one only considers the wages that defendant paid to applicant, she would not be entitled to temporary disability indemnity payments at the weekly rate of \$1,356.31. (Exhibit 11.) Moreover, defendant repeatedly stated that applicant's temporary disability indemnity rate could not be calculated without information regarding applicant's earnings from IHSS. (Exhibit 6, generally; Exhibit 7, generally; Pre-Trial Brief at p. 2.) Additionally, the primary issue framed for determination was whether the death of applicant's mother would reduce the amount of temporary disability indemnity that applicant was entitled to receive. (MOH/SOE, pp. 2:40-3:2.) In fact, defendant did not argue that the IHSS earnings should not be considered until after the F&A issued.

However, defendant now appears to want to withdraw from its stipulation that applicant's earnings from both jobs entitled her to temporary disability indemnity payments at the weekly rate of \$1,356.31 by contending that applicant's earnings from the IHSS should not have been considered in calculating her average weekly wage. (Petition for Reconsideration, March 9, 2022, pp. 4:25-4:26, 8:8-8:9.) Defendant has not produced any substantial evidence to support its speculation that applicant and her husband were co-employees of applicant's mother or that applicant was unable to perform the full spectrum of her duties for the IHSS before becoming temporarily disabled.

Applicant was employed by IHSS and not her mother. It is well established that IHSS caretakers can file workers' compensation claims against IHSS, and that those caretakers are eligible to receive temporary disability indemnity payments. (See e.g. *Waters v. Hometown Buffet, ACE American Ins. Co.*, 2013 Cal.Wrk.Comp.P.D. LEXIS 87<sup>3</sup> [Applicant's average weekly wage should consider earnings from IHSS]; *Kelso v. State of California, Dept. of Social Services – IHSS* (2008 Cal.Wrk.Comp.P.D. 715 [Record required development to determine whether incarcerated applicant who worked for IHSS had dependents who should receive applicant's benefits during the incarceration].) Defendant's reliance on *Skidgel v. California Unemployment Insurance Appeals Board*, (2018) 83 Cal.Comp.Cases 1260 and section 3351(b) is misplaced. The *Skidgel* opinion addressed whether an IHSS caretaker was eligible for unemployment insurance, not workers' compensation benefits.

---

<sup>3</sup> While WCAB panel decisions are not binding, they may be considered to the extent that their reasoning is persuasive. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc).)

Likewise, this matter is distinguishable from *Miller v. Cal. Dep't*, 2021 Cal. Wrk. Comp. P.D. LEXIS 52. In *Miller*, the parties agreed the injured worker's wages from the IHSS should be considered in calculating the relevant average weekly wage, but they could not agree whether a stipend that the VA administration paid the worker to care for a disabled veteran should also be considered. In *Miller*, the Appeals Board found that the stipend should not be considered as there was no evidence that the injured worker would have continued to receive that benefit after the death of the patient. As in *Miller*, applicant's wages from IHSS should be considered when calculating applicant's average weekly wage despite the death of her patient. Furthermore, applicant testimony that she rejected other jobs from the IHSS after her mother's death thereby confirming that her disability and not the death of her mother is the reason that she cannot currently earn wages from the IHSS.

Furthermore, in this matter, the credible<sup>4</sup> and unrebutted evidence reflects that until August 22, 2021, IHSS paid applicant to assist her mother with shopping, cooking, and separating medications, and there is no evidence that applicant performed those tasks after August 22, 2021. (Exhibit 10; Exhibit A, p. 26:19-26:23.) The facts that applicant's husband previously provided occasional assistance to applicant's mother and that he later assumed applicant's position with IHSS are insufficient to establish that applicant and her husband were joint employees. Defendant did not even establish that applicant and her husband shared a bank account, let alone that they entered into a joint venture, which requires "a community of interest in the object of the undertaking," "equality of right to govern the conduct of each other with respect thereto," "agreement to share profits or losses," and "evidence of an intention ...to become partners with respect thereto." (*Freedman v. Industrial Acci. Comm.* (1945) 10 Cal.Comp.Cas. 8, 9.) Rather, the evidence reflects that applicant's mother was "pretty much independent" and did not generally require assistance with tasks other than those enumerated above. (Exhibit A, pp. 26:19-26:23, 27:13-27:14.) Further, there is no evidence reflecting that applicant was unable to provide care to her mother before her injury.

Accordingly, defendant's arguments regarding why applicant's average weekly wage should not include her earnings from IHSS do not constitute good cause to allow it to withdraw

---

<sup>4</sup> The fact that applicant could not recall when she began working for IHSS in deposition or that she did not testify about other patients for whom she provided care through IHSS is insufficient to find applicant's testimony is not credible. Applicant may have remembered when she began working for that employer after her deposition, and defendant did not ask her if IHSS had paid her to provide care to any other patients during her deposition.

from the stipulation. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [Absent a showing of good cause, stipulations are binding on parties].) Thus, applicant's average weekly wage was properly based on her wages from both of her employers.

#### *Applicant's Indemnity Rate Did Not Change*

At times, an injured employee may be entitled to receive temporary disability indemnity at different rates. This may occur when an injured employee's earning records establish that the existence of two separate and distinct average weekly earnings capacities. (*Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74 (Appeals Board en banc).) Alternately, temporary disability indemnity rates may fluctuate when an injured worker is temporary partially disabled and the injury causes a loss in wages. (Lab. Code, §§ 4653-4655.)

In this matter, defendant appears conflate temporary total disability indemnity with temporary partial disability indemnity. If the evidence had reflected that applicant was temporarily partially disabled, the death of applicant's mother could have impacted the amount of temporary disability indemnity payments that defendant owed to applicant - particularly if it also had reflected that applicant was physically able to continue working for IHSS, and that applicant refused offers to perform other jobs which were compatible with her work restrictions. However, the evidence reflects that as of August 22, 2022, applicant was temporarily *totally* disabled. (Exhibit 1, p. 2.) In fact, defendant stipulated to pay temporary total disability indemnity to applicant from August 22, 2022 through the date of her mother's death. (MOH/SOE, p. 2:20-2:24.) Additionally, the credible and un rebutted evidence in the form of applicant's testimony and pay stubs from both of her jobs is that since August 22, 2021, she has been unable to work either of her jobs, and that she has declined job offers from the IHSS because of her injury. (Exhibits 9-10; MOH/SOE, pp. 4-7.)

Further, as explained in the F&A, there is no evidence that reflecting that applicant's earnings capacity was analogous to a seasonal employee because there is no evidence reflecting that she worked "reasonably identifiable and defined seasons of reasonably identifiable and defined duration." (*Jimenez, supra*, 67 Cal.Comp.Cases 79, fn. 9.)

Accordingly, applicant's temporary disability indemnity rates were not affected by the death of her mother.



Based upon the above, I recommend denial of defendant's Petition for Reconsideration.

Date: March 14, 2022

Alison Howell  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE