

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

MARIA PINA LLUBERES, *Applicant*

vs.

**ASSISTED HOME RECOVERY, INC.;
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ16518560
Oxnard District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) of October 17, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a caregiver for defendant, sustained injury arising out of and occurring in the course of employment (AOE/COE) to her right shoulder and that her average weekly earnings for both temporary and permanent disability indemnity is \$694.07 as defendant has properly calculated and ordered that jurisdiction is reserved over all remaining issues. Applicant contends that the WCJ used the wrong statute to determine her average weekly earnings.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&O, and return this matter to the WCJ for further proceedings.

FACTS

Applicant claimed industrial injury to her right shoulder while working as a home caregiver for defendant due to a fall on July 29, 2022. The parties agreed that applicant, while employed on July 29, 2022, as a caregiver, in Occupational Group No. 340, by defendant, sustained injury AOE/COE to her right shoulder and that at the time of the injury, the employer's workers' compensation carrier was Berkshire Hathaway Homestate Companies. (10/6/23 Minutes of Hearing (MOH), p. 2.) The only issue for trial was applicant's earnings. (MOH, p. 2.) Applicant claimed that her average weekly earnings were \$1,050.00 while defendant claimed her average weekly earnings were \$694.07. (MOH, p. 2.) The parties jointly submitted an earnings report into evidence. (Jt. Ex. A, Earnings Report dated 8/12/22.) There was no testimony on this issue. At the conclusion of the trial, the WCJ found that applicant's average weekly earnings for both temporary and permanent disability indemnity is \$694.07.

DISCUSSION

The issue before us is the calculation of applicant's average weekly earnings. In order to review the temporary disability rate, permanent disability rate, and whether applicant was adequately compensated, we must consider applicant's average weekly earnings at the time of injury. The Workers' Compensation Act provides for temporary and permanent disability indemnity. (Lab. Code, § 4650 et seq.)¹ "Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income." (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631], citations omitted.) Permanent disability indemnity has a dual function: "to compensate both for actual incapacity to work and for physical impairment of the worker's body, which may or may not be incapacitating." (*Id.*)

In order to compute either temporary or permanent disability indemnity, a worker's earning capacity (or average weekly earnings) must first be determined under Labor Code section 4453. An estimate of earning capacity is a prediction of what a worker's earnings would have been had they not been injured. (*Argonaut Ins. Co. v. Industrial Acci. Com. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130].) The method of computation of average weekly earnings is provided in section 4453, subdivision (c). (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78

¹ All further statutory citations are to the Labor Code unless otherwise noted.

Cal.App.4th 626, 632 [65 Cal.Comp.Cases 139].) Subdivision (c)(1)-(3) provides formulas that take a worker's actual earnings as a starting point, whereas subdivision (c)(4) is for irregular employment or other situations where the first three formulas cannot reasonably and fairly be applied. (*Montana, supra*, at pp. 594-595; *Pham, supra*, at pp. 632-633; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 894-895 [35 Cal.Comp.Cases 27].)

Applicant claims that the WCJ incorrectly used section 4453(c)(3) instead of sections 4453(c)(1) or (c)(4). According to the Opinion on Decision (OOD), the WCJ made the calculation based on section 4453(c)(1). (OOD, p. 2.) "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." (Lab. Code, § 4453(c)(1).) However, the crux of applicant's claim is that she contends her average weekly earnings were \$1,050.00 instead of the \$694.07 that the WCJ awarded to her. (MOH, p. 2.)

The issue that we face on reconsideration is that there is an insufficient record to evaluate the WCJ's Finding that applicant's average weekly earnings for both temporary and permanent disability indemnity is \$694.07. There was no testimony and only a single exhibit on this issue. The record does not establish a regular 30 hours or more work week as hours vary from less than 30 to 60. (Jt. Ex. A, pp. 2-16.) Further, applicant's hourly rate varies from \$15.00 to \$18.00 with some overtime and differential pay. (Jt. Ex. A, pp. 2-16.) There is no explanation in the record for the variance. It appears her hours leading up to the injury became more regular but without any evidence to show why more reasonable hours occurred.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. "The Labor Code and the Board's rules set forth what must be included in a proper trial record. It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*)).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Id.* at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) "For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record."

(*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476.) Accordingly, we grant the Petition, rescind the F&O, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the October 17, 2023 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the October 17, 2023 Findings and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2023

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

**MARIA PINA LLUBERES
JOHNSON SANDHU
TOBIN LUCKS**

JMR/ara

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