

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

**JOSE LUIS VARAS, *Applicant***

**vs.**

**TERESA LOBATOS;  
ALLSTATE INSURANCE, administered by  
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ2170203  
Pomona District Office**

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

Defendant seeks reconsideration of the February 28, 2023 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant is entitled to temporary disability benefits at a weekly rate of \$427.73 based on the currently applicable minimum wage of \$16.04 per hour.<sup>1</sup>

Defendant contends that the WCJ erred by applying the current minimum wage to applicant's injury in 1992 in order determine that applicant's earnings capacity is \$641.60 per week.<sup>2</sup>

We have received an Answer from applicant. 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

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<sup>1</sup> Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Worker's Compensation Appeals Board. Another panelist has been assigned in her place.

<sup>2</sup> All further statutory references are to the Labor Code unless otherwise stated.

will grant defendant's petition and affirm the Findings and Award, except that we will amend the temporary disability rate to reflect the current statutory minimum of \$242.86 per week.

## FACTS

Applicant, while employed as a house painter on October 26, 1992, sustained industrial injury to the neck, left shoulder, left elbow, left wrist, right upper extremity, low back, right knee, left knee, gastrointestinal (upper/lower G.I.) and psyche.

On January 6, 2020, the parties proceeded to trial, and stipulated that defendant had paid temporary disability benefits at the weekly rate of \$80 from October 27, 1992 through June 17, 1996, permanent disability at the weekly rate of \$70 a week from June 18, 1996 through January 27, 1997, temporary disability at the weekly rate of \$80 from January 28, 1997 through December 1, 2008, and permanent disability at the weekly rate of \$80 from December 2, 2008 through April 22, 2015. (Minutes of Hearing and Summary of Evidence, dated January 6, 2020, at 2:16.) The parties placed in issue, in relevant part, applicant's earnings, with the employee claiming \$200 per week and employer claiming \$120 per week.

On February 27, 2020, the WCJ issued Findings and Award, determining in relevant part that applicant's earnings based on the minimum wage at the time of injury were \$4.25 per hour, and based on a 40 hour workweek, produced a weekly rate of \$170.00 warranting a temporary disability rate of \$126.00 per week and a permanent disability indemnity rate of \$ 126.00 per week. (Findings of Fact No. 4.) The WCJ further determined that the injury resulted in temporary disability for the period October 26, 1992 through March 7, 2002 and again for 12 weeks from applicant's carpal tunnel release surgery in 2007, and an additional TTD period from August 13, 2010 knee surgery to October 12, 2010.

Defendant sought reconsideration of the award, and in our Opinion and Decision After Reconsideration, dated October 11, 2022, we affirmed the February 27, 2020 Findings and Award, except that we rescinded the WCJ's determination regarding applicant's earnings. (Opinion and Decision After Reconsideration, dated October 11, 2022, at p. 8.) We observed that pursuant to Labor Code section 4661.5, any temporary disability payment made two years or more after the date of injury is to be computed in accordance with the limits in effect on the date of payment, not the date of injury. We further noted that pursuant to *Hofmeister v. Workers' Compensation Appeal Board* (1984) 156 Cal.App.3d 848, 852 [49 Cal.Comp.Cases 438], "when there has been a delay

in the payment of temporary disability for two or more years, the weekly earnings amount of such payment shall be at the statutory rate on the date of ‘payment.’ The statute makes no reference to rates in effect on the date of ‘injury.’” (*Hofmeister, supra*, 156 Cal.App.3d at p. 852.) We further observed that despite partial payments of temporary disability indemnity, the section 4661.5 increase would apply when “any” portion of temporary disability payment is made two or more years from the date of injury. (Opinion on Decision, dated October 11, 2022, at p. 6.) Accordingly, we rescinded the WCJ’s findings regarding applicant’s earnings, and returned the matter to the trial level for further analysis consistent with section 4661.5 and with *Hofmeister*.

On January 25, 2023, the parties proceeded to trial on the issue of applicant’s wages.

On February 28, 2023, the WCJ issued Findings and Award (F&A), determining that applicant is entitled to temporary disability benefits at the statutory minimum for the period of October 26, 1992 to October 26, 1994, and to temporary disability benefits at the weekly rate of \$427.73 for the period October 27, 1994 to March 7, 2002, and for a period of 12 weeks in 2007, and an additional period of 12 weeks commencing August 13, 2010. (F&A, Findings of Fact Nos. 2 and 3.) Based on section 4661.5 and *Hofmeister, supra*, 156 Cal.App.3d 848, the WCJ applied the current minimum wage rate in Los Angeles, \$16.04, against a 40 hour work week, yielding average weekly wages of \$641.60, and a temporary disability rate of \$427.73. (F&A, Opinion on Decision, p. 2.)

Defendant’s Petition notes their agreement that “since applicant was found to be a minimum wage earner for TD purposes, he should receive the benefit of the provisions of Labor Code Section 4661.5 by increasing his compensation rate for any TD paid two years post injury, to the prevailing statutory minimum.” (Petition, at 4:14.) However, the Petition contends the WCJ’s decision to base applicant’s average weekly wages on an earnings capacity based on current minimum wage rates is not supported by statute or case law. (Petition, at 5:17.) Defendant further avers that *Hofmeister* is distinguishable because it provided for an increase in temporary disability rates rather than earning capacity. Defendant also avers the decision in *Thrifty Drug Stores, Inc. v. Workers’ Compensation Appeals Board (Kaye)* (1979) 95 Cal.App.3d 937 [157 Cal. Rptr. 459, 44 Cal.Comp.Cases 809] is distinguishable as applying to situations where the employee’s continued work was contemplated throughout the period of temporary disability. (Petition, at 6:23.) Defendant requests that we find that applicant is entitled to an increase in his temporary disability rate to the current minimum rate for temporary disability paid two years post injury per

section 4661.5, but that he is not entitled to a TD rate based on the current City of Los Angeles minimum wage. (*Id.* at 8:6.)

Applicant's Answer contends that section 4661.5 requires, "when TTD is paid beyond the 2 year anniversary of the DOI, that new Average Weekly Wage (AWW) determination/calculation is to be made for TTD payments at the time/date that such TTD payment is actually made." (Answer, at 3:25.) Applicant concedes that he likely would not have continued to work for this particular homeowner/employer, but that he "would be working, somewhere, and if working in LA City would be earning at least the minimum wage of \$16.01 per hour or \$641.60 per week," and that "TTD is to cover loss of earnings." (*Id.* at 4:8.)

The WCJ's Report observes that section 4661.5 requires that when there has been a delay in the payment of temporary disability for two or more years, the weekly earnings amount of such payment shall be at the statutory rate on the date of payment.

## DISCUSSION

The calculation of an award of temporary disability requires (1) a determination of the employee's average weekly earnings (which may be based on various calculations, including actual earnings or on earnings capacity), (2) the application of the minimum and maximum disability rates, and (3) a determination of the period the employee was temporarily totally disabled.

Section 4453(c) provides four methods to calculate average weekly earnings. (Lab. Code, § 4453(c)(1)-(4).) As relevant here, section 4453(c) provides as follows:

(1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.

....

(4) 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)(1) and (c)(4), emphasis added.)

Section 4453(a) provides the statutory minimum and maximum temporary disability *rates*, based on the average weekly earnings calculated under section 4453(c).

Once the temporary disability rate has been calculated based on average weekly earnings, a determination of the period of temporary disability must be made, subject to section 4656, which limits the aggregate disability payment available for a single injury causing temporary disability. (Lab. Code, § 4656.)

Here, the WCJ has determined that applicant's actual earnings at the time of injury in 1992 were \$4.25 per hour, and that applicant worked 40 hours per week. (February 27, 2020 Findings and Award, Findings of Fact No. 4.) This yields weekly earnings of \$170, which is below the statutory minimum rate of \$189 for temporary disability occurring after January 1, 1991. (Lab. Code, § 4453(a)(4).) The WCJ thus awarded temporary disability benefits of \$126, based on the minimum statutory earnings of \$189, as applicable to applicant's date of injury. (Findings and Award, dated February 27, 2020, Finding of Fact No. 4.)

Section 4661.5 provides:

Notwithstanding any other provision of this division, when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each temporary total disability payment is made unless computing the payment on this basis produces a lower payment because of a reduction in the minimum average weekly earnings applicable under Section 4453.

In *Hofmeister, v. Workers' Compensation Appeal Board, supra*, 156 Cal.App.3d 848, a firefighter/bulldozer operator was injured in 1979, but the defendant disputed employment and paid no benefits until an award issued in July, 1983. In the interim, the maximum statutory temporary disability rate had increased from \$154 per week to \$196 per week. The Court of Appeal held that in enacting section 4661.5, the legislature assigned the risk of inflation of indemnity rates to the employer. Accordingly, temporary disability payments more than two years from the date of injury should be paid at the statutory amount prevailing when the payment is made. (*Id.* at 851; 853.)

Our October 11, 2022 Decision after Reconsideration observed that pursuant to section 4661.5 and the holding in *Hofmeister, supra*, 156 Cal.App.3d 848, "when there has been a delay in the payment of temporary disability for two or more years, the weekly earnings amount of such

payment shall be at the statutory rate on the date of ‘payment.’” (Opinion on Decision, dated October 11, 2022, at p. 5.)

Applicant contends that because the award of temporary disability is made more than two years from the 1992 date of injury, his average weekly *earning capacity* should be fixed at the current minimum wage, which in the City of Los Angeles is \$16.04 per hour. A 40-hour work week at \$16.04 per hour yields an earning capacity of \$641.60 per week, and a temporary disability rate of \$427.73. Accordingly, applicant avers the WCJ appropriately awarded retroactive temporary disability benefits at the minimum statutory temporary disability rate for the first two years following the injury, and thereafter, at a rate commensurate with the currently applicable minimum wage. (*Id.* at 5:24.)

However, this argument conflates the *earning capacity* analysis of section 4453(c)(4), with the application of the appropriate statutory minimum and maximum *rates*, under section 4453(a) and 4661.5.

In *Kaye, supra*, 95 Cal.App.3d 937, the Court of Appeal held that where there is “*specific demonstrable evidence* that the injured employee, would, but for the injury, have received increased earnings, the fixed formula of [Labor Code section 4453,] subdivision (a) cannot be reasonably and fairly applied, and that in such circumstances average earnings can be computed on the basis of earning capacity under section 4453, subdivision (d).” (*Id.* at 944.) However, the *Kaye* court cautioned that “[i]n so holding we do not suggest that in every case the Board must engage in an open-ended consideration of nonspecific or amorphous claims of future potential earning ability.” (*Ibid.*) The burden rests with the employee to establish through specific, demonstrable evidence, that a change in earnings capacity was reasonably foreseeable at the time of injury. Based on this analysis, the court in *Kaye* concluded that benefits were appropriately calculated based on specific evidence of post-injury salary increases provided under a collective bargaining agreement between applicant’s employer and the labor union of which applicant was a member.

More recently, the WCAB panel decision in *Camberos v. Lyon* (March 5, 2019, ADJ10334253) [2019 Cal. Wrk. Comp. P.D. LEXIS 75] held it was appropriate to use a wage capacity analysis when applicant’s earning were tied to the minimum wage, and the minimum wage was statutorily scheduled to increase *prior to* applicant’s injury.

However, the consideration of earnings capacity “does not mean an employer must speculate or provide for remote possibilities.” (*Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348 [69 Cal.Rptr.2d 842, 62 Cal.Comp.Cases 1649].)

Where a dispute arises between the employer and injured worker, the Board must make a two-level analysis to determine what temporary disability benefits are due. First, it must determine the anticipated duration of the disability based upon the nature of the injury sustained and the normal duration of the disability associated with that injury. Second, the Board must consider whether, barring the injury, anything would have occurred during the anticipated duration of the disability that would have affected the injured worker's earning capacity in a manner that makes it unreasonable or unfair to use actual wages to calculate temporary disability benefits. *In doing so, the Board should consider only those factors existing at the time of injury or those that could reasonably be anticipated at that time.* Where there is specific demonstrable evidence that such factors exist which would have affected an injured worker's earning capacity other than in a *de minimis* manner, the Board should consider those factors to calculate one sum that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability. Once the Board makes an award for temporary disability, the third sentence of section 4453, subdivision (d) mandates it remain constant unless changed pursuant to section 4661.5. (*Id.* at 1363, *emphasis added.*)

Thus, we have held it to be inappropriate to calculate earning capacity based on salary increases arising out of unrealized future job promotions. (*Rich v. California* (March 28, 2008, SRO 0120100, SRO 0120101) [2008 Cal. Wrk. Comp. P.D. LEXIS 347].) We have also held that actual increases in pay following applicant's attempts to return to work should be used in calculating earnings capacity, but not a 2% annual raise that was not reasonably anticipated or scheduled at the time applicant became disabled. (*Bienkowski v. Giorgio Armani Corp.* (January 27, 2012, ADJ1274444 (OAK 0335094), ADJ2491363 (OAK 0059507)) [2012 Cal. Wrk. Comp. P.D. LEXIS 54].) Similarly, an earnings capacity analysis may not be based on vocational goals without affirmative steps take to reach those goals. (*Peris v. Oakland Opera Theater* (July 18, 2012, ADJ6707712) [2012 Cal. Wrk. Comp. P. EXIS 377].).

Here, applicant contends that section 4661.5 requires adjustment to applicant's earnings calculations, including an earnings capacity analysis under section 4453(c)(4). Applicant asserts, “[h]ere there is a finding that the applicant was a minimum wage earner for 40 hours a week. To effectuate the intent and clear language of Section 4661.5, the applicant's earnings rate and

temporary disability rate must be adjusted with consideration of the minimum wage rate in effect on the date of payments.” (Petition, at 5:24.)

However, section 4661.5 does not mandate a new determination of applicant’s average weekly earnings, rather it requires that payments of temporary disability more than two years after the date of injury be paid at current *rates*, i.e., at the prevailing minimum and maximum rates as of the date of payment as set forth in section 4453(a). For example, in *Hofmeister, supra*, 156 Cal.App.3d 848, the maximum statutory temporary disability rate was \$154 as of the date of injury in 1979, but had increased to \$196 (based on maximum earnings of \$294) per week as of the award of temporary disability in 1983. (See Labor Code, § 4453(a)(1).) The dispute in *Hofmeister* did not involve applicant’s earnings capacity, but rather the applicable temporary disability *rate*. Thus, “under section 4661.5, when any TTD payment is made two years or more after the date of injury, the amount of the payment is to be computed in accordance with *the limits in effect* on the date of payment, not the date of injury.” (*Coca-Cola Enterprises Inc. v. Workers' Comp. Appeals Bd. (Espinoza)* (2011) 194 Cal.App.4th 809, 812-813 [123 Cal.Rptr.3d 712, 76 Cal.Comp.Cases 391], *emphasis added*.)

Section 4661.5 thus requires the application of the rates (i.e., the limits) in effect as of the date of payment of temporary disability, rather than calculation of average weekly earnings as of the date of payment of temporary disability. Pursuant to section 4453(c)(1), earnings are determined as of the “time of the injury.” We must also consider whether anything would have occurred during the anticipated duration of the disability that would have affected the injured worker's earning capacity in a manner that makes it unreasonable or unfair to use actual wages to calculate temporary disability benefits. (*Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)*, *supra*, 59 Cal.App.4th 1348, 1363.) However, such factors may not be based on speculation or remote possibilities, and are limited to “only those factors only those factors existing at the time of injury or those that could reasonably be anticipated at that time.” (*Id.* at 1363.)

Here, the F&A awarded temporary disability arising out of a 1992 injury based on the minimum wage applicable in 2023. It is inherently speculative to assert that the prevailing local minimum wage in the City of Los Angeles in 2023 was a reasonably anticipated factor at the time of applicant’s injury in 1992, some 31 years earlier. (*cf. Camberos v. Lyon, supra*, 2019 Cal. Wrk. Comp. P.D. LEXIS 75 [wage capacity analysis appropriate when wages were tied to the state minimum wage which, prior to applicant's injury, was scheduled to increase pursuant to AB 10].)



Accordingly, we find that because the local minimum wage in 2023 was not a reasonably anticipated factor in 1992, applicant has not established through specific, demonstrable evidence that the wage capacity analysis based on current minimum wage is an appropriate basis for a wage capacity determination.

However, section 4661.5 requires the application of current temporary disability *rates* to payments made more than two years after the injury. (Lab. Code, § 4661.5.) Here, applicant's weekly earnings at the time of injury were determined to be \$170.00 per week. (Findings and Award, dated February 27, 2020, Finding of Fact No. 4.) The WCJ correctly determined that the resulting temporary disability rate (approximately \$113 per week) would be below the statutory minimum, of \$126 per week, and thus applied the statutory minimum pursuant to section 4453(a)(4) for the first two years following applicant's date of injury. (Lab. Code, § 4453(a)(4).) Pursuant to section 4661.5 and *Hoffmeister, supra*, 156 Cal.App.3d 848, temporary disability payments made more than two years from the date of injury are to be paid at current temporary disability rates. We take judicial notice that the current statutory minimum weekly earnings for 2023 are \$364.29, yielding a weekly temporary disability rate of \$242.86.<sup>3</sup> Applicant's earnings of \$170 per week fall below the statutory minimum rate as set forth in section 4453(a)(10), which sets rates for injuries occurring after January 1, 2007.

Accordingly, applicant is entitled to the statutory rates available as of the date of the payment of temporary disability more than two years from the date of injury, which in this case is the statutory minimum rate of \$364.29 per week, with a corresponding temporary disability rate of \$242.86. We will amend the Finding of Fact No. 3 to reflect that applicant is entitled to benefits at the weekly rate of \$242.86 for the period October 27, 1994, through March 7, 2002, 12 weeks in 2007 and 12 weeks from August 13, 2010, and further amend the Award to reflect the same periods and rates.

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<sup>3</sup> <https://www.dir.ca.gov/DIRNews/2022/2022-95.html>

For the foregoing reasons,

**IT IS ORDERED** that the defendant's Petition for Reconsideration of the February 28, 2023 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 28, 2023 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

3. Applicant is entitled to TTD benefits at a weekly rate of \$242.86 based on the current statutory minimum rate, for the periods of October 27, 1994, through March 7, 2002, 12 weeks in 2007, and 12 weeks from August 13, 2010.

#### **AWARD**

- a. Temporary disability indemnity at the rate of \$126.00 per week beginning October 26, 1992, through October 26, 1994, in an amount to be adjusted by the parties, less benefits paid and less attorney fees.
- b. Applicant is entitled to temporary disability indemnity at a rate of \$242.86 per week beginning October 27, 1994, through March 7, 2002, 12 weeks in 2007, and an additional 12 weeks beginning August 13, 2010, in a total amount to be adjusted by the parties with jurisdiction reserved to the WCJ, less credit for sums paid, and less attorney fees.

- c. Applicant's attorney is entitled to a 15% fee from TTD benefits awarded, less sums previously paid.

**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 19, 2023**

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

**JOSE LUIS VARAS  
MOISES VAZQUEZ, ESQ.  
LAW OFFICE OF ALAN S. FREEMAN**

**SAR/abs**

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