

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

EDEN BOJORQUEZ GERARDO, *Applicant*

vs.

METAL SUPPLY, INC.;
FEDERAL INSURANCE COMPANY,
administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ11991362
San Diego 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.¹ 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 and the Opinion on Decision 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 and the Opinion on Decision, both of which we adopt and incorporate, we will affirm the July 5, 2022 Findings and Order.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

¹ Commissioner Sweeney, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 5, 2022 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 13, 2023

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

**EDEN BOJORQUEZ GERARDO
LAW OFFICES OF GUY LEVY
BLACK & ROSE
MULLEN & FILIPPI**

SAR/abs

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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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Nature of Petition

Applicant has filed a timely, properly verified petition for reconsideration on recognized statutory grounds of a decision issued July 5, 2022. By that decision, the workers' compensation administrative law judge (WCJ) found in relevant part that the applicant's weekly earnings are \$1,492.25 per week and that the applicant is entitled to temporary disability at the weekly rate of \$994.83 for the period February 9, 2019 through May 28, 2021.

Applicant contends the WCJ erred in that (1) by the order, decision or award the WCJ acted without or in excess of his powers and that (2) the evidence does not justify the Findings of Fact.

Defendant has filed a timely answer to the applicant's petition.

Statement of Facts

Applicant, Eden Bojorquez Gerardo, born [], while employed on January 23, 2019, as an iron worker/welder, at San Diego, California, by Metal Supply, LLC, sustained an injury arising out of and in the course of employment to his psyche, reproductive system, chest, ribs, knees, and excretory system.

At trial, the parties raised as issues for adjudication: (1) earnings; (2) temporary disability; and (3) attorney's fees. The evidentiary record consisted of various paycheck stubs, W-2s, the deposition transcript from Dion Genchi, and testimony from the applicant and one witness for the applicant, Miguel Montejo.

The WCJ's concerns regarding the documentary evidence

As the WCJ made quite clear in his decision "Numerous problems beset the exhibits in this matter and many of these problems were not clarified by testimony at trial."

The WCJ further explained in his Opinion that he would reject "any attempts by the parties to simply focus on a snapshot of the applicant's earnings" that would produce erroneous findings or a windfall to either party.

With regards to the gaps or voids in the documentary evidence, by way of example (for a full analysis see the WCJ's Opinion on Decision), although defendant provided the WCJ with pay stubs from the applicant for 2018, there are no paystubs for the applicant for the period September 9, 2018 through December 31, 2018.

As the WCJ noted:

A review of these Pay Stubs indicates that applicant's regular work hours were initially inconsistent from pay period to pay period; however, the data does show that applicant was trending toward consistent weekly hours as will hereafter be

explained in greater detail. Each of the Pay Stubs provided by the defendant, covers a two week period.

Similarly, the applicant provided the WCJ with pay stubs without any clarification of the problems within them.

For example, applicant's exhibit 1 is a Pay Stub for the period from January 14, 2019 to January 20, 2019 in the gross amount of \$1,434.10. This is for Prevailing Wage (PW) Regular pay. Applicant worked for 20 hours. Applicant's Prevailing Wage Regular pay hourly rate was \$71.7050.

This Pay Stub (applicant's exhibit 1) only covers only a one-week period. **This [is unlike] every other Pay Stub in evidence.** This discrepancy remained unexplained at trial. Mr. Genchi, in his deposition testimony, noted that a one week Pay Stub was highly unusual (see joint exhibit AA, page 45, lines 17-25; page 50, lines 3-16; "never in the history of the company has it ever done weekly payroll"). This calls the consistency of this type of income into considerable question.

The pay stub lends further credence to Mr. Genchi's opinion that this pay stub is representative of the applicant taking over the work for another employee and that it would not continue on that project (see joint exhibit AA, page 41, lines 20-22).

When asked if the applicant would continue to make Prevailing Wage through the project, Mr. Genchi responded "no" (Joint Exhibit AA, page 51, lines 1-3).

Again "at the beginning of that year, he was mostly working at a regular project and a non-prevailing wage project." (Joint Exhibit AA, page 53, lines 3-5). (Again, for a complete analysis of the many flaws in the documentary record, the WCJ would refer the Commissioners to his Opinion on Decision).

Applicant's exhibit 2 is a regular Pay Stub, which covers a two-week period from January 14, 2019 to January 27, 2019. This Pay Stub identifies 36 hours of regular work generating \$1,080 in gross wages.

If we were simply to add applicant's Prevailing Wage Pay Stub and his regular Pay Stub together, the total would be $\$1,434.10 + \$1,080 = \$2,514.10$ which when divided by two (it is a two week pay period) would generate a weekly average of approximately **\$1,189.78**.

The WCJ does not believe that this is a fair representation of the applicant's earning capacity at this employer (applicant was injured and stopped working during the pay period) and this is why he rejected the usage of Labor Code section 4453(c)(1) as the proper method of calculating the applicant's wages.

The WCJ resolved the numerous deficiencies in the record by simply **using the W2 information for 2018 and 2019**. Unlike Pay Stubs, the W2s are tendered to the applicant who in turn tenders them to the IRS as proof of receipt of earnings. The W2s further cover the entire year as opposed to a single paycheck without further explanation.

From the W2s it appears that the applicant earned \$30,178.48 in 2018 for a period of 25 weeks and 2 days. Applicant further earned \$10,693 in 2019 from January 1, 2019 to February 8, 2019 for a total of 27 weeks and 4 days. The total amount of earnings for Metal Supply LLC amounts therefore to \$40,871.48. This equates to an approximate average weekly wage of \$1,490.11.

Because the result of the WCJ's math closely approximates defendant's own calculated average weekly wage rate of \$1,492.25 the WCJ relied on the rate proposed by the defendants and found the applicant's average weekly wage was \$1,492.25 producing a temporary disability rate of \$994.83.

Any other attempt to understand the evidence would require assumptions and speculation.

Arguments in the Petition for Reconsideration

Much of the petition assumes facts that are not in evidence; in short, it is argument and not based on evidence. Page 3 of the petition contains the following statement:

“In addition, APPLICANT's coworker, Jesus Anguiano was also able to locate a couple of checks prior to trial that were provided to the court to evidence that **after APPLICANT's injury, APPLICANT's coworkers and team members that he had worked with as a team for over six years continued receiving wages in the form of prevailing wages.**” (Petition for Reconsideration, page 3).

There is no evidence before the WCJ that Mr. Anguiano was the applicant's co-worker. There is no evidence before the WCJ that Mr. Anguiano was a team member of the applicant. Applicant placed into evidence two paychecks from Mr. Anguiano from 2019 from Metal Supply.

The checks show that Mr. Anguiano worked for metal supply and received prevailing wages. The checks do not provide evidence of who Mr. Anguiano is, what his job title was at Metal Supply, whether he knew the applicant, what Prevailing wage jobs he worked on, whether or not he was a part of the applicant's team, and whether or not the Prevailing Wage jobs he worked on would have continued.

Although applicant testified and called one witness, Mr. Montejo, neither Mr. Montejo nor the applicant, testified about Mr. Anguiano. In short, the paystubs of

Mr. Anguiano are simply in evidence without any foundation and without explanation and therefore without weight as evidence.

The Petition for Reconsideration also argues that applicant received a “raise” as a result of the Prevailing wage (see numerous points in the Petition for Reconsideration, page 4, lines 6-9; page 6, lines 24-27; page 11, lines 18-21.)

However, there is evidence to refute this. First we have the joint exhibit of Mr. Genchi’s testimony (joint exhibit AA). Mr. Genchi was the owner of Metal Supply.

According to Mr. Genchi, Metal Supply LLC went out of business (joint exhibit AA, page 14, lines 21-25). This occurred on October 31, 2019 (joint exhibit AA, page 15, lines 3-4).

Mr. Genchi further testified that he was getting “financial reports that said the company lost a million dollars”. Mr. Genchi also testified that defendant had other prevailing wage installation jobs going on concurrently. He estimates approximately 4 of the jobs were Prevailing Wage jobs (joint exhibit AA, page 28).

When asked if the applicant would continue to make Prevailing Wage through the project, Mr. Genchi responded “no” (Joint Exhibit AA, page 51, lines 1-3). Again “at the beginning of that year, he was mostly working at a regular project and a non-prevailing wage project.” (Joint Exhibit AA, page 53, lines 3-5).

Here we have a joint exhibit, relied upon by both parties that is refuting the applicant’s testimony. It indicates that the applicant’s employer went out of business in October of 2019; therefore, applicant could not have worked on a Prevailing Wage job for the employer for a period of one year as there is no evidence that he received Prevailing Wages for this employer before January of 2019.

Furthermore, with regards to the paychecks applicant received for Prevailing Wage work in 2019, Mr. Genchi analyzed the paychecks of the applicant and concluded that the applicant likely took over a prevailing wage job from another employee that would not have continued. Therefore this was not a “raise” it was an aberration in applicant’s earnings.

Applicant further relies on the testimony of Mr. Montejo who testified on the applicant’s behalf. Mr. Montejo indicated that he worked as a part of the applicant’s team. There are several problems with Mr. Montejo’s testimony. Firstly, Mr. Montejo indicated that “around January of 2019” he worked for Metal Supply. However, applicant commenced working for Metal Supply on July 30, 2018 and worked there for the remainder of 2018 (see defendant’s exhibit C).

Mr. Montejo did not testify to working with Metal Supply in 2018. Applicant did not testify that he worked with Mr. Montejo at Metal Supply in 2018. This leaves the

argument made by applicant that he was part of a team for several years (which presumably included Mr. Montejo) into question (see Petition for Reconsideration, page 3, lines 18-20).

Mr. Montejo indicated that when the team moved from Global Steel to Metal Supply, applicant went with them. However, applicant was already at Metal Supply, having left Global Steel in 2018 to commence work with Metal Steel on July 30, 2018.

And, while Mr. Montejo worked at various Prevailing Wage jobs for Metal Supply, there is no evidence that the applicant would have. Applicant cites Mr. Genchi's testimony that the crews generally work together (Petition for Reconsideration, page 9, lines 6-28; page 10, lines 1-3).

However, Mr. Genchi also testified that applicant's paycheck for prevailing wage that covered one week was probably the result of taking over a prevailing wage job for another worker.

More importantly, there is nothing in evidence that supports that when applicant worked his prevailing wage job in January 2019 for the defendant (as evidenced by the applicant's paychecks), that the witness, Mr. Montejo worked with him. *That* would have been corroborating evidence; however, no such testimony was elicited by the applicant from the witness.

Therefore, the WCJ did not give Mr. Montejo's testimony much weight as there was little to connect his earnings to that of the applicant's and any attempt to do would have required assumptions and speculation.

Having therefore paychecks presented to him with large gaps in the pay record and little explanation through testimony to explain the inconsistencies in the documentary record, the WCJ resorted to calculating the applicant's weekly earnings based on his W2 information (see above). The WCJ believes that this is the fairest method to calculate the applicant's wages as it takes into account all of the applicant's earnings for this employer.

Recommendation

It is therefore respectfully recommended that the Petition for Reconsideration be denied.

DATE: August 8, 2022

Mark Romano
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

At trial, the parties raised as issues for adjudication: (1) earnings; (2) temporary disability; and (3) attorney's fees.

The evidentiary record consisted of various paycheck stubs, W-2s, the deposition transcript from Dion Genchi, and testimony from the applicant and one witness, Miguel Montejo.

Unlike permanent disability, which compensates an injured employee for diminished future earning capacity or decreased ability to compete in the open labor market, temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. (Livitsanos v. Superior Court (1992) 2 Cal.4th 744, 753, 7 Cal.Rptr.2d 808, 828 P.2d 1195.)

That purpose "is inferable from section 4653, which requires temporary total disability be calculated as '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.'" (Lauher, supra, 30 Cal.4th at p. 1291, 135 Cal.Rptr.2d 665, 70 P.3d1076.)

Relying on the Supreme Court's decision in Argonaut Ins. Co. v. Industrial Acc. Com. (1962) 57 Cal.2d 589, 21 Cal.Rptr. 545, 371 P.2d 281 (Montana), the WCAB reasoned that the essential objective in determining earnings for purposes of a temporary disability award "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."

At trial, defendant claimed that applicant earned \$1,492.25 per week. The temporary disability rate for this weekly earning rate would amount to \$994.83, which is the amount that the defendant has paid to applicant.

Initially, defendant relied on applicant's 2018 earnings to calculate applicant's average weekly wage. However, after receiving information on applicant's 2019 earnings, defendant adjusted the applicant's average weekly wage, increasing the figure and by extension the applicant's temporary disability rate. Consequently, defendant paid applicant the retroactive difference along with a self-imposed 10% penalty.

Therefore, initially, defendant based applicant's average weekly wage on 2018 earnings and then adjusted this accordingly to incorporate both 2018 and 2019 earnings.

Applicant maintains that his average weekly wage is \$3,254.39 based solely on 2019 wage records during which time the applicant only worked from January 1, 2019 to January 23, 2019, his date of injury.

Numerous problems beset the exhibits in this matter and many of these problems **were not** clarified by testimony at trial.

Commencing first with defendant's documentary evidence, defendant produced 2018 Paycheck Stubs (hereinafter "Pay Stubs") and 2018 W2 information. Defendant's exhibit A is a W2 form for the 2018 calendar year. The exhibit is barely legible; however, the WCJ was

ultimately able to decipher that for the calendar year of 2018, while working for the defendant, applicant's gross earnings were \$30,178.48. According to the applicant's testimony, he commenced work on July 29, 2018 for the defendant.

Defendant's exhibits C, D, E, and F are individual Pay Stubs for the applicant from 2018. The Pay Stubs run chronologically commencing with applicant's first two weeks of work for the defendant and continuing until September 8, 2018. There are no Pay Stubs in evidence by the defendant for the period September 9, 2018 through December 31, 2018.

A review of these Pay Stubs indicates that applicant's regular work hours were initially inconsistent from pay period to pay period; however, the data does show that applicant was trending toward consistent weekly hours as will hereafter be explained in greater detail. Each of the Pay Stubs provided by the defendant, covers a two week period.

For example, exhibit C demonstrates that the applicant worked 32.15 regular hours with 4 hours of overtime for two weeks. Exhibit D indicates that applicant worked 37.15 regular hours with 5.3 hours of overtime for two weeks. Exhibit E has applicant working 72 hours of regular pay or approximately 31 hours per week and 13 hours or overtime or 6.5 hours per week.

Exhibit F, which is the last of the defendant's Pay Stubs chronologically, indicates that for the two-week period from August 27, 2018 through September 9, 2018 the applicant earned \$2,722.50. During this period applicant worked 72 hours of regular time which produced \$2,160.00 in pay, and 12.3 hours of overtime or approximately 6 hours per week of overtime producing \$562.50. This last paycheck would equate to approximately **\$1,361.25** per week in income.

Defendant's 2018 Pay Stub data stops at September 9, 2018 (see defendant's exhibit F). There are no Pay Stubs from September 10, 2018 through December 31, 2018. However, based on the applicant's 2018 W2, applicant earned \$30,178.48 from January 30, 2018 through December 31, 2018. According to the last Pay Stub in 2018, by September 9, 2018 applicant had earned a year to date total of \$7,980.00.

From the 2018 W2 information, one may deduce that from September 10, 2018 to December 31, 2018, the remaining pay period in 2018, applicant earned an additional \$22,198.48. From September 10, 2018 to December 31, 2018 is exactly 16 weeks. Therefore, \$22,198.48/16 produces a weekly pay rate of **\$1,387.37**.

Applicant's weekly pay rate through 2018 remained largely consistent then with regular pay based on approximately 31 hours of work per week and some overtime as well. Based on the applicant's last Pay Stub (defendant's exhibit F) where he worked the most regular hours and earned the most overtime, his average weekly rate was \$1,361.25. Based on a calculation on applicant's remaining weeks and his W2 information, applicant earned approximately \$1,387.37 per week from September 10, 2018 to December 31, 2018. Again, these are fairly consistent earnings.

This consistency in pay however falls apart once we begin to analyze applicant's pay during the year of 2019.

Applicant claims that but for the injury he would have earned \$3,254.39 per week. This is based largely upon a calculation of applicant's W2 earnings divided by actual number of days worked (even though applicant was paid by defendant after he stopped working) to produce a daily wage rate.

The WCJ rejects this reasoning as it fails to take into account the applicant's consistent earnings from 2018. As will be seen, the WCJ rejects any attempts by the parties to simply focus on a snapshot of the applicant's earnings with regard for the considerable earnings evidence in this case.

As noted previously, the defendant had initially based applicant's average weekly wages solely upon 2018 earnings. The WCJ, during informal meetings with the parties, before submission at trial, had advised the defendant that he rejected this calculation as it failed to take into account applicant's 2019 earnings. Defendant thereafter considered these earnings, adjusted its calculation of applicant's wages, and increased applicant's temporary disability rate accordingly.

However, the same logic applies to applicant's calculations. By focusing on the inconsistent (and unexplained) earnings of 2019, the applicant fails to take into account the applicants consistent 2018 earnings.

As already indicated, there are glaring discrepancies in the evidence for applicant's earnings during the approximately three-week period in 2019, which were never clarified at trial.

For example, applicant's exhibit 1 is a Pay Stub for the period from January 14, 2019 to January 20, 2019 in the gross amount of \$1,434.10. This is for Prevailing Wage (PW) Regular pay. Applicant worked for 20 hours. Applicant's Prevailing Wage Regular pay hourly rate was \$71.7050.

This Pay Stub (applicant's exhibit 1) only covers only a one-week period. This is unlike every other Pay Stub in evidence. This discrepancy remained unexplained at trial. Mr. Genchi, in his deposition testimony, noted that a one week Pay Stub was highly unusual (see joint exhibit AA, page 45, lines 17-25; page 50, lines 3-16; "never in the history of the company has it ever done weekly payroll"). This calls the consistency of this type of income into considerable question.

The pay period for applicant's exhibit 1 begins with January 14, 2019 and has an end date of January 20, 2019. The end date is three days **before** the applicant was injured on January 23, 2019.

Applicant's exhibit 2 is a regular Pay Stub, which covers a two-week period from January 14, 2019 to January 27, 2019. This Pay Stub identifies 36 hours of regular work generating \$1,080 in gross wages. If we were simply to add applicant's Prevailing Wage Pay Stub and his regular Pay Stub together, the total would be $\$1,434.10 + \$1,080 = \$2514.10$ which when divided by two (it is a two week pay period) would generate a weekly average of approximately **\$1,189.78**.

The WCJ does not believe that this is a fair representation of the applicant's earning capacity at this employer and this is why he rejects the usage of Labor Code section 4453(c)(1) as the proper method of calculating the applicant's wages.

The WCJ rejects this section and considers it unfair because the applicant was injured on January 23, 2019 during the pay period and did not work after his injury date. Because the pay period continued until January 27, 2019, the applicant's earnings during this pay period were cut short and therefore the WCJ believes the earnings reflected on the regular Pay Stub do not adequately and credibly reflect his earning potential. This is especially true when taking into consideration that the applicant's consistent 2018 earnings produce a higher average weekly wage.

Applicant's exhibit 2 provides other information as well. The Pay Stub also notes that by January 27, 2019, applicant had accrued 158 hours of regular work. The WCJ finds this information highly unusual and unfortunately, it remained unclarified at trial. Firstly, applicant only worked 36 hours for the pay period January 14, 2019 to January 27, 2019 due to his injury. Deducting the 36 hours from 158 hours for this period leaves 122 hours accrued in regular work for the period January 1, 2019 to January 13, 2019. This amounts to approximately 61 hours per week of regular time. This is double what the applicant worked during 2018. It is further inconsistent with the regular work hours applicant accrued during his second pay period from January 14, 2018 to January 27, 2018. For example, the applicant's Pay Stub (applicant's exhibit 2) only identifies 38 hours of regular work; it does not indicate 61 hours or more of work for the period January 14, 2018 to January 23, 2018 the date of the applicant's injury, which one would have expected if the applicant in 2019 was working a consistent 61-hour workweek.

Nor is there any credible explanation for this spike in the applicant's working hours. Applicant did not provide any testimony concerning it at all. Defendant's exhibits demonstrate from earlier Pay Stubs that applicant was already accruing overtime after 30+ hours of regular time. The WCJ cannot understand why, and no explanation was given, if the applicant worked 61 hours or more per week for the first two weeks of January 2019, why much of that time was not reflected as overtime pay. There is simply no adequate explanation in the documentary record or in testimony for this spike in applicant's hours for the first two weeks of January 2019.

Making matters more difficult is the fact that the WCJ was not provided with the first Pay Stub of the applicant, which would have covered the period January 1, 2019 to January 13, 2019 for comparison and corroboration.

Additionally, according to applicant's exhibit 2, applicant's year to date earnings were \$7,812.74. However, applicant did not work after the date of injury on January 23, 2019 (according to the defendant's brief). If we were to take applicant's **year to date total** divided by the number of days worked it would produce the following: $\$7,812.74 / 22 \text{ days} = 355.12 \text{ per day}$ or a weekly rate of \$2,485.87.

The WCJ does not find this to be a correct assessment of the applicant's earning capacity for several reasons. Firstly, the evidence itself has not been adequately explained. Without the first paycheck or testimony in explanation, the result would be a windfall for the applicant which is

wildly inconsistent with both the applicant's 2018 earnings and the two weeks of earnings in 2019 between January 14, 2019 and January 27, 2019 (for which there is an actual Pay Stub).

Secondly, the applicant was apparently paid after his injury as his W2 for 2019, also in evidence, identifies that applicant earned \$10,693 for the year 2019 from Metal Supply LLC.

It is clear from the W2 that the W2 reported taxable earnings and the applicant's sole Pay Stub year to date earnings do not match as \$7,812.74 (year to date total from the Pay Stub) and \$10,693 (W2) are not equivalent. This means that applicant was paid by the employer \$2,880.26 after he stopped working (defendant argues this much in its brief). This payment by the way produces a weekly total of \$1,440.13 **which again is fairly consistent with the applicant's 2018 earnings and the weekly earnings for the pay period January 14, 2019 to January 27, 2019.**

Taking the applicant's 2019 W2 information only, applicant would have earned \$10,693 over a period of 38 days (January 1, 2019 to February 8, 2019). This is \$1,969.76 per week. If we take the W2 earnings and divide by the actual number of days worked (22 days), the rate is even higher \$3,402.31. This again is high and takes advantage of the unexplained spike in the applicant's regular hours for the first two weeks of 2019.

The WCJ rejects the applicant's contention that his pay should be based solely on his 2019 earnings as that would result in a windfall to the applicant and is not representative of his earnings at this employer. Temporary disability is by its very nature, designed to reimburse applicant for lost earnings, not provide him more money than he would have earned had he continued to work.

The WCJ resolves the numerous deficiencies in the record by simply **using the W2 information for 2018 and 2019.** Unlike Pay Stubs, the W2s are tendered to the applicant who in turn tenders them to the IRS as proof of receipt of earnings.

From the W2s it appears that the applicant earned \$30,178.48 in 2018 for a period of 25 weeks and 2 days. Applicant further earned \$10,693 in 2019 from January 1, 2019 to February 8, 2019 for a total of 27 weeks and 4 days. The total amount of earnings for Metal Supply LLC amounts therefore to \$40,871.48. This equates to an approximate average weekly wage of \$1,490.11.

Because the result of the WCJ's math closely approximates defendant's own calculated average weekly wage rate of \$1,492.25 the WCJ will rely on the rate proposed by the defendants and find the applicant's average weekly wage was \$1,492.25 producing a temporary disability rate of \$994.83. As this is the rate that the carrier paid the applicant, the WCJ finds that applicant is not entitled to any additional temporary disability or penalties.

DATE: July 5, 2022

Mark Romano
WORKERS' COMPENSATION JUDGE