WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA YOLANDA JIMENEZ, *Applicant,* **vs.** **SAN JOAQUIN VALLEY LABOR; and SUPERIOR NATIONAL INSURANCE COMPANY,** *Defendants.*	**Case No. FRE 0147567** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On July 21, 2000, the Board granted defendant's petition for reconsideration of the Findings and Award issued by the workers' compensation administrative law judge (WCJ) on April 28, 2000. In essence, the WCJ found that applicant, a seasonal farm laborer, sustained industrial injury to her back, spine, and lower extremities on August 24, 1994, resulting in temporary disability for specified periods and in permanent disability of 46-1/2%. Based on the parties' stipulation that applicant's average earnings were $405 per week during the season and $0 (zero) per week during the off-season, the WCJ further found that applicant's in-season temporary disability indemnity rate is $270 per week and that her off-season temporary disability indemnity rate is $0 (zero) per week. The WCJ, however, found that applicant is entitled to vocational rehabilitation maintenance allowance benefits (VRMA) at the rate of $246 per week, irrespective of whether her participation in vocational rehabilitation occurs in-season or off-season.

In its petition, defendant contended that the WCJ erred in awarding VRMA at $246 per week for all periods of applicant's vocational rehabilitation, arguing in substance that Labor Code

section 139.5[1] mandates that VRMA be calculated based on the employee's earnings and on what he or she would have received as temporary disability indemnity (up to $246 per week) and, therefore, applicant should receive VRMA of $246 per week for her in-season participation in vocational rehabilitation and $0 (zero) per week for her off-season participation.[2] Defendant additionally contended that it is entitled to credit for certain overpayments of temporary disability indemnity and that applicant sustained no permanent disability as result of her August 24, 1994 injury.

Applicant filed an answer to defendant's petition, asserting in substance that the WCJ properly awarded VRMA at $246 per week, even though her participation in vocational rehabilitation occurred during the off-season, because the purpose of VRMA is to provide some income to injured workers during the vocational rehabilitation process so that the workers "can survive while being retrained into a new career." Applicant also asserted that defendant is estopped from seeking credit for its temporary disability indemnity overpayments and that the 46-1/2% permanent disability finding was proper.

Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an en banc decision. (Lab. Code, § 115.)[3] Based on our review of the relevant statutory and case law, we conclude that an industrially injured seasonal employee shall be awarded temporary disability indemnity at two rates: (1) an in-season rate based on the employee's in-season earnings capacity and (2) an off-season rate based on the employee's off-season earnings capacity, taking into consideration such factors as the employee's earnings history, willingness and ability to work, age and health, education and skill, as well as employment opportunities and the general condition of the labor market. We further conclude, in

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[1] All further statutory references are to the Labor Code.

[2] Alternatively, defendant argued that applicant should be allowed a single in-season/off-season VRMA rate of $10 per week, based upon her average weekly earnings in the one year preceding her injury.

[3] The Board's en banc decisions are binding precedent on all Board panels and WCJs. (WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

light of the language of section 139.5(d)(1),[4] that where a seasonal employee receives a two-tiered award of temporary disability indemnity, the seasonal employee must also receive a two-tiered award of VRMA at his or her in-season and off-season temporary disability indemnity rates, subject to the $246 per week ceiling.

I. BACKGROUND

The relevant facts pertaining to the temporary disability indemnity and VRMA rate issues are essentially undisputed.[5]

Applicant sustained her August 24, 1994 injury while employed as a seasonal farm laborer. Her job consisted of picking grapes in the field, packing grapes in boxes, and stacking the boxes on pallets. The grape-picking season was stipulated to be from August 16, 1994 through October 25, 1994. It was also stipulated that applicant's average earnings during the season were $405 per week.

The parties further stipulated that applicant had had no employment in the twelve months preceding the commencement of the grape-picking season. From the record, it appears that applicant's last employment had been as a fruit packer from April 1992 through December 1992.

Following applicant's injury, defendant paid temporary disability indemnity and VRMA at various rates and for various periods but, initially, it paid temporary disability indemnity at the rate of $269.50 per week, including during off-season periods.

On March 3, 1995, defendant sent applicant a letter stating it was changing her temporary disability indemnity rate to $10 per week because "the season ended at your employer in October" and, because the season had ended, she qualified only for "the non-seasonal rate."

On December 26, 1995, applicant became medically permanent and stationary.

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[4] Section 139.5(d)(1) states, in relevant part, that the amount of VRMA due shall be "[t]he amount the employee would have received as *continuing temporary disability indemnity*, but not more than two hundred forty-six dollars ($246)." (Emphasis added.)

[5] Because of our disposition, there is no present need to address the facts relating to the issues of temporary disability indemnity overpayments or permanent disability.

On April 16, 1996, applicant began participating in vocational rehabilitation. She continued to participate through October 25, 1996, when the parties agreed to interrupt vocational rehabilitation.[6]

From April 2, 1997 through August 22, 1997, applicant again participated in vocational rehabilitation. A plan was developed (and completed) with a vocational objective of floral arranging.

It appears applicant's vocational rehabilitation services did not result in new employment. On August 12, 1999, she attempted a return to work as a burrito packer but, after completing one full eight-hour workday, she was unable to return because of pain.

II. DISCUSSION

A. Temporary Disability Indemnity Rate For Seasonal Employees

Although neither party sought reconsideration regarding the specific issue of applicant's temporary disability indemnity rate, discussion of that issue is necessary to resolve the dispute before us regarding applicant's VRMA rate.

Within statutory limits, the amount of an injured employee's weekly disability indemnity payment, regardless of its specie, is based on the employee's "average weekly earnings" at the time of injury. (Lab. Code, §§ 139.5(d)(1), 4653, 4658, 4659.) In turn, an employee's "average weekly earnings" are computed based on one of four statutory methods. (Lab. Code, §§ 4453(c)(1) through (c)(4) (formerly, section 4453(a) through (d)); *Argonaut Ins. Co. v. Industrial Acc. Com. (Montana)* (1962) 57 Cal.2d 589, 593-594 [27 Cal.Comp.Cases 130, 132].) Ordinarily, the average weekly earnings of a seasonal employee are computed under section 4453(c)(4) (formerly, section 4453(d)) and are based on the employee's average weekly earning capacity. (*Westside*

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[6] Although some evidence in the record suggests the interruption began on December 10, 1996, applicant's verified answer to the petition for reconsideration alleges the interruption began on October 26, 1996, which appears consistent with the history of defendant's VRMA payments.

Produce Co. v. Workers' Comp. Appeals Bd. (Avila) (1978) 81 Cal.App.3d 546, 552-553 [43 Cal.Comp.Cases 653, 656-657].)[7]

In determining the issue of earnings for purposes of a temporary disability indemnity award, the essential objective is to predict what the employee's earnings would have been during his or her period(s) of temporary disability, but for the industrial injury. As stated by *Montana*:

> "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. ... In making an award for temporary disability, the [Board] will ordinarily be concerned with whether an applicant would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. With regard to both awards all facts relevant and helpful to making the estimate must be considered. [Citations omitted.] The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant." (*Argonaut Ins. Co. v. Industrial Acc. Com., supra*, 57 Cal.2d at pp. 594-595 [27 Cal. Comp. Cases at p. 133].)

Here, the parties stipulated that applicant's earnings were $405 per week during the season and $0 (zero) per week during the off-season. Based on this earnings stipulation, the WCJ (implicitly applying section 4453(c)(4)) found that applicant's in-season temporary disability

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[7] Section 4453(c)(4) provides: "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." (Lab. Code, § 4453(c)(4).)

indemnity rate is $270 per week and that her off-season temporary disability indemnity rate is $0 per week.

For the following reasons, we conclude the WCJ properly found two different temporary disability indemnity rates: one for applicant's in-season periods of temporary disability and one for her off-season periods of temporary disability.

First, the off-season temporary disability indemnity rate of $0 per week (based on applicant's stipulated off-season earnings of $0 per week) is consistent with the particular facts of this case, as established by the existing record. Specifically, there is no significant evidence applicant likely would have worked during the off-season, had she not been injured. The parties stipulated she did not work at all in the twelve months preceding the August 1994 through October 1994 grape-picking season. Moreover, although the record on this question is not well developed, it appears applicant's last employment was as a fruit packer from April 1992 to December 1992. Finally, although applicant is young (i.e., she was 26 years old at the time of her August 24, 1994 injury), there is nothing in the present record demonstrating she had any specialized training or skills that would suggest a significant off-season labor market for her. To the contrary, her vocational rehabilitation plan reflects she had only a tenth grade education and a limited work history, as discussed above.

Second, the finding of two different temporary disability indemnity rates for a seasonal employee is fully consistent with the governing law.

As discussed above, the case law makes clear that, in determining an injured employee's temporary disability indemnity rate, the basic goal is to predict what the employee's earnings would have been during his or her period(s) of temporary disability, absent the industrial injury. (E.g., *Argonaut Ins. Co. v. Industrial Acc. Com.* (*Montana*), *supra*, 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133].) Similarly, the case law makes clear that the essential purpose of temporary disability indemnity is to help replace the wages the employee would have earned, but for the injury, during his or her period(s) of temporary disability. (E.g., *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 479] (stating that " '[t]emporary disability indemnity is intended primarily to substitute for the worker's *lost wages*,

in order to maintain a steady stream of income' " (emphasis added)); *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647] (stating that "[t]he primary element of temporary disability is *wage loss*," that "temporary disability payments [are] a substitute for *lost wages*," and that "[temporary disability] benefits are based ... directly on *lost wages*" (69 Cal.2d at pp. 403, 404, 405 (emphasis added) [33 Cal.Comp.Cases at pp. 650, 651 (emphasis added)].)[8] Finally, regardless of which provision of section 4453(c) is used (i.e., Lab. Code, § 4453(c)(1) through (c)(4)), the case law makes clear that *earning capacity* is the "benchmark" or "touchstone" of any earnings determination. (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 632-633 [65 Cal.Comp.Cases 139 (at 65 Cal.Comp.Cases Supp., p. 7)]; *Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 846 [63 Cal.Comp.Cases 1477, 1478]; *Pascoe v. Workmen's Comp. Appeals Bd.* (1975) 46 Cal.App.3d 146, 152-153 [40 Cal.Comp.Cases 191, 194]; *West v. Industrial Acc. Com.* (1947) 79 Cal.App.2d 711, 722 [12 Cal. Comp. Cases 86, 91].)

Thus, where the earnings history and reasonably anticipated future earnings of a seasonal employee establish that he or she has two separate and distinct average weekly earnings capacities (i.e., one average weekly earnings capacity for the in-season and another for the off-season), it is

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[8] As pointed out in *Granado v. Workmen's Comp. Appeals Bd., supra*, 69 Cal.2d pp. 403-404 [33 Cal.Comp.Cases at p. 650], the terms of the temporary disability indemnity statutes emphasize that their intent is to address lost wages during the period(s) of the injured employee's temporary disability. Section 4653 states: "If the injury causes temporary disability, the disability payment is two-thirds of *the average weekly earnings during the period of such disability*, consideration being given to the ability of the injured employee to compete in an open labor market." (Emphasis added.) Similarly, section 4654 states: "If the injury causes temporary partial disability, the disability payment is two-thirds of *the weekly loss in wages during the period of such disability*." (Emphasis added.) Further, section 4657 states: "In case of temporary partial disability *the weekly loss in wages* shall consist of the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn *during the disability*." (Emphasis added.)

proper to find and award two different temporary disability indemnity rates.[9] (*Westside Produce Co. v. Workers' Comp. Appeals Bd. (Avila), supra*, 81 Cal.App.3d at pp. 551-553 [43 Cal.Comp.Cases at pp. 656-657]; see also, e.g., *Colorado v. Kemper Ins. Co.* (1999), FRE 0145620, 27 Cal. Workers' Comp. Rptr. 110 (Board panel); *Arroyo v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 950 (writ den.); *Carrizales v. Berryessa Unified Sch. Dist.* (1995), SJO 0172396, 24 Cal. Workers' Comp. Rptr. 140 (Board panel); *Hammonds v. Workmen's Comp. Appeals Bd.* (1971) 36 Cal.Comp.Cases 356 (writ den.); *Bell v. Workmen's Comp. Appeals Bd.* (1969) 34 Cal.Comp.Cases 443 (writ den.).)

We are not persuaded that *Grossmont Hospital v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348 [62 Cal.Comp.Cases 1649]) requires a different approach than that set forth above.[10]

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[9] We emphasize that our holding is limited to cases involving the earning capacity of true "seasonal" employees, i.e., employees who work reasonably identifiable and defined seasons of reasonably identifiable and defined duration, such as the agricultural worker in this case. Our holding does not apply to cases of *intermittent* employment (such as in the building trades or with temporary employment agencies), where the duration of a particular project may be limited, but the evidence establishes the employee has worked (and/or likely will work) periodically throughout the year.

For intermittent employment, an employee's temporary disability indemnity rate should ordinarily be determined based on his or her actual wages at the time of injury (Lab. Code, §4453(c)(1) through (c)(3)), if the period of temporary disability would have lasted as long as the employment. (*Cal. Comp. & Fire Co. v. Industrial Acc. Com. (Colston)* (1962) 57 Cal.2d 598 [27 Cal.Comp.Cases 135].) Otherwise, the employee's temporary disability indemnity rate should ordinarily be determined under section 4453(c)(4), consideration being given to his or her representative past earnings history and reasonably anticipated future earnings. (E.g., *Cal. Comp. & Fire Co. v. Industrial Acc. Com. (Stevens)* (1962) 57 Cal.2d 600 [27 Cal.Comp.Cases 136]; *West v. Industrial Acc. Com. (Best)* (1947) 79 Cal.App.2d 711, 723-724 [12 Cal.Comp.Cases 86]; *A. Teichert & Sons, Inc. v. Workers' Comp. Appeals Bd. (Tulleys)* (2001) 66 Cal.Comp.Cases 491 (writ den.); *cf., Argonaut Ins. Co. v. Industrial Acc. Com. (Montana), supra,*) 57 Cal.2d at pp. 595-596 [27 Cal.Comp.Cases at pp. 133-134]].)

[10] In *Kyllonen*, the Court focused on the portion of section 4453(d) (enacted effective January 1, 1990) which provides that disability indemnity benefits "shall remain in effect for the duration of any disability resulting from the injury." The Court stated that "subdivision (d) therefore requires that ... the amount of benefits shall remain unchanged for the duration of the disability," that the Board should "calculate one sum that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability," and that the Board should calculate "one consistent benefit amount for the term of the disability." (*Grossmont Hospital v. Workers' Comp. Appeals Bd. (Kyllonen), supra*, 59 Cal.App.4th at pp. 1361, 1363, 1364 [62 Cal.Comp.Cases at pp. 1659, 1660-1661, 1661].)

Initially, it must be recognized that *Kyllonen* involved the setting of the temporary disability indemnity rate of a *full-time* employee who, had she not been injured, would have received a regularly scheduled wage increase during her period of temporary disability. (*Grossmont Hospital v. Workers' Comp. Appeals Bd.* (*Kyllonen*), *supra*, 59 Cal.App.4th at p. 1352 [62 Cal.Comp.Cases at p. 1650].) Thus, the Court in *Kyllonen* was not faced with (nor did it address) the effect section 4453(d) has on determining the earning capacity (and the temporary disability indemnity rate or rates) of workers in seasonal employments who, but for their injuries, likely would have had different earnings, respectively, during the in-season and off-season periods of their temporary disability.[11]

Moreover, the essential holding of *Kyllonen* is that an injured employee's temporary disability indemnity payments should be based on any reasonably anticipated increase or decrease in earnings the employee would have had during the duration of his or her temporary disability, absent the injury. (*Grossmont Hospital v. Workers' Comp. Appeals Bd.* (*Kyllonen*), *supra*, 59 Cal.App.4th at pp. 1351, 1362-1364 [62 Cal.Comp.Cases at pp. 1650, 1659-1661].) Consistent with this holding (and consistent with the foundational holding of *Montana* that, in determining temporary disability indemnity rates, the goal is to predict what the employee's earnings would have been and whether he or she would have continued working at a given wage for the duration of the disability),[12] it is appropriate to have two separate (but unchanging) temporary disability indemnity rates for a seasonal employee: one fixed in-season rate based on what his or her reasonably anticipated earnings would have been during the season and another (presumably lower) fixed off-season rate based on what his or her reasonably anticipated earnings would have

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[11] This distinction is significant because, for full-time and other regular and on-going employments, the employments (but for the injury) would normally have lasted as long as the period of temporary disability. This, however, is frequently not true for seasonal employments.

[12] See *Argonaut Ins. Co. v. Industrial Acc. Com.* (*Montana*), *supra*, 57 Cal.2d at pp. 594-595 [27 Cal. Comp. Cases at p. 133].

been during the off-season, absent the injury.[13]

We recognize that, in *Westside Produce Co. v. Workers' Comp. Appeals Bd.* (*Avila*), *supra*, 81 Cal.App.3d at pp. 552-553 [43 Cal.Comp.Cases at pp. 656-657]) and some other cases,[14] seasonal employees have been awarded an in-season temporary disability indemnity rate based on what their in-season earnings would have been (absent the injury) and they also have been awarded an off-season temporary disability indemnity rate based on their average weekly earnings for up to one year prior to the injury. To the extent these cases base the injured employee's off-season temporary disability indemnity rate on his or her *actual off-season earning capacity*, we endorse them as being consistent with the fundamental principle that "an estimate of earning capacity is a prediction of what an employee's earnings would have been had he [or she] not been injured." (*Argonaut Insurance Co. v. Industrial Acc. Com.* (*Montana*), *supra*, 57 Cal.2d at p. 594 [27 Cal.Comp.Cases at p. 133].) However, if the evidence establishes, for example, that an employee has a substantial in-season earnings capacity, but a *zero* off-season earnings capacity, we believe it is legally incorrect to award the employee an in-season temporary disability rate based on the seasonal earnings capacity and then, in addition, to award him or her an off-season temporary disability indemnity rate based on the *seasonal earnings* averaged out over a one-year period. Such an award would not be consistent with the mandates of *Montana*, *supra*, because the

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[13] Indeed, such a conclusion is consistent with the third sentence of section 4453(d) which, in relevant part, states "disability indemnity benefits shall be calculated according to the limits in this section in effect on the date of injury and shall remain in effect for the duration of any disability resulting from the injury." (Lab. Code, § 4453(d).) This sentence has two basic components, i.e., part one (which provides that "disability indemnity benefits shall be calculated *according to the limits in this section* in effect on the date of injury" (emphasis added)) and part two (which provides that these disability indemnity benefits "shall remain in effect for the duration of any disability resulting from the injury"). Part two of this third sentence of section 4453(d) *relates back to and modifies* part one. Therefore, nothing in section 4453(d) appears to require the use of a single temporary disability indemnity rate for seasonal workers (which applies both to in-season and off-season periods of temporary disability); rather, section 4453(d) appears merely to require that the separate in-season and off-season rates, once calculated "according to the limits" of section 4453, shall remain in effect for the duration of the disability.

[14] E.g., *San Jose Sharks v. Workers' Comp. Appeals Bd.* (*Hayward*) (1998) 63 Cal.Comp.Cases 346 (writ den.); *Gil v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1300 (writ den.); *City of Eureka v. Workers' Comp. Appeals Bd.* (*Dake*) (1995) 60 Cal.Comp.Cases 1019 (writ den.); *Placer County Office of Education v. Workers' Comp. Appeals Bd.* (*Halkyard*) (1995) 60 Cal.Comp.Cases 641 (writ den.).

award would not be truly reflective of the employee's predicted earning capacity during his or her off-season periods of temporary disability indemnity.

B. VRMA Rate For Seasonal Employees

Having concluded the WCJ properly awarded an in-season temporary disability indemnity rate of $270 per week and an off-season temporary disability indemnity rate of $0 per week, we now address defendant's contention that applicant should not have been awarded VRMA at $246 per week for *all* periods of her participation in vocational rehabilitation; rather, she should have been awarded VRMA at $246 per week for her in-season participation and at $0 per week for her off-season participation.

Section 139.5(c) provides that "[w]hen an injured employee is determined to be medically eligible and chooses to participate in a vocational rehabilitation program, he or she shall continue to receive temporary disability indemnity payments ... until his or her medical condition becomes permanent and stationary and, thereafter, may receive a [vocational rehabilitation] maintenance allowance."

Section 139.5(d) provides that "[t]he amount of the maintenance allowance due under subdivision (c) shall be two-thirds of the employee's average weekly earnings at the date of injury payable as follows: (1) [t]he amount the employee would have received as continuing temporary disability indemnity, but not more than two hundred forty-six dollars ($246) ... ."

When interpreting a statute, the essential goal is to determine and effectuate the Legislature's intent; generally, the words of the statute to be construed are the best indication of legislative intent, particularly where the words are clear and unambiguous. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [58 Cal.Comp.Cases 286, 289]; *Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal.4th 1213, 1226 [58 Cal.Comp.Cases 172, 182].)

Here, the clear and unambiguous terms of section 139.5(d) provide that the amount of VRMA due to an injured employee shall be the amount he or she "would have received *as continuing temporary disability indemnity*" (emphasis added), except the amount shall not exceed $246 per week. Thus, if a seasonal employee's off-season earning capacity would justify an off-season temporary disability indemnity rate of $0 per week, then section 139.5(d) mandates that he

or she must also receive VRMA at $0 per week during the off-season.[15]

In his Opinion on Decision (Opinion) and in his Report on Petition for Reconsideration (Report), the WCJ sets forth several policy arguments to support his determination that applicant here is entitled to VRMA at $246 per week even during her off-season participation in vocational rehabilitation. In essence, the WCJ states: "[i]t seems fairly obvious that the [L]egislature did not intend to carve out a subclass of [seasonal] workers who might be entitled to Rehabilitation benefits and, in effect, nonetheless penalize them during the off-season by reducing the VRMA benefit to zero. Such would defeat the purpose of rehabilitation as a matter of public policy."

We certainly understand and are sympathetic to the serious public policy concerns expressed by the WCJ. Vocational rehabilitation is one of the most important benefits under the Labor Code (*Martinez v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th 1079, 1084 [65 Cal. Comp. Cases 1253, 1257]) and there is a strong public policy that injured employees should be able to participate in vocational rehabilitation to the fullest extent possible, thereby affording them the opportunity to reenter the productive workforce as soon as practicable and thereby minimizing society's burden of caring for them and their families. (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 244 [48 Cal.Comp.Cases 587, 593]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 232-233 [38 Cal.Comp.Cases 652, 659]; *Sanchez v. Workers' Comp. Appeals Bd.* (1990) 217 Cal.App.3d 346, 357 [55 Cal.Comp.Cases 179, 186]; *Bussear v. Workers' Comp. Appeals Bd.* (1986) 181 Cal.App.3d 186, 189 [51 Cal.Comp.Cases 240, 241].) Moreover, one of the important elements of vocational rehabilitation is financial support (in the form of VRMA) to help injured employees defray their expenses while participating in vocational rehabilitation. (*Webb v. Workers' Comp. Appeals Bd.* (1980) 28 Cal.3d 621, 628 [45 Cal.Comp.Cases 1282, 1286]; *Ritchie v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1182 [59 Cal.Comp.Cases 243, 247].)

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[15] This conclusion is bolstered by the language of section 139.5(c), which provides that an employee who participates in vocational rehabilitation before becoming medically permanent and stationary "shall continue to receive *temporary disability indemnity payments*." (Emphasis added.)

Nevertheless, in enacting legislation, the Legislature is presumed to have knowledge of existing judicial decisions, including WCAB decisions, and to have adopted or amended statutes in light of such decisions. (*Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 10; *Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684, 695-696 [56 Cal.Comp.Cases 331, 340]; *Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 650-651 [52 Cal.Comp.Cases 467, 478]; *Ezzy v. Workers' Comp. Appeals Bd.* (1983) 146 Cal.App.3d 252, 261, fn. 4 [48 Cal.Comp.Cases 611, 616, fn. 4].) Thus, when the Legislature enacted the current version of section 139.5(d) in 1989 and provided that VRMA is payable in "[t]he amount the employee would have received as *continuing temporary disability indemnity*" (emphasis added), it must be presumed the Legislature was aware that a seasonal employee may have two different temporary disability indemnity rates, one for the in-season and one for the off-season. (E.g., *Westside Produce Co. v. Workers' Comp. Appeals Bd.* (*Avila*), *supra*, 81 Cal.App.3d at pp. 552-553 [43 Cal.Comp.Cases at p. 656-657].)

Accordingly, although legitimate policy arguments may be made for a constant VRMA rate in order to give a vocational rehabilitation program the best chance of success, such policy arguments should be made to the Legislature.[16]

Notwithstanding our discussion above, however, we do not believe it is appropriate (on this record) to make a determination that applicant's VRMA rate is $0 per week during the off-season. Although applicant stipulated at trial to earnings of $0 per week during the off-season, it does not appear she intended or believed this stipulation would go to her VRMA rate. Moreover, if the parties are given a reasonable opportunity to present further evidence regarding applicant's

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[16] We observe that injured seasonal employees have some options (other than VRMA) for providing for life necessities while participating in vocational rehabilitation. For one, within the $16,000 cap for vocational rehabilitation services (Lab. Code, § 139.5(a)(5), (c)), provision can be made for monies to be allocated for "additional living expenses necessitated by ... vocational rehabilitation services." (Lab. Code, § 139.5(c).) Such "additional living expenses" may include, but are not limited to, reasonable costs for food, lodging, transportation, clothing and dependent care. (Cal. Code Regs., tit. 8, § 10125.2.) Also, injured seasonal employees may be eligible to receive special *retraining* unemployment insurance benefits. (Unemp. Ins. Code, § 1267; Cal. Code Regs., tit. 22, § 1267-1(b); see also, Unemp. Ins. Code, § 1271; Cal. Code Regs., tit. 22, § 1256-5(c).) Finally, during off-season periods, a permanent and stationary injured seasonal employee may receive either "permanent disability supplements" to his or her VRMA (see, Lab. Code, § 139.5(d)(2)) or ordinary permanent disability indemnity.

off-season earning capacity, any such evidence might support an off-season VRMA rate of greater than $0 per week. Accordingly, we will rescind the WCJ's finding on applicant's VRMA rate and remand the matter to him for further proceedings, to the extent he deems them appropriate. Thereafter, he should issue a new decision consistent with our opinion.

In developing the record on applicant's off-season earning capacity, she (and others, if appropriate) may testify and be cross-examined regarding her age, health, skill, training, education, and willingness to work (including but not limited to her prior non-seasonal employment or attempts to obtain such employment). The parties may supplement any testimony with documentary evidence (where available), including but not necessarily limited to check stubs, employer records, union records, unemployment records, social security records, and tax returns and W-2 or 1099 forms.[17] Further, if the parties believe the cost and time involved would justify it (and if the WCJ believes it to be reasonably necessary), the parties may elect to present expert testimony regarding employment opportunities for persons similarly situated and regarding the general condition of the labor market.[18]

Because we are rescinding and remanding on the VRMA rate issue, we will also rescind and remand with respect to the balance of the WCJ's April 28, 2000 Findings and Award, in order to avoid bifurcation. As a result, we will not now address the other issues (i.e., the issue of credit for temporary disability indemnity overpayments and the issue of permanent disability) raised in defendant's petition for reconsideration. On remand, the WCJ may re-address those issues.

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[17] An employee may obtain his or her wage information from the Employment Development Department (EDD), upon written request or written release, without charge. (Unemp. Ins. Code, § 1094.) Similarly, an employee may obtain his or her social security earnings records from the Social Security Administration. (42 U.S.C. § 405(c)(3) & (c)(4); 20 C.F.R. §§ 404.803, 404.810.) Moreover, although federal and state tax returns and tax-related documents (such as W-2 or 1099 forms) are privileged and can only be discovered under limited circumstances (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718-723; *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260, 1289 [61 Cal. Comp. Cases 149, 170]), an employee may waive the privilege.

[18] We note, however, that such expert testimony may often be more costly and time-consuming than its value in resolving a disputed off-season earning capacity issue. Therefore, the WCJ should have wide latitude, within the bounds of due process, to allow or disallow it.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that the Findings and Award issued by the workers' compensation administrative law judge on April 28,2000 be, and it is hereby, **RESCINDED** and that this matter is **REMANDED** to the workers' compensation administrative law judge for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

COLLEEN S. CASEY, Commissioner

WILLIAM K. O'BRIEN, Commissioner

JAMES C. CUNEO, Commissioner

FRANK M. BRASS, Commissioner

JANICE J. MURRAY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 2 4 2002

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD

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