WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISTIAN AVILA GARCIA (Deceased),
SINTIA YANETH GARCIA (Guardia Ad Litem), ***Applicant***

vs.

BAYVIEW ENVIRONMENTAL SERVICES INCORPORATED; GREAT DIVIDE INSURANCE COMPANY, Administered by BERKELEY ENTERTAINMENT,
Defendants

Adjudication Number: ADJ12393038
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration[1] of the Findings and Award (F&A) issued on November 28, 2022, wherein the workers' compensation administrative law judge (WCJ) found that applicant's average weekly wage (AWW) at the time of injury exceeded the state maximum of $1,822.91, warranting a temporary disability indemnity rate of $1,215.27.

Defendant contends that the WCJ erred by calculating the AWW based upon applicant's earnings during the four-week period before his death and not the entire duration of his tenure.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, as our Decision After Reconsideration, we will affirm the F&A.

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[1] Commissioner Sweeney, who previously served on the panel hearing petitions for reconsideration in this case, no longer serves on the Appeals Board. Deputy Commissioner Schmitz has been substituted in her place.

FACTUAL BACKGROUND

In the Report, the WCJ states:

Bayview worked on projects involving, at least, asbestos abatement, mostly in the San Francisco Bay Area. It has, though, performed such work in Southern California, and in 2018 successfully bid on a project to refurbish Santa Monica High School. To perform that work, Bayview hired some workers in the Los Angeles area, but also offered work on that job to some of its Bay Area employees. Reportedly, the prevailing wage in Santa Monica was somewhat higher than laborers received in Northern California. In addition, the company agreed to put up traveling workers in a hotel, a Motel 6 in Inglewood; also, Bayview provided a stipend of $125 for travel at the beginning of the job, and the same amount at the end to return, as well as $20 per day for meals. (Exh. 6, deposition of Juan Saragosa, 1 pg. 24) It regarded the $250 as a travel incentive (Summary of Evidence, testimony of Richard Cleveland2); there was no requirement as to how it was spent (Id., testimony of Peter Warren). The traveling employees were told that they were free to spend their weekends as they pleased, as long as they were not needed for work. (The company got behind on the Santa Monica High School project, and began working some Saturdays.) . . .

Bayview was on the job in Santa Monica on Saturday, July 28, 2018. They did not begin until 9:00, because of noise ordinances. At around 11:30, one of the generators failed and the employees all quit for the weekend. (Testimony of Juan Saragosa, transcript of trial in case number ADJ12177450 (Edil David Melendez Banagas, decd.), at 15:13-17, Exh. 40 here) With his coworker and putative father-in-law, Mr. Melendez, Mr. Avila-Garcia left for their Oakland home. Returning to Southern California the following evening, through Kern County, their car was involved in a fatal collision. Mr. Avila-Garcia, the passenger, died at the scene. (Mr. Melendez died on August 15, 2018.)

Following trial, I concluded . . . that decedent's earnings for Bayview at the time of injury were in excess of the 2018 maximum, $1822.91, pursuant to Labor Code section 4453.

. . .

The only evidence of decedent's earnings consisted of exhibits offered by applicant and admitted at trial, together with trial testimony by Bayview managers. (The documentary evidence (Exhs. 12, 13, 21 and 35) is referenced in applicant's answer, at page 4, where she points out that defendant did not offer any other evidence of earnings.) . . . [O]ne sees that decedent's pay rose during his tenure with Bayview. This is common: Generally speaking, workers tend to receive raises, rather than cuts in pay, and are often able to increase their working hours. This was true in this case, and this is why defendants prefer to average an employee's earnings over a period of up to a year. (Lab. Code § 4453(c)(3))

In this case, in the roughly six months during which Mr. Avila-Garcia worked for this employer prior to his death, he consistently worked more than 30 hours per

week. The exceptions are one week in May, 2018, and two weeks in June, 2018. His base pay was $20.42 per hour when he began at Bayview, and $33.19 at the end. This was a union job, and prevailing wages were a measure of pay; this explains decedent's willingness to work in Santa Monica. More jobs in Southern California were anticipated.

. . .

Applicants contended at trial that the temporary disability indemnity rate – relevant to calculating potential death benefits for a minor, not to temporary disability – applicable in this matter is the maximum in effect for the time of injury, based in large part on the wages paid to Mr. Avila-Garcia in Santa Monica rather than the Bay Area. Indeed, the difference is considerable: The last regular wages the employee worked before embarking on the Santa Monica project were at $23 per hour, exclusive of overtime, and the base rate in Santa Monica was $33.19. With overtime, the total earned during the four one-week pay periods at the higher rate was $7039.52. (Exhs. 12, 21, 35) To that would be added $250 for the travel incentive, plus $20 per day for food. Using five-day work weeks for the food, the total of those figures, divided by the four weeks, yields an earning rate of $1922.38. Thus, without considering the cost of the hotel, the earnings crest the 2018 maximum set according to Labor Code section 4453, which is $1822.91. That section requires that wages be calculated on the basis of weekly pay "at the time of injury," if full-time.

(Report, pp. 1-4.)

DISCUSSION

Labor Code[2] § 4453(c), which governs the calculation of average weekly earnings, states in pertinent part:

> [T]he average weekly earnings . . . 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.
>
> . . .
>
> (§ 4453(c).)

In *Pham v. Workers' Comp. Appeals Bd*. (2000) 78 Cal.App.4th 626, the court found that an injured bakery worker's actual earnings at the time of her injury accurately reflected both her average weekly earnings under section 4453(c)(1) and (2), as well as her average weekly earning capacity under section 4453(c)(4), and held that the WCAB improperly utilized section 4453(c)(4) to calculate the employee's average weekly earnings based upon the time she was laid off, nine days after her accident, rather than at the time of the injury, thereby limiting her average

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

weekly earnings to those based on the part-time wages she would have continued to earn at a second job. In doing so, the court reasoned that section 455(c)(1) mandates that AWW be calculated based upon earnings "at the time of injury," stating:

> The language of subdivision (c)(1) is explicit and direct, providing that where an injured employee is employed "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*."
> (*Pham v. Workers' Comp. Appeals Bd*., *supra*, 78 Cal.App.4th at p. 635 [Emphasis in original].)

In *County of San Joaquin v. Workers' Comp. Appeals Bd*. (2007) 147 Cal.App.4th 1459, the court summarized section 4453's statutory meaning:

> "Average weekly earnings" are determined under the provisions of section 4453, which provides four methods for making that calculation. (*Pham v. Workers' Comp. Appeals Bd*. (2000) 78 Cal.App.4th 626, 633 [93 Cal. Rptr. 2d 115] (*Pham*); *Gonzales v. Workers' Comp. Appeals Bd*., *supra*, 68 Cal.App.4th at p. 846.)
>
> Although the statute uses the legal term "average weekly earnings," it is well established that "earning capacity" remains the benchmark for determining "average weekly earnings" regardless of which statutory method is applicable. (*Gonzales v. Workers' Comp. Appeals Bd*., *supra*, 68 Cal.App.4th at p. 846; *West v. Industrial Acc. Com.* (1947) 79 Cal. App. 2d 711, 722 [180 P.2d 972] [earning capacity is the "touchstone" in determining average earnings].)
>
> Moreover, "[e]arning 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." (*Goytia v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 889, 894 [83 Cal. Rptr. 591, 464 P.2d 47] (*Goytia*).)
> (*County of San Joaquin v. Workers' Comp. Appeals Bd*., *supra*, 147 Cal.App.4th at pp. 1464-1465.)

In this case, as stated by the WCJ in the Report, the WCJ calculated applicant's AWW based upon his earnings at the time of injury, which included base pay of $33.19 per hour, overtime, a $250 stipend for travel to and from defendant's Santa Monica project, and $20.00 per day for meals. (Report, pp. 3-4.) But defendant argues that the WCJ should have determined the AWW based upon applicant's earnings over his approximately six-month tenure with defendant rather than his earnings over the last four weeks before his death. (Petition, p. 4:20-28.) More

specifically, defendant argues that the failure to include applicant's earlier earnings in the calculation of AWW constitutes "some liberal construction of the facts twisted to turn [applicant] into a maximum wage earner when he clearly was not." (*Id*., p. 5:9-10.) We disagree.

Under the foregoing authorities, the WCJ is required to determine the employee's AWW based upon the employee's "daily earnings at the time of the injury" and is generally not permitted to utilize evidence of previous earnings to diminish that calculation because the calculation is intended to reflect the employee's earning capacity, not necessarily the employee's earnings history. We discern no error in the F&A.

Accordingly, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on November 28, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 7, 2023

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

CRISTIAN AVILA GARCIA (DEC.)
SINTIA YANETH GARCIA
THE LAW OFFICE OF MARK A. VICKNESS
PEARLMAN, BROWN & WAX, LLP

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