

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

JESSICA LEIVA, *Applicant*

vs.

**PORTO'S BAKERY; TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA, *Defendants***

**Adjudication Number: ADJ16066568
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of February 22, 2024 wherein it was found that while employed on March 8, 2022 as a quality assurance technician, applicant sustained industrial injury to her left knee and foot causing temporary disability from May 18, 2023 through August 30, 2023 and the need for further medical treatment.¹ The WCJ found applicant entitled to temporary disability indemnity at the rate of \$501.77 per week, based on the finding that applicant's average weekly wage was \$752.66 per week. While the issues for determination at trial included "whether Dr. Bertoldi is a medical provider within defendant's MPN" and "whether there has been a denial or refusal to provide medical care by defendants," the Findings, Award and Order does not contain any express findings on these issues. In the Opinion on Decision, the WCJ makes clear that that Dr. Bertoldi was not in defendant's medical provider network and defendant did not refuse medical care.² Finally, the WCJ awarded an attorney's fee of 10% of the temporary disability indemnity awarded to applicant.

Applicant contends that the WCJ erred in finding that (1) Dr. Bertoldi is not in defendant's medical provider network, (2) defendant did not fail to give proper notice of the medical provider

¹ Applicant also claims industrial injury to her left ankle, left great toe, teeth, heart, high blood pressure, weight gain, and psyche. Those body parts were deferred pending further development of the medical record.

² Although the better practice is to clearly make express findings on every issue for determination, we imply negative findings on these issues. (*Limited Mut. Compensation Ins. Co. v. Industrial Acci. Com. (Vold)* (1940) 37 Cal.App.2d 50, 55 [5 Cal.Comp.Cases 31].)

network and in not finding that the purported lack of notice resulted in a denial or refusal of medical care, (3) finding an average weekly wage of only \$752.66 per week and in (4) awarding an attorney's fee of only 10%. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated in the WCJ's Report which we quote below, and for the additional reasons explained below, we will deny the applicant's Petition. We do not incorporate the WCJ's discussion of the attorney's fee award. However, we do not consider applicant's counsel request for an increased attorney's fee because the request fails to comply with Appeals Board Rule 10842, which states, "All requests for an increase in attorney's fee shall be accompanied by proof of service on the applicant of written notice of the attorney's adverse interest and of the applicant's right to seek independent counsel. Failure to notify the applicant may constitute grounds for dismissal of the request for increase in fee." (Cal. Code Regs., tit. 8, § 10842.)

In analyzing the issues in this matter, we note that no testimony was offered by either party at the December 28, 2023 trial, and that only documentary evidence was submitted with absolutely no explanatory testimony.

With regard to MPN notice, we note that applicant was given medical treatment at Stacy Medical Center on the date of injury and that the "Injury intake form" from that visit and the Doctor's First Report of Occupational Injury or Illness lists 1964 E 130th St. in Compton as applicant's address. Five days after the injury, defendant sent notice of its MPN to this address. Applicant states in its Petition that this "was not the Applicant's listed address on the official address record," but applicant had not yet filed a DWC-1 form or Application for Adjudication of Claim, so it is unclear what applicant means by "official address record." "[W]hen an employer establishes the existence of a valid MPN and demonstrates actions designed to give MPN notice to the applicant, the burden shifts to the applicant ... to show that the notice or some other aspect of the MPN was defective and resulted in a denial of care." (*Southland Spine & Rehab. Med. Ctr. V. Workers' Comp. Appeals Bd. (Salas)* (2015) 81 Cal.Comp.Cases 88, 90 [writ den.].) Here, applicant did not carry her burden to show that the notice was defective or that it resulted in a denial of care.

With regard to applicant's average weekly earnings, "[i]n most cases benefits for total temporary disability may be based on actual earnings under section 4453, subdivision (c)(1)-(3). Application of the section 4453, subdivision (c)(4) earning capacity method is appropriate where

for any reason the application of the actual earnings methods is not reasonable and fair.” (*Grossmont Hosp. v. Workers’ Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348, 1362 [62 Cal.Comp.Cases 1649].) Again, applicant had the burden of proof on this issue, including the burden of showing why the method applicable to “most cases” should be eschewed and why actual earnings are not a reasonable and fair method to be utilized. (Lab. Code, §§ 3202.5; 5705; *Sandoval v. A.M. Harvesting, Inc.* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 643, *4-5 [Appeals Bd. panel].) However, applicant presented no such explanatory evidence. Nevertheless, the WCJ did calculate earnings at a higher rate than by strict application of subdivision (c)(1-3) and we see no abuse of discretion in that regard.

We otherwise deny applicant’s Petition for the reasons in the Report quoted below. As noted above, we do not quote the discussion regarding attorney’s fees since we do not consider this request because of the failure to comply with Appeals Board Rule 10842. We also omit the WCJ’s discussion of temporary disability since applicant does not challenge the finding of the period of temporary disability. We omit some references in the Report to applicant’s counsel’s purported bad faith arguments. Although we reject the arguments for the reasons stated by the WCJ, no sanctions are sought by defendant or recommended by the WCJ, and thus consideration of whether the arguments were made in bad faith is not necessary to our determination.

**REPORT AND RECOMMENDATION ON APPLICANT’S PETITION
FOR RECONSIDERATION AND PETITION FOR REMOVAL**

**I
INTRODUCTION**

- | | | |
|----|--|--|
| 1. | Applicant’s Occupation:
Date of Injury:
Parts of Body Injured: | Quality assurance technician
March 8, 2022
left knee and left foot |
| 2. | Identity of Petitioner:
Verification: | Applicant filed the Petition.
The Petition is verified. |
| 3. | Date of Findings of Fact:
Amended Findings of Fact issued: | February 22, 2024
March 18, 2024 |
| 4. | Petitioner’s contentions:
Applicant contends:
(a) the evidence does not justify the findings of fact;
(b) the findings of fact do not support the Order, Decision or Award. | |

II FACTS

It is undisputed applicant, Jessica Leiva , while employed on March 8, 2022 as a quality assurance technician at Commerce, California by Porto's Bakery, Inc., sustained an injury arising out of and in the course of employment to her left knee and left foot. Applicant claims the March 8, 2022 incident also caused injury to her left ankle, left great toe, teeth, heart, high blood pressure, weight gain, and psyche; however, the Court found further development of the medical record is necessary to address the compensability of the disputed body parts.

Pursuant to the parties' stipulation, the employer's workers' compensation carrier was Travelers Property Casualty Company of America.

No witnesses were called to testify at Trial. After review of the available evidence the Court found the applicant's earnings at the time of injury to be \$752.66 per week, entitling applicant to temporary disability benefits at \$501.77 per week, and \$290.00 per week for permanent disability.

The Court found applicant's March 8, 2022 injury caused her to be temporarily disabled from May 18, 2023 thru August 30, 2023 (105 days) and entitles applicant to temporarily disability benefits at the rate of \$501.77 per week totaling \$7,526.55 less credit for temporary disability benefits issued to date.

After review of all exhibits the Court found Dr. Roger Vernon Bertodli is not a medical provider within Defendant Travelers MPN ID # 2493; and defendant is not liable for the self-procured medical treatment services rendered by Dr. Roger Vernon Bertodli. The Court also found defendant did not deny or neglect to provide medical treatment such that applicant would be allowed to self-procure medical treatment outside of Defendant Travelers MPN ID # 2493. The Court found that any delay in treatment was solely caused by applicant's attorney unreasonable and frivolous arguments that Dr. Bertoldi is a medical provider within Defendant Travelers MPN ID# 2493.

The Court found applicant is entitled to further medical treatment to cure or be relieved from the effects of the industrial injury. The Court awarded an attorney fees in the amount of \$752.65 or 10% of the retro temporary disability benefits found to be owed to applicant.

III DISCUSSION:

A Petition for Reconsideration is the appropriate mechanism to challenge a final order, decision, or award (Labor Code Section 5900). An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a

final order. See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068 [65 Cal. Comp. Cases 650; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer)* (1980) 104 Cal. App. 3d 528 [45 Cal. Comp Cases 410].

EARNINGS:

In the present case, applicant argues the Court erred in finding applicant's average weekly earnings to be \$752.66; and argues applicant's average weekly earnings should be \$1,033.69 despite the evidence submitted at Trial showing applicant never earned more than \$1,000.00 a week.

Several factors may influence the evaluation of earnings for indemnity purposes, and the analysis may differ between permanent disability and temporary disability. *Argonaut Ins. Co. v. Industrial Accident Commission (Montana)* (1962) 57 Cal. 2d 589 [27 Cal.Comp.Cases 130]. For both, the primary question is what the employee would have earned had he or she not been injured. *Id.*; *Pascoe v. Workers' Comp. Appeals Bd.*(1975) 46 Cal.App. 3d 146 [40 Cal.Comp.Cases 191]. For temporary disability, earning capacity during the disability period must be calculated; for permanent disability, other factors may lead to a different calculation of long-term earning capacity. *Id.*; *Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App. 3d 901 [55 Cal.Comp.Cases 196].

In the present case, defendant submitted a one page unsigned wage statement with a header stating "Leiva Jessica 03/08/2021-03/08/2022- Biweekly" and columns listings pay date, pay amount sum, and work hours sum for the dates between March 12, 2021 and February 25, 2022 (Exhibit 11). In response applicant submitted cellphone screenshots of alleged earning details showing bi-weekly earnings, taxes, net pay, regular hours worked, overtime hours worked, and sick time used (Exhibit 9). Strangely the dollar figures for the total weekly earnings listed on applicant's Exhibit 9 and defendant's Exhibit 11 do not match, albeit the figures are within \$1 or \$2 of each other. No testimony was provided at Trial that may have clarified this earnings dispute.

Applicant's attorney requested a finding of weekly earnings of \$1,033.69 based on the earnings for the pay period ending January 28, 2022 while disregarding all other evidence. The Court took note that the payroll records for the pay period ending January 14, 2022 on defendant's Exhibit 11 shows earnings of \$594.32 while the same pay period on applicant's Exhibit 9 show earnings of \$593.39 that includes 24.0010 hours of regular time and 5.3830 hours of overtime. The following pay period ending January 28, 2022 on defendant's Exhibit 11 shows earnings of \$2,069.88 and the same period on applicant's Exhibit 9 show earnings of \$2,067.38 that includes 16 hours of "Retro -Sick" time, 8hours of vacation, 79.9980 hours of regular time, and 5.1670 hours of overtime. Without Trial testimony to decipher this wage statement the Court inferred the "Retro -

Sick” time is the sole reason for the significant change in earnings between the pay periods ending January 14, 2022 and January 28, 2022.

At Trial Defendant argued applicant’s weekly earnings are \$710.94 based on a straightforward division of applicant’s total earnings during the 40 weeks prior to her injury, but defendant included weeks where applicant earned significantly less than expected, and thus unjustly lowering the weekly wage average.

To obtain the most equitable result the Court removed the four pay periods where applicant earned substantially less than expected and used the remaining seventeen pay periods to calculate the average weekly earnings of \$752.66. After review of all evidence the Court found applicant’s average weekly earnings are \$752.66 entitling applicant to temporary disability benefits at \$501.77 per week, and \$290.00 per week for permanent disability.

[Discussion of temporary disability omitted.]

MEDICAL PROVIDER NETWORK:

After review of all exhibits the Court found Dr. Roger Vernon Bertodli is not a medical provider within Defendant Travelers MPN ID # 2493; and defendant is not liable for the self-procured medical treatment services rendered by Dr. Roger Vernon Bertodli. Applicant was served with the appropriate Notice of Defendant Travelers MPN ID #2493 and no evidence was presented at Trial to support the argument Dr. Bertodli is or ever was a medical provider within Defendant Travelers MPN ID# 2493.

Despite having reviewed the Notice of Defendant Travelers MPN ID # 2493. Applicant’s attorney argues that Coventry is the correct Medical Provider Network for the above case because applicant received an Explanation of Reimbursement dated July 30, 2022 (Exhibit 1) for services rendered by Stacy Medical Center that indicates “Network Name: Coventry Integrated Network.” This isolated mention of Coventry in an Explanation of Reimbursement with no other mention of Coventry in any of the Notices provided to applicant or applicant's attorney cannot be interpreted by a reasonable person to infer that Coventry is the appropriate Medical Provider Network for the present matter.

Additionally, applicant's attorney argues that a contract between Coventry and Dr. Bertoldi dated June 19, 2009 (Exhibit 10) which makes no mention of the present defendant employer or the present insurance carrier Travelers, and is dated thirteen years prior to applicant’s March 8, 2022 injury, should be relied upon by the Court to find Dr. Bertoldi is a medical provider within Defendant Travelers MPN is unreasonable

DENIAL OR NEGLECT TO PROVIDE CARE:

Applicant argues defendant has denied or neglected to provide medical treatment and thus applicant should be allowed to self-procure medical treatment outside of Defendant Travelers MPN ID# 2493; however, the Court found any delay in treatment was solely caused by applicant's attorney's [...] arguments that Dr. Bertoldi is somehow within Defendant Travelers MPN ID # 2493.

Applicant was initially treated at Stacy Medical Center on March 17, 2022. Applicant was served with Notice of Defendant Travelers MPN ID# 2493 on March 22, 2022 (Exhibit N). Applicant was reevaluated on multiple occasions at Stacy Medical Center before becoming represented by counsel. Applicant's attorney filed their notice of representation on April 27, 2022. On May 11, 2022 defendant served applicant's counsel with Notice of Travelers MPN ID # 2493 (Exhibit A).

Also on May 11, 2022 applicant's attorney notified defendant via letter, email, and fax that applicant wishes to elect Dr. Bertoldi as the new primary treating physician and attached a printout from the Coventry Network listing Dr. Bertoldi as a provider (Exhibit 5,6,7, and 8). The Court will not speculate as to why applicant's counsel ignored the Notice of Defendant Travelers MPN ID # 2493 and chose to search thru the Coventry provider directory on May 11, 2022 to elect Dr. Bertoldi. However, the Court will note it is impossible for applicant's attorney to have relied on the Explanation of Reimbursement dated July 30, 2022 that states "Network Name: Coventry Integrated Network" (Exhibit 1) when making the election of Dr. Bertoldi on May 11, 2022 because the Explanation of Reimbursement is dated two months after applicant's attorney election of Dr. Bertoldi.

[Attorney's fee discussion omitted.]

**IV
RECOMMENDATION**

For the reasons stated above, it is respectfully requested that applicant's Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings, Award and Order of February 22, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 17, 2024

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

**JESSICA LEIVA
SOLOV AND TEITELL
MORGAN & LEAHY**

DW/oo

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