

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

IRMA GAXIOLA, Applicant

vs.

SUNOPTA; ZURICH NORTH AMERICA, Defendants

**Adjudication Number: ADJ12254115
Santa Barbara District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of January 10, 2022, the workers' compensation administrative law judge ("WCJ") found that applicant, while employed as a conveyor tender, Occupational Group 360, during the period April 10, 2018 through May 19, 2018, sustained industrial injury to her cervical, thoracic and lumbar spine, that applicant's earnings were sufficient to produce a weekly earnings rate of \$440.00, warranting weekly indemnity rates of \$293.33 for temporary disability and \$290.00 for permanent disability, and that the injury caused permanent disability of 61%. In addition, the WCJ found that in 2017 applicant's work season was July 16, 2017 through December 2017 and in 2018 applicant's work season was April 10, 2018 through October 23, 2018. Finally, the WCJ found that "applicant is entitled to temporary disability for the period May 20, 2018 through November 25, 2020 (for the dates of the season), less credit for monies received, paid or earned," that "permanent disability payments shall commence as of November 26, 2020, the date after TD will be last paid or the last date of the season for 2020," and that defendant is not entitled to credit.

Defendant filed a timely Petition for Reconsideration of the WCJ's decision. Defendant contends that the evidence justifies a finding that applicant had minimal weekly earnings for purposes of determining temporary and permanent disability indemnity, which should be awarded at \$160.00 per week. Defendant further contends that as a seasonal worker, applicant is not entitled

to temporary disability indemnity during the off-season, and that because applicant is limited to 104 weeks of temporary disability indemnity within the period May 20, 2018 through May 20, 2020, the WCJ erred in awarding temporary disability indemnity after October 23, 2018, for which defendant is entitled to credit. Finally, defendant contends that the evidence justifies a finding that applicant's Occupational Group Number is 221, and that the opinion of Dr. Brouman, the Agreed Medical Evaluator ("AME") in orthopedics, justifies a permanent disability rating of 51%.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which we adopt and incorporate except as to the issues of applicant's earnings at the time of injury and her earning capacity for purposes of determining the permanent disability indemnity rate, we will affirm the WCJ's findings that applicant sustained industrial injury to her cervical, thoracic and lumbar spine during the period April 10, 2018 through May 19, 2018, that applicant's Occupational Group number is 360, that applicant is entitled to temporary disability for the period May 20, 2018 through November 25, 2020 (with benefits payable only during the work seasons within that period),¹ that applicant is entitled to permanent disability indemnity beginning November 26, 2020, and that defendant is not entitled to credit.

Though we affirm the WCJ's findings as specified above, we conclude there are unresolved questions concerning applicant's earnings at the time of injury for purposes of determining the correct temporary disability indemnity rate, and her earning capacity for purposes of determining the correct permanent disability indemnity rate. We will amend the WCJ's decision accordingly, and we will return this matter to the trial level for further proceedings and new findings by the WCJ on the outstanding issues.

The record is confusing and incomplete on the issue of earnings. The trial minutes of September 16, 2021 show that only one item of evidence relevant to earnings was introduced into the record, i.e., a description of applicant's job dated May 22, 2018. (Applicant's Exhibit 4.)

¹ For instance, for the year 2018 applicant is only entitled to temporary disability indemnity from May 20, 2018 through October 23, 2018; she is not entitled to temporary disability indemnity for any time she is temporarily disabled during the off-season. (*Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 790 [71 Cal. Comp. Cases 1044].)

Relying upon this exhibit to determine earnings, the WCJ reasoned in his Opinion on Decision that since the job description showed applicant was hired to work 8 hours per day, 40 hours per week, and the minimum wage was \$11.00 per hour, applicant must have had weekly earnings of \$440.00 per week, thereby justifying a temporary disability indemnity rate of \$293.33 per week (2/3 of \$444.00) and a permanent disability indemnity rate of \$290.00 per week.

However, the trial minutes of September 16, 2021 also include the parties' stipulation that applicant's earnings at the time of injury were \$343.70, "producing a seasonal temporary disability rate of \$229.18." Then again, defendant alleges in its petition for reconsideration that applicant had earnings of \$5221.78 for the work season in 2017 and earnings of \$1653.62 for the work season in 2018, before her injury. We note that although defendant's allegations are improper because they are supported by no admitted evidence, they suggest that defendant may have readily-available information that would allow the WCJ to make a sound determination of applicant's earnings at the time of injury, and in turn to determine the correct rate of temporary disability indemnity. However, the WCJ also needs to consider whether this evidence or other evidence the parties may produce on the issue of applicant's earnings at the time of injury is sufficient to overcome the parties' trial stipulation. We therefore conclude that the issue of applicant's earnings at the time of injury requires further development of the record and new determination by the WCJ. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence].)

We likewise conclude that further development of the record is required to determine applicant's earning capacity for purposes of determining the correct permanent disability indemnity rate. In *Garibay v. Silverado Farming Co.* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 57, the Board panel provided sound guidance on this issue:

"Actual earnings at the time of injury are not necessarily determinative of average weekly earnings for permanent disability purposes. Temporary disability and permanent disability are two separate benefits, and applicant's permanent disability rate should reflect what applicant's earning capacity would have been during the corresponding period of disability. Thus, earnings for an award of temporary disability indemnity may be different than earning capacity for an award of permanent disability indemnity because the entitlement to benefits is based on a different time period. (*Argonaut Ins. Co. v. I. A. C. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130].) [...]"

In this case, there are no stipulations and there is no evidence in the record to enable the WCJ or the Board to make a finding on applicant's earning capacity for purposes of determining the appropriate permanent disability indemnity rate. Accordingly, we will return this issue to the trial level for further development of the record and new determination by the WCJ.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of January 10, 2022 is **AFFIRMED**, except that Findings of Fact 3, 7 and 12 are **RESCINDED**, and the following new Findings 3, 7 and 12 are **SUBSTITUTED** in their place:

FINDINGS OF FACT

3. The issue of earnings for purposes of determining the correct temporary disability indemnity rate, and the issue of earning capacity for purposes of determining the correct permanent disability rate, is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.
7. The industrial injury described in Finding 1 caused permanent disability of 61%. The total amount of permanent disability indemnity and the rate at which it shall be paid are deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.
12. The issue of attorney's fees is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new determination of the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 29, 2023

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

**IRMA GAXIOLA
WOLFF WALKER LAW FIRM
PEARLMAN, BROWN & WAX, LLP**

JTL/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

- | | | |
|----|---|---|
| 1. | Applicant's Occupation:
Date of birth:
Date(s) of Injury:
Parts of Body Injured:
Manner in Which Injury Occurred: | Conveyor tender
[]
CT – April 10, 2018 – May 19, 2018
Cervical, thoracic and lumbar spine
Not in dispute |
| 2. | Identity of Petitioner:
Timeliness:
Verification:
Service: | Defendant
The petition is timely
The petitions is verified
The petition was served on all parties |
| 3. | Date of Issuance of Order: | January 10, 2022 |
| 4. | Petitioner's Contention: | The WCJ erred in determining AWW, TD, Occupational group number, Credit for overpayment of TD and Permanent Disability. |

I.
FACTS

Applicant was a seasonal worker and sustained an admitted continuous trauma injury to her cervical, lumbar and thoracic spine.

Applicant was evaluated by Steven Brouman, M.D., in the capacity of an agreed medical evaluator (AME).

The matter proceeded to trial on numerous issues.

Defendant filed this instant petition for reconsideration disagreeing with all of the WCJ's findings except for not finding a body part industrial.

II.
DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cure those defects.

Defendant's first point of contention is their disagreement to the WCJ'S calculation of applicant's average weekly earnings (AWW).

Defendant cites L.C. § 4453(c)(4) to specifically apply to seasonal workers. However, there is nothing in that section referring to seasonal workers, rather it applies to workers' working less than 30 hours per week.

Exhibit 4 is a job description prepared by defendant and provides in part, Applicant is to work 8+ hours per day and 40+ hours per week. No other testimonial or documentary evidence was submitted on this issue.

[...]

Next defendant contends there was error in the WCJ's finding of temporary disability. Specifically, that TD could not be awarded beyond the 2018 season. However, based on the AME's findings, applicant was temporarily total disabled during the period of May 20, 2018 through November 25, 2020.

In both the Opinion on Decision and the Findings of Fact & Award, the awarding of temporary disability was subject to the 104 week cap and subject to the dates of the season.

Next, defendant objects to the WCJ's determination as to applicant's occupation group number.

Applicant proffered the appropriate group modifier would be an "H" and defendant requested an "E" modifier.

As defendant points out in his petition for reconsideration, page 4, lines 12 – 14, "Applicant was fired by SunOpta as a sorter, which required her to inspect strawberries that were placed on a conveyor belt. . ."

The only direct evidence submitted as to applicant's occupation is exhibit 4 that lists applicant's occupation as a "production worker", which is not a scheduled occupation.

Applicant sorts strawberries on a conveyor belt. As reflected in the medical reporting of Dr. Brouman, applicant performed significant other work duties, and it was all of those duties that formed the basis for the WCJ to find applicant to fit under occupation group 360 which includes conveyor tenders and provided for a "G" modifier.

In Dr. Brouman's November 25, 2020 report, on pages 18 – 19, under the heading of **IMPAIRMENT RATING**:, the final sentence written concludes, "The patient has Total Whole Person Impairment of 35% with respect to her current permanent disability."

Based on that level of permanent disability, applicant is entitled to a 61% permanent disability award after being adjusted for age and occupation.

Lastly, defendant is requesting a credit for the overpayment of temporary disability against permanent disability. The issue was moot based on the WCJ's finding of applicant's entitlement to temporary disability. However, to the extent defendant has overpaid temporary disability, they are entitled to a credit against any future temporary disability should a petition to reopen be filed.

III.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant's Petition for Reconsideration be denied based on the arguments and merits addressed herein.

DATE: February 21, 2022

Scott Seiden
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

[...]

PARTS OF BODY INJURED

Defendant admits industrial injury to applicant's lumbar spine, cervical spine and thoracic spine. Applicant is also claiming injury to her left upper extremity. Based on the medical reporting of Steven Brouman, M.D., in the capacity of an AME, it is found applicant did not sustain injury to her left upper extremity on an industrial basis as a result of the claim hereinabove.

EARNINGS

Exhibit 4, a Job Description was filled out by the HR Supervisor, Joey Vasquez on May 21, 2018. The document reflects on the third line from the top on page one that applicant is to work 8+ hours per day and 40+ hours per week.

No evidence was submitted as to applicant's hourly wage or if any overtime was worked. [...]

TEMPORARY DISABILITY

In Steven Brouman, M.D.'s report dated November 25, 2020, on page 18, under the heading of **PERIODS OF TOTAL DISABILITY**, he wrote, "The patient has not worked since the industrial injury on May 19, 2018." (Exhibit 2).

In the same report on page 18, in the heading below that **DISABILITY STATUS**, Dr. Brouman wrote, "in my opinion, the patient has achieved a state of maximum medical improvement and can be considered permanent and stationary for rating purposes."

This would support a finding of applicant being temporary total disabled for the period from May 20, 2018 through November 25, 2020.

However, in his report dated February 10, 2021 under the heading of **DISCUSSION**, in response to an inquiry if there are periods of temporary disability, Dr. Brouman stated based upon his review of his chart, ". . . it appears the treating doctors kept her on temporary total disability following the injury and she never returned to work."

He continues, "Consequently, she would have been considered temporarily totally disabled following the May 19, 2018 injury until she was declared permanent and stationary." (Exhibit 3)

There is no clarification if Dr. Brouman is referring to when he found her permanent and stationary per his November 25, 2020 report or some other physician's finding of applicant being permanent and stationary. Without the clarity, the only conclusion is that he is referring to his report.

Applicant is entitled to temporary disability benefits for the period from May 20, 2018 through November 25, 2020; less credit for monies received, paid or earned and subject to the 104 week cap for those dates of season within this time frame.

PERMANENT & STATIONARY DATE

Based on the medical reporting of Steven Brouman, MD., in his capacity as an AME, it is found applicant became permanent and stationary on November 25, 2020.

OCCUPATIONAL GROUP NUMBER

Applicant contends that based on the Job Description submitted into evidence (Exhibit 4), the occupational group applied should be 491 or 460, both of which take an “H” modifier on the spine.

Group 491 is for persons who tend the land or care for animals and does not appear to properly apply in this case. Applicant also argues for the use of Group 460. However, that is generally for material handlers such as a baggage handler, Chain Off bearer or laborer. Those seem to be require the lifting of heavier items.

Defendant contends the appropriate modifier is that of 221 a produce sorter, which takes an “E” as a modifier on the spine. The employer’s HR representative listed applicant’s job as a production worker (Exhibit 4). However, there is no scheduled occupation with that title.

Further the October 14, 2020 medical reporting of Dr. Brouman on page two describes applicant’s employment as an occupation of a sorter of strawberries but it also contains additional job duties and significant physical requirements. (Exhibit 3).

Focusing on the job duties of constant carrying of items up to 25 pounds and occasionally carrying up to 50 pounds and the constant lifting and carrying, it is found the most appropriate occupational group variant is a group 360. In the rating manual one of the listed occupations for this number is that of a conveyor tender. This allows for a “G” as a modifier for the spine.

PERMANENT DISABILITY

Based on the medical reporting of Steven Brouman, MD., in his capacity as an AME, it is found Applicant sustained partial permanent disability as follows:

15.01.02.01

15.02.02.03 – 35 – [1.4]49 – 360G – 52 – 61

15.03.02.02

It is found Applicant sustained 61% permanent disability [...]. Permanent disability payments shall commence as of November 25, 2020 or the date of the last date of the season for 2020.

APPORTIONMENT

Based on the medical reporting of Steven Brouman, M.D., it is found there is no legal basis for apportionment. Dr. Brouman did not explain the how and why applicant’s age contributed or caused her disability.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the medical reporting of Steven Brouman, M.D., in his capacity as an AME, it is found there is a need for further medical treatment to cure or relieve the effects of the industrial injury.

[...]

PETITION FOR CREDIT AGAINST PD FOR OVERPAYMENT OF TD

Defendant seeks a credit for the overpayment of temporary disability from April 20, 2019 through November 16, 2019. Based on the finding hereinabove applicant was temporary totally disabled until November 25, 2020, this issue is moot.

SUPPLEMENTAL JOB DISPLACEMENT VOUCHER

Based on the medical reporting of Steven Brouman, M.D. in his capacity as an AME, it is found applicant is entitled to a Supplement Job Displacement Voucher.

DATE: January 10, 2022

Scott Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE