WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HEVER RIVERA FLORES, ***Applicant***

vs.

L.A. SPECIALTY FOOD PRODUCE COMPANY, INC.; SAFETY NATIONAL CASUALTY CORPORATION, administered by TRISTAR RISK MANAGEMENT, ***Defendants***

Adjudication Number: ADJ16035179
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued on November 22, 2023 by the Workers' Compensation Administrative Law Judge (WCJ). Therein, and in relevant part, the WCJ determined that applicant's average weekly earnings (AWE) were $749.42, based on Labor Code section 4453(c)(1). 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 discussed below, we will grant reconsideration and amend the F&A to find that applicant's AWE was $1,301.46; that the issue of attorney fees on any accrued temporary disability benefits is deferred; that defendant is not entitled to credit for overpayment of temporary total disability indemnity; and that the issue of unreasonable delay in the payment of temporary disability to the applicant is deferred. We will further affirm the award of permanent disability but amend the award of future medical treatment to specify the left shoulder, as recommended by the WCJ.

BACKGROUND

Applicant sustained admitted injury to the left shoulder, while employed as an order puller by defendant L.A. Specialty Food Produce Company, Inc., on August 28, 2021. The parties selected Ramon Terrazas, M.D., to act as the Qualified Medial Evaluator (QME) in occupational medicine.

On August 24, 2023, the parties proceeded to trial, stipulating therein that defendant had paid applicant temporary total disability (TTD) from August 29, 2021 to December 7, 2022 at the weekly rate of $499.61. (Minutes of Hearing and Summary of Evidence (Minutes), dated August 24, 2023, at p. 2:23.) The parties further stipulated applicant had sustained 25 permanent disability based on the reporting of QME Dr. Terrazas. (*Id.* at p. 2:35.) The parties framed for decision the issue of applicant's AWE, with applicant asserting an earning capacity of $1,301.46, and defendant asserting actual weekly wages of $749.38 per week. (*Id.* at p. 3:3.) The parties further placed in issue a claimed TTD overpayment of $4,639.24 arising out of delay in the service of the QME report, and applicant's claim for penalties related to alleged delay in TTD indemnity from June 19, 2022 to August 1, 2022. The testimony of applicant and defense witness Jay Garcia was adduced, and the parties submitted the matter the same day.

On November 22, 2023, the WCJ issued the F&A, determining in relevant part that "[t]he correct Average Weekly Earnings for Applicant is $749.42, which warrants a temporary total disability (TTD) rate of $499.61 per week, and defendant paid TTD at the correct rate and that no further TTD is due." (Finding of Fact No. 5.) The WCJ also determined that "[t]here was a TTD overpayment due to delayed service of the QME report in the amount of $1,915.84." (Finding of Fact No. 6.) Accordingly, the WCJ awarded defendant a credit of $1,915.84 against any accrued permanent disability or future disability found in the event applicant's claim was reopened. (Award, Para. "d".) The WCJ further awarded applicant a penalty of $492.47 with respect to delayed payment of TTD. (Award, Para. "e".) In determining applicant's AWE, the WCJ's Opinion on Decision explained his analysis as follows:

> It is inarguable that Applicant's earnings in the year prior to his August 28, 2021 injury, were depressed as a result of Covid and its impact on the economy and the employer's business, and not due to Applicant's inability to physically work or to voluntarily work less hours then he did in prior years. With government ordered quarantines during the pandemic, and thereafter the legacy of people staying home by choice, many people remained at home and the demand of the

employer's customers for its produce, e.g., restaurants, schools, etc., was greatly reduced, resulting in the need for LA Produce to lay off many employees and/or to reduce the hours of remaining employees for reasons of business necessary and solvency.

Likewise, it appears from the evidence that Applicant was a good and valued employee, who had worked at LA Produce since November of 2016, and was one of a handful of employees that was not laid off, which speaks well of his work ethic. I do not doubt based on his work history, and especially the significant overtime he worked in 2019, pre-pandemic, which effectively was almost double his 2020 gross, (Per W-2's Applicant's 3, as noted in Applicant's Trial Brief at p. 6), that pre-injury he was physically able to work and would have worked additional hours then he did in 2020, absent the pandemic, had he been offered such hours.

Applicant's attorney does not appear to dispute that Applicant's actual average earnings in the year prior to his injury are consistent with the defendant's calculations based on the payroll printout, i.e., $749.42, which equates to the $499.61 per week in TTD that the defendant paid Applicant. (Joint Exhibit 101, MOH Stipulation No. 3 at p. 2, and Defendant's B at pp. 2-3.)

[…]

Although I can see Applicant attorney's rationale and the basis of her argument, and in other special cases and decisions I have in fact used the method in Labor Code section 4453(c)(4) to calculate AWE and award additional TTD, including one involving this same Applicant's attorney, after much thought and reflection, I am not persuaded that *in this case and on these facts*, the earning capacity method is required on a theory that the method in 4453(c)(1) is not fair or reasonable, even in the context of a pandemic, that affected the U.S. and local economy dramatically. The pandemic and its resulting impact on the economy affected everyone, and almost universally, those effects were adverse. It was not the employer's hope or desire to lay off a large portion of its work force and/or to reduce the hours of the employees that it did retain, but that was the reality given the dramatic Covid caused fall in its business. Applicant was one of the few who was retained, seemingly because of his value to the employer. He did work significant hours in the year prior to his injury, with an approximate gross, excluding the duplicate four weeks referenced above, and holiday pay, and the two columns 4 & 6 in Joint 101, that are not legible on this copy, of approximately $33,836.26, and those are reflected in the TTD rate that he was paid after his injury.

There is also an equity component here, and notwithstanding *Montana's* passing reference to a "brief recession," I think the effects of the pandemic were felt equally and can be reasonably said ought to be shared equally. *Montana* makes clear that 4453(c)(4) calculations are to be used rarely and in very special

> circumstances, and I am not persuaded that the facts in this case are such that using 4453(c)(1) would be unreasonable and/or unfair. Accordingly, I find that the defendant's calculation of AWE using that second and Applicant's earnings records in the year prior to his injury was reasonable and I do not find a different AWE should apply. With no additional TTD being found due, there is no additional attorney fee to award in this context.
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> (Opinion on Decision, at pp. 6-8.)

Applicant's Petition avers that the earnings utilized in the year prior to applicant's injury were artificially depressed as a result of the COVID-19 pandemic, and that the proper measure of applicant's earning capacity, i.e. the wages applicant would otherwise have earned but for his industrial injury, was applicant's pre-pandemic wages. Applicant's Petition contends that "[h]ere, we have a situation where Applicant has worked many overtime hours prior to Covid, got his hours reduced due to a slow-down in business during Covid and got injured when business started to pick up again at the end of Pandemic. It is clear based on the pre-Covid wage statements that Applicant would have returned to his pre-Covid earnings but for his injury." (Petition, at p. 7:21.) Applicant thus concludes that the appropriate measure of his wages for purposes of calculating his temporary disability rate should be the average of his 2019 wages, or $1,301.46 per week. (*Id.* at p. 8:14.)

Defendant's Answer avers that applicant's earnings in the 12 months preceding his injury is the appropriate metric by which to determine his wages for purposes of temporary disability. Defendant observes, "[a]ny reduction in applicant's earning from between 2019 and 2021 was because of adjustments to and the general condition of the labor market, as mentioned in the *Montana* decision. Labor market factors cannot simply be ignored for what was occurring leading up to the actual time applicant went off work in August 2021 and instead pretend that he went off work in 2019 because it is financially beneficial for applicant to create that fiction." (Answer, at p. 4:10)

The WCJ's Report initially notes typographical error in Finding of Fact No. 4, which inadvertently listed the right, rather than the left shoulder. (Report, at p. 5.) With respect to applicant's AWE, the WCJ noted that the application of section 4453(c)(1) was reasonable and fair to applicant on the present facts, and that using applicant's earnings from 2019 "would be to entirely ignore the Applicant's earnings for the 18 months prior to his date of injury, which in my judgment is inconsistent with Labor Code section 4453(c)(4)'s instruction to consider

actual earnings when applying it." (Report, at p. 9.) Accordingly, the WCJ recommends we grant reconsideration to amend Finding of Fact No. 4 to reflect the left shoulder but deny reconsideration with respect to applicant's wage calculations. (*Id.* at p. 12.)

DISCUSSION

I.

Labor Code section 5900[1] states that:

> (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition shall be made *within the time* and in the manner *specified in this chapter*.
>
> (b) At any time within 60 days after the filing of an order, decision, or award by a workers' compensation judge and the accompanying report, the appeals board may, on its own motion, grant reconsideration.
>
> (Lab. Code, § 5900, italics added.)

As set forth in section 5901, a final decision may issue either after an aggrieved person has filed a timely petition for reconsideration or after action by the Appeals Board on its own motion. In either instance, a party may seek timely appellate review of that final decision under section 5950.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) As explained further below, petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, §

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

10940(a)); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].)

This time limit is jurisdictional and therefore, the Appeals Board has no authority to act upon or consider an *untimely* petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

In contrast, here, applicant's Petition for Reconsideration was ***timely*** filed on December 15, 2023, twenty-three days after the WCJ's decision of November 22, 2023. Thus, as explained below, the Appeals Board has the authority to act upon the Petition and to consider it.

The jurisdiction conferred on the Appeals Board when a petition is timely filed under section 5900, subdivision (a), means that in order to act, the Appeals Board does not have to issue an order removing the proceedings to itself under section 5301, nor does it have to provide notice and an opportunity to be heard as required under section 5803 before issuing a new decision. Moreover, when reconsideration is granted under section 5900 or section 5811[2], it has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]), and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

Section 5909 provides that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed.[3] However, unlike the Court of Appeal, which has the right to summarily deny petitions for writ of review and mandate, the Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909. This is based on the Supreme Court's holdings that summary denial of reconsideration is no longer

[2] Section 5811 allows the Appeals Board, after a petition by an aggrieved person, or on its own motion, to grant reconsideration of its decision within 60 days. Since the time for filing a petition for writ of review is 45 days, the Appeals Board rarely exercises this power, so as to avoid duplicate proceedings.

[3] We observe that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board over all proceedings, and section 5803 provides for "continuing jurisdiction" by the Appeals Board over all of its "orders, decisions, and awards." (Lab. Code, §§ 5301, 5803.) Thus, the Appeals Board's failure to act within 60 days on a timely petition is not a true issue of jurisdiction because the Appeals Board always has jurisdiction over all proceedings and all orders, decisions, and awards.

sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision."]; *Moyer v. Workmen's Comp. Appeals Bd*. (1972) 24 Cal.App.3d 650, 655 [37 Cal.Comp.Cases 219]; *Hodges v. Workers' Comp. Appeals Bd*. (1978) 82 Cal.App.3d 894, 906 [43 Cal.Comp.Cases 870; *Painter v. Workers' Comp. Appeals Bd*. (1985) 166 Cal.App.3d 264, 268.)

Timely petitions for reconsideration filed and *received by* the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition. Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See Lab. Code, § 5901.)

An exception occurs when a petition is *not* *received by* the Appeals Board within 60 days due to irregularities outside the petitioner's control. In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70

Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans, supra,* 68 Cal.2d at pp. 754-755; *LeVesque, supra,* 1 Cal.3d at p. 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753; see also *Rea, supra,* 127 Cal.App.4th at p. 643.) *Rea* and other California appellate courts[4] have consistently followed the *Shipley* court's lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[5]

As the California Supreme Court stated in *Elkins v. Derby (1974) 12 Cal.3d 410, 420 [39 Cal.Comp.Cases 624]*:

> ***Procedural rules should engender smooth and functional adjudication.*** A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional. We think duplicative filing succumbs to all three charges. We also believe that ***respect for our legal***

[4] See e.g., *Hubbard v. Workers Comp. Appeals Bd.* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Comp. Appeals Bd. and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd. and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v. Workers' Comp. Appeals Bd. et al. (Lomeli)* (2022) (C095051)); (*Ace American Insurance Company v. Workers' Comp. Appeals Bd. and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Piro v. Workers' Comp. Appeals Bd. and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Comp. Appeals Bd. et al. (Melendez Banegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Bd. et al. (Hay*nes) (2022) 87 Cal.Comp.Cases 905).

[5] But see *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (2023) 97 Cal.App.5th 1213, wherein the Second District Court of Appeal, Division 7, concluded that section 5909 terminates the Appeals Board's jurisdiction to consider a petition for reconsideration after 60 days, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction unless specified equitable circumstances are present. The Court's opinion in *Zurich* appears to reflect a split of authority on the application of "*Shipley*" because it disagreed "with the conclusion in *Shipley* that a petitioner has a due process right to review by the Board of a petition for reconsideration even after 60 days has passed…" (*Id.* at p. 1237.)

> ***system -- a respect which is absolutely essential to its effective functioning -- is hardly enhanced by an incongruent procedural structure*** which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent. Absent a tolling rule, this is precisely the strategy to which a party unsure of his remedy must resort in order to protect his right to recovery. (Italics and bolding added.)

(*Elkins, supra,* 12 Cal.3d at p. 420.)

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley, supra,* 7 Cal.App.4th at p. 1108.) The California Constitution mandates that the WCAB "accomplish substantial justice in all cases. . . ." (Cal. Const., art XIV, § 4; Lab. Code, § 3201.) ***In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB.***[6] The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

In this case, the WCJ issued the Findings & Award on November 22, 2023, and applicant filed a timely Petition for Reconsideration on December 15, 2023 at the Oakland district office.

When a petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) The EAMS task

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[6] The workers' compensation system "was intended to afford a *simple and nontechnical path* to relief. (Italics added.)" (*Elkins, supra,* 12 Cal.3d at p. 419, citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) In order to further the goal of expeditious adjudication of disputes, informal rules of pleading apply to workers' compensation proceedings. (See Cal. Code Regs., tit. 8, § 10617; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 141]; see also *Claxton v. Waters* (2004) 34 Cal.4th 367, 373 [69 Cal.Comp.Cases 895]; *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972, 973 [48 Cal.Comp.Cases 369].) Moreover, as part of advancing the underlying public policy, workers may be unrepresented or represented by individuals other than attorneys. (See Lab. Code, § 5501 [providing for filing of application for adjudication by non-attorney representative or unrepresented worker].) "The system affords means by which an employee may learn about his rights informally and without an attorney." (*Elkins, supra,* 12 Cal.3d 410 at p. 419 referring to 1 Hanna, *supra*, at § 4.02[1-5], pp. 4-4 to 4-6.)

system is used by WCJs in the district offices and not by the Appeals Board; the Appeals Board does not receive notice by way of a task. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS and notifies the Appeals Board that it has been transmitted.

Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on March 21, 2024. Thus, the first notice to the Appeals Board of the Petition was on March 21, 2024. The WCJ issued the Report on March 20, 2024. Due to this lack of notice by the district office, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that applicant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on applicant's Petition was tolled until 60 days after March 21, 2024.

II.

The calculation of an award of temporary disability requires (1) a determination of the employee's average weekly earnings (which may be based on various calculations, including actual earnings or on earnings capacity), (2) the application of the minimum and maximum disability rates, and (3) a determination of the period the employee was temporarily totally disabled.

Section 4453(c) provides four methods to calculate average weekly earnings. (Lab. Code, § 4453(c)(1)-(4).) As relevant here, section 4453(c) provides 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.
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> …
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> (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.

(Lab. Code, § 4453(c)(1) and (c)(4).)

Subdivision (c)(1) thus provides for temporary disability calculations where the applicant is regularly employed on a full-time basis, and the subdivision uses the applicant's regular earnings at the time of injury as the metric for temporary disability calculation. Subdivision (c)(4) on the other hand provides an alternative calculation where the work at the time of injury is part-time, irregular, or the applicant's earnings at the time of injury "cannot reasonably and fairly be applied."

In *Goytia v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 889 [35 Cal.Comp.Cases 27] (*Goytia*), the California Supreme Court distinguished between the various approaches to calculating average earnings as follows:

> The language of the statute leads to two conclusions: first, average weekly earnings under subdivision [(c)(4)][7] differs from average weekly earnings under the other three subdivisions; subdivision [(c)(4)] applies "where the employment is for less than 30 hours per week, *or* where for any reason the foregoing methods … cannot reasonably and fairly be applied." (Italics added.) Since the prior three subdivisions calculate average weekly earnings solely on the basis of prior earnings, the statute apparently contemplated that prior earnings are not the sole basis for the determination of earning capacity or average weekly earnings under subdivision [(c)(4)].
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> Secondly, subdivision [(c)(4)] states that in determining average weekly earning capacity the appeals board should give "due consideration" to actual earnings "from all sources and employments." Pre-injury earnings constitute one factor, but not the exclusive factor, in determining such earnings. The subdivision in alluding to earning "capacity" must necessarily refer to earning potential which may not, and probably will not, be reflected by prior part-time earnings.
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> (*Id.* at p. 895.)

The Supreme Court further discussed its prior decision in *Argonaut Ins. Co. v. Indus. Acc. Comm.* (*Montana*) (1962) 57 Cal.2d 589 [371 P.2d 281] (*Montana*) wherein it observed that in arriving at a realistic appraisal of earnings:

> An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured … In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading … [All] facts relevant and helpful to making the estimate must be considered [citations].

[7] The original text in *Goytia* refers to former Labor Code section 4453, subdivision (d), which has since been redesignated as subdivision (c)(4).

> The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant."
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> (*Id.* at p. 594-595.)

Thus, our inquiry in this matter is necessarily factual in nature and must account for applicant's past earnings as a "reliable guide" in predicting earning capacity. However, a determination of what an employee's earnings would have been had he not been injured also requires consideration of additional factors, including applicant's age and health, willingness to work, skill and education, and the general condition of the labor market. (*Goytia, supra*, 1 Cal.3d at p. 895.)

Here, the parties do not dispute that the COVID-19 pandemic resulted in a significant reduction in hours and resulting wages for applicant. The WCJ has observed that "[i]t is inarguable that Applicant's earnings in the year prior to his August 28, 2021 injury, were depressed as a result of Covid and its impact on the economy and the employer's business, and not due to Applicant's inability to physically work or to voluntarily work less hours then he did in prior years." (Opinion on Decision, at p. 6.) However, the WCJ also notes that "[t]he pandemic and its resulting impact on the economy affected everyone, and almost universally, those effects were adverse." (*Id.* at p. 8.) Addressing equitable considerations, the WCJ wrote that "the effects of the pandemic were felt equally and can be reasonably said ought to be shared equally." (*Id.* at p. 7.) Accordingly, the WCJ concluded that the record did not support a departure from the wage analysis of section 4453(c)(1), which calculated applicant's AWE based on the 12 months prior to the injury date of August 28, 2021.

Applicant contends, however, that the wage capacity analysis described in section 4453(c)(4) is warranted given the extraordinary changes to the labor market resulting from the COVID-19 pandemic:

> Thus, if we are to use method under LC 4453(c)(l) in calculating Applicant's AWE and use actual earnings for the year before the date of injury, it will produce an unfair and unequitable result for Applicant as it will fail to account for the extraordinary [and] unusual circumstances of Pandemic and its dramatic effect on Applicant's earnings due to the line of work he was in. And that is exactly the situation that necessitates the use of LC 4453(c)(4).

(Petition, at p. 7:5, italics added.)

We agree. The Supreme Court in *Goytia* observed that "[t]he purpose of subdivision [(c)(4)] is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of the injury may be aberrant or otherwise a distorted basis for estimating true earning power … Thus, when a regularly employed worker for reasons beyond his control, such as illness, strikes, lay offs, temporary recession, or other factors affecting the opportunity for full-time employment in his customary occupation, is receiving a wage at the time of his injury that does not fairly reflect his earning capacity as suggested by his work history, subdivision [(c)(4)] permits the board to consider that history and other relevant information in determining his earning capacity." (*Goytia, supra*, 1 Cal. 3d at p. 899.)

Here, we are persuaded that limiting the wage analysis to the 12 months prior to applicant's date of injury will result in a similarly distorted basis for estimating applicant's true earning power. The applicant testified credibly and without rebuttal that prior to the pandemic he often worked 11 to 12 hours each day. However, during the pandemic, "he would work 5 to 6 hours a day, initially 5 days a week, but later sometimes 4 or 3 days a week. The hours decreased because their business dropped dramatically because customers were closed and did not need the produce." (Minutes, at p. 5:38.) Applicant's testimony is further reflected in his annual earnings, which were nearly halved between 2019 and 2020. (Ex. 3, W-2 Forms for 2019-2021.) The record thus reflects that the period leading up to applicant's injury represented a significant departure from applicant's pre-pandemic earnings and was the result of market forces beyond applicant's control. (*Montana, supra,* 57 Cal.2d at p. 594.)

Therefore, and on the record before us, we conclude that the wage capacity analysis of section 4453(c)(4) more accurately reflects applicant's true earning power at the time of his injury. Pursuant to section 4453(c)(4), the most accurate representation of applicant's true earning capacity at the time of injury was his earnings in 2019, the last full year in which applicant worked prior to the COVID-19 pandemic which resulted in the reduction in applicant's hours and wages. Applicant's 2019 wages reflect gross remuneration in the amount of $67,676.16, which when divided by 52 weeks, yields $1,301.46 per week.

We will therefore grant applicant's Petition and amend Finding of Fact No. 5 to reflect that applicant's earnings capacity at the time of injury was $1,301.46 per week, yielding a corresponding temporary total disability rate of $867.64.

The increase to the weekly temporary disability rate to $867.64 over the course of applicant's period of temporary disability from August 29, 2021 to October 4, 2022, will exceed the temporary disability overpayment of $1,915.84 previously identified in Finding of Fact No. 6. We will therefore amend Finding of Fact No. 6 to reflect that there has been no overpayment of TTD.

In addition, we note that the penalty calculated by the WCJ for unreasonably delayed temporary disability indemnity was based on the prior temporary disability rate of $499.61. We will therefore amend Finding of Fact No. 7 to reflect that the issue of the amount of temporary disability indemnity unreasonably delayed is deferred, pending a return of this matter to the trial level for further proceedings and determination by the WCJ.

Finally, we will amend Finding of Fact No. 4 as recommended by the WCJ in his report, to reflect the correct body part of the *left* shoulder.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 22, 2023 F&A is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 22, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Hever Rivera Flores, while employed on August 28, 2021, as an order puller, occupational group 360, in Hayward, California by L.A. Specialty Food Produce Company, Inc., sustained injury AOE/COE to his left shoulder.
2. At the time of injury the employer's workers compensation carrier was Safety National Casualty Corp., currently administered by Tristar.
3. Applicant's injury resulted in permanent disability of 25%, per the stipulation of the parties, based on the QME report of Ramon Terrazas, M.D., dated October 4, 2022.
4. Per the stipulation of the parties, there is a need for further medical treatment with respect to the left shoulder.
5. Applicant's average weekly earnings pursuant to Labor Code section 4453(c)(4) at the time of injury were $1,301.46, which warrants a temporary total disability rate of $867.64 per week.
6. There was no overpayment of temporary total disability indemnity.
7. Defendant unreasonably delayed the payment of TTD to the Applicant for the period June 19, 2022 through August 3, 2022. The amount of the delayed payment and any corresponding penalty is deferred.
8. Defendant unreasonably delayed the issuance of the SJDB voucher to the Applicant.

AWARD

AWARD IS MADE in favor of Hever Rivera Flores against L.A. Specialty Food Produce Company, Inc., and Safety National Casualty Corp., administered by Tristar, as follows:

a. Permanent disability of 25%, equivalent on the facts of this case to $29,217.50, payable at the rate of $290.00 per week, less credit for any and all permanent disability advances to date, and less a reasonable attorney fee of $4,382.63, awarded below, which if not already accrued, shall be commuted from the far end of the award.
b. Further medical treatment consistent with Findings of Fact 1 and 4.
c. Applicant's attorney is awarded a fee of $4,382.63 with respect to the award of PD.

d. The Applicant is awarded a penalty of $1,500.00 with respect to the delay in providing him with the SJDB voucher.

ORDERS

e. The issue of penalties for unreasonably delayed payment of temporary disability to the applicant is deferred.
f. The issue of attorney fees for accrued temporary total disability is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 29, 2024

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

HEVER RIVERA FLORES
LAW OFFICES OF JOHN E. HILL
L.A. SPECIALTY PRODUCE COMPANY
TRISTAR
WITKOP LAW

SAR/*cs*

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