WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICK GODINEZ, ***Applicant***

vs.

CITY OF LOS ANGELES;
permissibly self-insured, ***Defendants***

Adjudication Number: ADJ11998534
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After 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 affirm the August 5, 2020 Findings of Fact and Award.

Procedurally, we note that the issuance of this decision is timely. Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

On June 5, 2020, the State of California's Governor, Gavin Newsom, issued Executive Order N-68-20, wherein he ordered that the deadlines in sections 5909 and 5315 shall be extended for a period of 60 days. Pursuant to Executive Order N-68-20, the time within which the Appeals Board must act in this case was extended by 60 days. Therefore, this decision is timely.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 5, 2020 Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 9, 2021

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

RICK GODINEZ
LEWIS MARENSTEIN WICKE SHERWIN & LEE
OFFICE OF THE CITY ATTORNEY-LOS ANGELES

PAG/abs

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

Applicant Rick Godinez has filed a timely, verified Petition for Reconsideration from an August 5, 2020 Findings and Award (Expedited Hearing), which found that applicant had not withdrawn from the labor market when he retired, and awarded TTD benefits based on applicant's post-retirement earnings *capacity*, per Labor Code § 4453, subd. (c)(4). Applicant contends that it was error not to calculate the TTD rate using the applicant's earnings at the *time of injury*, pursuant to § 4453, subd. (c)(1). The matter is not presently on calendar.

II.
FACTS

Applicant Rick Godinez was employed as a firefighter for the City of Los Angeles. After approximately 30 years of service, Mr. Godinez entered the Deferred Retirement Option Plan ("DROP") with the City in approximately 2015. Among the various terms of the program was an agreement that the applicant would participate for up to five years, at which time he would separate from the City. In addition to his work for the City of Los Angeles, applicant also worked intermittently as a firefighting consultant for a television production in January, March and April, 2019. On February 14, 2019, the applicant filed the instant cumulative trauma claim for the period November 11, 1984 through February 14, 2019.

The parties stipulate that applicant became temporarily totally disabled as of December 8, 2019 and remains medically TTD presently. The defendant paid Labor Code § 4850 benefits to the applicant through April 7, 2020. However, on April 7, 2020, the applicant separated from the City pursuant to the five year agreement as part of the DROP program. Defendant then terminated both § 4850 benefits, and further declined to pay TTD indemnity, asserting that the applicant had withdrawn from the labor market.

Applicant requested an Expedited Hearing on the issue, and the matter was heard before the undersigned on July 27, 2020 and on July 29, 2020. The primary issue presented was temporary disability with the applicant alleging temporary disability commencing April 8, 2020 through the present and continuing, and associated attorney fees. Sub-issues of withdrawal from the labor market, and the correct method for calculating Average Weekly Wages (AWW) were identified. The applicant's testimony was adduced under direct and cross examination, and the matter submitted for decision on July 29, 2020.

Findings of Fact and Award issued on August 5, 2020, determining that the applicant had not withdrawn from the labor market, and retained post-retirement earnings capacity. TTD was awarded from April 8, 2020 through the present. These findings are not disputed.

However, applicant avers in the instant Petition for Reconsideration the court erred in using his post-retirement earnings *capacity* to calculate the average weekly wages, rather than using applicant's wages *at the date of injury*.

III.
DISCUSSION

Applicant argues that because he was regularly employed in a full-time capacity at the time of injury, § 4453(c)(1) requires that actual wages at the time of injury be used in the calculation of temporary disability rates.

However, the applicant's prearranged voluntary retirement from firefighting and plan to work in a different field with different wages *during the period of temporary disability* militates against the mechanical application of section 4453(c)(1) earnings at the time of injury. Because subd. (c)(1) would provide a distorted picture of applicant's earnings capacity, subd. (c)(4) earnings capacity provides the appropriate calculation for temporary disability.

When an injury causes temporary disability, "the disability payment is two-thirds of the weekly loss in wages during the period of such disability."[1] The rate at which temporary disability benefits are paid is set forth in Labor Code § 4453, which provides in pertinent part:

> (c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459, 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.
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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.

Subdivision (c)(1) 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."

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[1] Cal. Lab. Code § 4654.

California courts have developed a significant body of jurisprudence regarding the application of § 4453 to average earnings calculations:

> In 1962 the Supreme Court handed down a series of decisions dealing with the question of average earnings. (*California Comp. & Fire Co. v. Industrial Acc. Com. [Stevens]*, 57 Cal.2d 600 [21 Cal.Rptr. 551, 371 P.2d 287]; *California Comp. & Fire Co. v. Industrial Acc. Com. [Colston]*, 57 Cal.2d 598 [21 Cal.Rptr. 549, 371 P.2d 285]; and *Argonaut Ins. Co. v. Industrial Acc. Com. [Montana]*, 57 Cal.2d 589 [21 Cal.Rptr. 545, 371 P.2d 281].) The court emphasized that future loss is the primary consideration in the determination of average earnings for temporary disability indemnity when Labor Code section 4453, subdivision (d) determines the manner of computation. This section applies when the employment is for less than 30 hours per week or where for any reason other methods set out in Labor Code section 4453 cannot be fairly applied. These decisions indicate that an employee is entitled to maximum temporary disability indemnity when the evidence shows maximum *earnings at the time of injury and that continued steady employment would have been available during the period of temporary disability.*[2]

In 1970, the California Supreme Court handed down the seminal decision in *Goytia v. Workers' Comp. Appeals Bd.*[3] There, applicant Ruth Goytia sustained industrial injury on April 15, 1966 while employed as a seasonal worker for a produce packing company with minimal earnings. Following her injury, the applicant obtained work as a cashier at a significantly higher wage. The workers' compensation referee awarded benefits to the applicant at the higher rate, based on applicant's earning capacity. The WCAB reversed, noting that earnings at the time of injury controlled. The case was ultimately heard by the Supreme Court, which noted some confusion as to whether the WCAB had appropriately taken into account the applicant's post-injury earnings. The Supreme Court observed:

> Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut "capacity" to the procrustean bed of the earnings at the date of injury. A comparison of the first three subdivisions of section 4453 with the fourth shows that the Legislature deliberately established earning capacity as the test for the fourth subdivision as distinguished from the actual earnings for the other three subdivisions. Section 4453 provides for the computation of both temporary and permanent disability indemnity. Subdivisions (a), (b), and (c) relate to full-time employees, employees working for two or more employers, and employment at an irregular rate, such as piecework or work on a commission basis. Each of those subdivisions provide for computation of

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[2] *W. M. Lyles Co. v. Workers' Comp. Appeals Bd.* (1969) 3 Cal.App.3d 132, 137 [82 Cal.Rptr. 891], *emphasis added*.

[3] *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 891 [83 Cal.Rptr. 591, 464 P.2d 47].

> "average annual earnings for purposes of permanent disability indemnity" based upon earnings prior to the injury.
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> Section 4453, subdivision (d), applicable here, provides as follows: "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 95 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his *actual earnings* from all sources and employments." (Italics added.)
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> The language of the statute leads to two conclusions: first, average weekly earnings under subdivision (d) differs from average weekly earnings under the other three subdivisions; subdivision (d) 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 (d).
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> Secondly, subdivision (d) 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.[4]

Goytia makes it clear that the earnings capacity calculation applies if either of two scenarios apply: where the employment is for less than 30 hours of weekly work, *or* where subdivisions (a) through (c) cannot be reasonably and fairly applied.[5]

Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income.[6] An injured worker is indemnified for the wage loss actually sustained, or anticipated to be sustained, during the course of convalescence and rehabilitation.[7]

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[4] *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 894-895 [83 Cal.Rptr. 591, 464 P.2d 47].

[5] Labor Code §4553, subsections (a) through (d) have since been renumbered as (c)(1) through (4).

[6] *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [286 Cal.Rptr. 600].

[7] "An estimate of earning capacity is a prediction of what an employee's earnings would have been had [s]he not been injured." (*Argonaut Ins. Co. v. Ind. Acc. Comm.* (Montana) (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130].)

> The essence of the employer's analysis is to determine whether there are factors that within the anticipated duration of the temporary disability would increase or decrease the earnings the worker would have received absent the injury. If such factors exist and their impact is significant enough that it is unreasonable or unfair to use actual earnings at the time of injury to calculate temporary disability benefits, earning capacity should be used to calculate benefits. However, if no such factors exist or their impact on earning capacity is *de minimis*, the employer may use actual earnings in calculating benefits.[8]

Thus, where the applicant has regular employment on a full-time basis, the wage calculation is appropriately fixed at earnings at the time of injury. This assumes, however, that "continued steady employment would have been available during the period of temporary disability."[9]

The calculus changes when that steady employment would no longer be available during the period of disability. Here, the applicant has testified to a planned transition in profession following his retirement, from active firefighting, to consulting in the entertainment field and teaching work. To indemnify the applicant's wage loss when there is *no reasonable expectation* that the applicant would continue to earn the same wages he earned as a firefighter is to award indemnity on an artificially inflated basis.

As the Supreme Court noted in *Goytia*, the mechanical application of earnings at the time of injury may lead to inherently unreasonable results. The legislature created the wage capacity analysis to fill the analytical space where the mechanical application of earnings at the time of injury would otherwise result in distorted earnings no longer germane to the ongoing need for wage replacement. Thus, the analytical framework includes earnings before and after the injury, as well as earnings from collateral employments.

Here, the applicant retired from active firefighting on April 7, 2020, per the terms of the DROP program which he entered into freely. The City's position that applicant retained no earning capacity after that date is not sustainable, but neither is applicant's assertion that this court must ignore the changes in Mr. Godinez' earnings capacity after voluntary retirement and pursuit of a new vocation. It is inherently unreasonable to force the defendant to indemnify applicant for wages that he would not otherwise have earned. The analysis under Labor Code Section §4453, subd. (c)(4) provides the most accurate methodology for assessing applicant's wage loss and resulting indemnification, by assessing both pre- and post-injury earning capacity as well as market conditions, willingness to work, and other factors as set forth in *Argonaut Ins. Co. v. Industrial Acc. Com. (Montana)*.[10]

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[8] (Grossmont Hosp. v. Workers' Comp. Appeals Bd. (1997) 59 Cal.App.4th 1348, 1362-1363 [69 Cal.Rptr.2d 842].)

[9] *W. M. Lyles Co. v. Workers' Comp. Appeals Bd.* (1969) 3 Cal.App.3d 132, 137 [82 Cal.Rptr. 891].

[10] *Argonaut Ins. Co. v. Industrial Acc. Com.* [Montana], 57 Cal.2d 589 [21 Cal.Rptr. 545, 371 P.2d 281].

As to the basis for calculation of the wages, it is felt that the award of temporary disability based on applicant's past part-time work, including applicant's paystubs for prior consulting work, found ample support in the evidentiary record.

> In deciding what temporary disability benefits to pay an injured worker, an employer must consider both the anticipated duration of the disability, a function of the nature of the injury and the normal duration of the disability associated with that injury, and any factors which reasonably would affect the worker's earning capacity during the anticipated period of disability. Due consideration should be given to an injured worker's earnings at the time of injury; however, other factors may play a significant role in determining earning capacity. Factors to be considered include the worker's employment history, his or her ability, willingness and opportunity to work, his or her age, health, skill, employment history and education, as well as general labor market conditions.[11]

Thus, this court's August 5, 2020 determination took into account both applicant's prior work experience in the entertainment industry, as well as his testimony regarding his expectations of availability of consulting and teaching work after his retirement. The court further considered applicant's testimony regarding the state of the industry amidst the COVID-19 pandemic.

Applicant argues on Petition for Reconsideration that the court should have calculated wages based on the possibility that he might be hired full time. However, the applicant's past work as a television consultant was part-time,[12] and the applicant further testified that the nature of the work was intermittent,[13] and subject to a variety of external factors, including whether a show would be picked up by a network or renewed. The applicant's last consulting job lasted six days.[14] The teaching position that the applicant was considering before his injury would last just four to five days, twice per year.[15] The applicant was not clear that either of the shows he had worked on in the past were even currently in production.[16] Nor did the applicant testify that full-time work was presently available to him, only that his part-time work might at some undefined point in the future ripen into full-time work. As such, applicant's assertion on Petition for Reconsideration that he ought to be indemnified for full-time continuous employment in the entertainment industry is not supported in his own work history, or in testimony regarding the availability of ongoing consulting opportunities. Accordingly, the finding of wage capacity was based on applicant's own testimony and was fixed at part-time employment based on prior consulting wages and job history.

Having had the opportunity to review the record and to once again evaluate the issues presented, it is felt that the decision to utilize Labor Code § 4453(c)(4) to calculate wage capacity based on prior earnings at part-time work was reasonable and warranted in the evidentiary record.

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[11] *Grossmont Hosp. v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 1348, 1362 [69 Cal.Rptr.2d 842].

[12] July 27, 2020 MOH at 6:7 and 6:24.

[13] Id. at 5:20.

[14] Id at 6:7.

[15] Id. at 7:9.

[16] Id. at 7:6.

IV.
RECOMMENDATION

It is respectfully recommended that the applicant's August 20, 2020 Petition for Reconsideration be denied.

Dated: August 31, 2020
SHILOH ANDREW RASMUSSON
Workers' Compensation Administrative Law Judge