

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

KENDRICK THIMOTHEE, *Applicant*

vs.

BOAR CROSS'N; EMPLOYER'S PREFERRED INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ12833193
San Diego 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.¹ 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.

The WCJ's analysis and decision is consistent with the holding in *Goytia v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 889 [35 Cal.Comp.Cases 27] [in determining an injured worker's earning capacity, due consideration should be given to the ability to work, age and health, willingness and opportunities to work, skills and education, and general condition of the labor market].) We agree the WCJ gave due consideration to the relevant factors and that applicant did not meet his burden of proof.

¹ We also received and considered defendant's answer. (Lab. Code, § 5905.)

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/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 27, 2021

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

**KENDRICK THIMOTHEE
LAW OFFICES OF PIERRE VAUGHN
MICHAEL SULLIVAN AND ASSOCIATES**

PAG/pc

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**

Counsel:

Petition for Reconsideration Filed By: Applicant
Applicant Represented By: Law Offices of Pierre Vaughn, by
Pierre Vaughn, Esq.
Defendant Represented By: Michael Sullivan and Associates, by
Nadine M. Elkhattat, Esq.

INTRODUCTION

Applicant has filed a timely, verified “Petition for Reconsideration,” on the undersigned’s Finding of Fact that applicant’s earning at the time of injury were \$180.76 per week, warranting a temporary disability rates as follows: \$187.71 for 2019, \$194.91 for 2020, and \$203.44 for 2021. Defendant has not filed an Answer.

FACTS

Applicant, Age 26, while employed on November 28, 2019, as a Bouncer, Occupational Group No. 390, at Carlsbad, California, by Boar Cross’n, then insured by Employers Preferred Insurance Company for workers’ compensation insurance, sustained injury arising out of and in the course of employment to his head and right shoulder.

The issues for trial was Applicant’s average weekly wage, temporary disability rate and attorney fees. Applicant claimed that his average weekly wage should be \$579 per week based on an earning capacity argument pursuant to Labor Code section 4453(c)(4). Defendant contended that Applicant’s average weekly wage was \$180.76 per week based on his actual earning at Boar Cross’n. The documentary evidence consisted of Applicant’s payroll records from a prior employer, Universal Security, for the period of August 23, 2018 through March 7, 2019, as well as Applicant’s payroll records from Boar Cross’n for the period of March 29, 2019 through November 28, 2019. Applicant was the sole witness at trial. At trial, the parties stipulated that if temporary disability was calculated based on Applicant’s wages at Boar Cross’n, where he was employed at the time of his injury, his temporary disability rate would be \$187.71 for 2019, \$194.91 for 2020, and \$203.44 for 2021. After listening to and reviewing all the evidence, including the testimony of Applicant, the undersigned did not find that Applicant has established that his temporary disability rate should be based on an earning capacity of \$579 per week. There was insufficient evidence to support a higher average weekly wage than one

based on applicant's actual earnings at the time of injury. Instead, the undersigned found his temporary disability rate to be \$187.71 for 2019, \$194.91 for 2020, and \$203.44 for 2021, which was based on his actual earning at the time of his injury at Boar Cross'n and his average weekly wage of \$180.76. It is from this finding that Applicant filed his petition for reconsideration.

DISCUSSION

Applicant claimed that his average weekly wage should be \$579 per week based on an earning capacity argument pursuant to Labor Code section 4453(c)(4). Applicant based \$579 on wages he earned at a prior employer, Universal Security. Labor Code Section 4453(c)(4) states as follows:

(4) Where the employment is 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.

In this case, the Applicant was working less than 30 hours per week when he was injured at Boar Cross'n. At trial, Applicant testified about his employment history prior to Boar Cross'n. Applicant testified that shortly after graduating from high school he entered the Marine Corp. He enlisted in the Marines in 2012 and was honorably discharged from the Marine Corps in 2016 (12/29/20 Minutes of Hearing "MOH", page 6, lines 2 and 20). After he was discharged, he worked a couple of months for Walmart as a stocker. He quit the job at Walmart (12/29/20 MOH, page 6, lines 21-25). He was unemployed for several months until he took a job as a porter at a Lexis dealership. He worked for the Lexis dealership for a couple of months until he was fired from that job due to getting into a car accident (3/22/21 MOH, page 2, lines 20-25, and page 3, lines 1-3). Applicant testified that in 2018 he started working as a Security Guard for a company called Universal Security. He worked there for approximately 6 months until he was terminated from that job in February 2019 because he was not coming into work on time and was no-showing on the job. He testified that he had these issues because he was suffering from depression and anxiety (12/29/20 MOH, page 4, lines 4-11). Applicant has been taking prescription medications for his depression and anxiety and is still taking medication for these issues. He testified that he believed the medication was helping him and that if he had not injured his shoulder at Boar Cross'n, he would be able to work somewhere full-time (3/22/21 MOH, page 4, lines 5-17).

After reviewing all the evidence, including the testimony of Applicant, the undersigned does not find that Applicant has established that he had an earning

capacity of \$579 per week. While Applicant testified that, with his current medications for his depression and anxiety, he believed he would be able to work full-time but for his shoulder injury at Boar Cross'n, the undersigned found his testimony too speculative. While he was working part-time for Boar Cross'n, he never secured another job to supplement his income and did not attempt to work additional hours at Boar Cross'n, although additional hours were offered to him (12/20/20 MOH, page 4, lines 18-22). As such, the WCJ made a finding that Applicant's earnings and average weekly wage at the time of injury were \$180.76 per week based on his actual wages at the time of his injury, warranting temporary disability rates as follows: \$187.71 for 2019, \$194.91 for 2020, and \$203.44 for 2021.

RECOMMENDATION

It is respectfully recommended that reconsideration be denied.

DATED: 07/13/2021

Michelle M. Utter

WORKERS COMPENSATION JUDGE WORKERS' COMPENSATION
APPEALS BOARD