

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

ALDO ONTIVEROS, *Applicant*

vs.

**COAST TO COAST GLASS COMPANY; MID-CENTURY INSURANCE
COMPANY, *Defendants***

**Adjudication Number: ADJ11067921
Marina del Rey District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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, which we adopt and incorporate, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the February 22, 2022 Findings of Fact and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 22, 2022 Findings of Fact and Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 9, 2022

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

**ALDO ONTIVEROS
THE JIN LAW FIRM P.C.
LAW OFFICES OF STRATMAN & WILLIAMS-ABREGO
EMPLOYMENT DEVELOPMENT DEPT.**

PAG/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
SYNOPSIS

1. Applicant's Occupation: Glazier
Date of Injury: January 1, 2015 to August 19, 2016
Parts of Body Alleged: Hernia, Back, Abdomen, Internal System,
And Excretory System

2. Identity of Petitioner: **Applicant** filed the Petition.
Timeliness: The petition was timely filed.
Verification: The petition was properly verified.

3. Date of issuance of Findings and Award: February 18, 2022

4. **Petitioner's contentions:**
 - A. Applicant contends that his start date of employment is August 11, 2014.
 - B. Applicant contends that his earning capacity is \$1,800 to 1,875.00
 - C. Applicant contends that the employer witnesses lack credibility and their testimony is not reliable.

II
FACTS

Applicant, Aldo Ontiveras, filed a claim of injury to his back, abdomen, internal system, excretory system and hernia while working as a Glazier for Coast to Coast Glass Company during the period of January 1, 2015 to August 19, 2016.

This case proceed to trial on the issues framed by the parties as injury arising out of and in the course of employment, parts of body injured, earnings, temporary disability, lien of the Employment Development Department, attorney fees and Defendant's objection to the Panel Qualified Medical Evaluation reporting.

As indicated in the Minutes of Hearing, the following exhibits were entered into evidence on behalf of Applicant with no objection by Defendant:

1. Medical reports from Panel Qualified Medical Evaluator Dr. Graham Woolf.
2. Deposition transcript of the testimony of Dr. Graham Woolf.
3. Excerpts of records from Olive View Medical.
4. W-2s and payroll information from Sure Payroll.
5. Photographs of the work site.

Defendant did not offer any exhibits.

Applicant testified as summarized in the Minutes of Hearing. The trial was conducted remotely through videoconference (Lifesize). Relevant to the issues raised in the petition for reconsideration, on direct examination he testified he was not currently working. He last worked in 2016 when he worked for Coast to Coast Glass Company. At the time he stopped working for Coast to Coast Glass Company, he work there for one and a half years and he was working full time with overtime. During the last one and a half years, he worked at jobs located in Marina Del Rey (off the 90 Freeway where you exit on Centinela), Santa Barbara, Beverly Hills, Westwood, North Hollywood BMW and a location off the 101 freeway that he thought was in Malibu. His last job was in Santa Barbara. He also did concurrent work and that was from Marina Del Rey to Beverly Hills and from North Hollywood to Westwood. He went back and forth between the Marina Del Rey project and the Santa Barbara project.

He testified that he was paid by both check and cash. He was paid by check for his regular time and cash for his overtime. The check came from Todd, who was the owner; and at the same time he would receive his overtime in cash. He did receive paperwork for overtime filled out by Todd. He did receive paperwork for overtime filled out by Todd.

When he started working at the Marina Del Rey project, he was paid \$25 per hour. During the course of that project, his pay increased to \$30 per hour. At the Marina Del Rey project, he was paid \$25 per hour. During the course of that project, his pay increased to \$30 per hour. At the Marina Del Rey project he did work overtime.

He testified that, while employed by Coast to Coast Glass Company, he worked at other projects besides the Marina Del Rey. He described the projects, his duties and the locations.

He testified that at Marina Del Rey he was paid overtime at \$20.00 per hour. He was paid less money for overtime because it was cash money, tax free. He was not told this was the reason, but that is what he thought was the reason for the difference in the amount he received for the overtime. This happened from the very first day that he started working there. He never questioned anyone about this. He accepted whatever they paid him.

He testified that when he first began employment with Coast to Coast Glass Company, they paid him by check and took taxes, EDD and Social Security out of his check. He received a 1099. He does not remember how long this happened. The 1099 was given to him at the end of the year. At some point they switched the 1099 to a W-2. He thinks this happened when he was at the Marina Del Rey project or the end of the project. They did not tell him why they were changing from the 1099 to the W-2, except to say that they had made a mistake.

A reference was made to Applicant's Exhibit 7, which is the 2015 W-2 and payroll information. He acknowledges that the 2015 1099 was paid and the W-2 had medical and Social Security in there as well. His employer did tell him that there had been a mistake and that he was paying Applicant now by the 1099. Applicant did not remember if the W-2 or 1099 reflected overtime.

Applicant testified about other locations he worked for the Defendant, together with his brother. He testified that he routinely worked overtime every week while working for the Defendant. He estimates that he worked overtime about eight hours on Saturdays and sometimes five hours on

Sundays, but not every Sunday. Sometimes he worked more than the regular eight hours a day - Monday through Friday – but not every day and not all the time. He average one to three hours of overtime Monday through Friday. Each month he worked overtime two or three Sundays. He worked eight hours overtime pretty much every Saturday.

On cross-examination, he testified that he worked in various sites in Marina Del Rey, starting in 2014 until 2016. He stated that the last time he worked for the employer was at the Santa Barbara site and his pay was initially \$25 per hour and increased to \$30 per hour while working at Marina Del Rey. This occurred sometime in 2015. Overtime pay was \$20 per hour.

He worked in Santa Barbara for five to seven weeks before he stopped working. He testified about other sites that he worked and stated that he was generally paid \$20 to \$25 per hour. He worked for Coast to Coast for a number of years. He last worked for Coast to Coast in 2016.

He repeated that he was paid cash and some payroll. He received an envelope and it was handwritten. Todd passed out the envelope (with the cash) and personally hand it to him with the paycheck. He was paid once a week.

Upon further examination by his attorney, Applicant testified that the Marina Del Rey project took a year and a half and that his pay rate wen from \$25 an hour to \$30 per hour.

Defendant called as a witness Todd Leiterding who testified that he is the owner and vice president of Coast to Coast. He is familiar with Applicant because he worked with him at his company and has known him for over 20 years.

He did not personally hand the payroll checks to the applicant. He confirmed that Applicant was paid weekly. His son was the project manager and either his son or a foreman would distribute the checks to the applicant.

On cross-examination, he testified that his son's name was Caleb. He would give Caleb the checks and Caleb would give the checks to the project manager or foreman and then it would be given to the employee. Probably it was given to Mike Calderone or maybe his son would distribute the checks, if Mike was not available. He was not present when the checks were given out.

He testified that from 2014 to 2016, 1099 payments were not paid to the applicant. From 2014 to 2016, Applicant was not issued a 1099.

On re-direct examination, he testified that he reviewed the payroll records to determine Applicant's hourly rate.

Defendant also called Michael Calderone to testify on behalf of the employer. On direct examination, he testified that his job title was foreman for Coast to Coast Glass. He worked with the applicant at many different job sites. He clarify that the Marina Del Rey project was actually located in Playa Del Rey and called Runway at Playa Vista. He was in charge as the foreman.

On cross-examination, he testified that he handed out the paychecks. They were delivered to him and distributed on Friday on a weekly basis. He would read the name on the envelope and hand it to the employee. He didn't open the envelope. There was no overtime. They worked 7 am to 3 pm – Monday through Friday. That was the schedule and the Applicant never worked overtime.

A Finding of Facts issued. It is from this Finding of Facts that Applicant is aggrieved and filed a timely Petition for Reconsideration. Defendant has not filed a response.

II CONTENTIONS

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, testimony and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to *Smales v. WCAB* (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

Applicant states that his start date for employment with the Defendant was August 11, 2014. However, as acknowledged in the petition, Applicant stipulated that the cumulative trauma period was January 1, 2015 to August 19, 2016. Accordingly, there was not any finding regarding the date of cumulative trauma period by this Judge.

Applicant states that the weekly earnings of \$1,120.42 as determined in the decision is incorrect. His testimony regarding his cash earnings was credibly rebutted by defense witnesses. However, Applicant's assertion that the documentary evidence submitted into the record does support a determination of higher weekly earnings of \$1,120.42. (Exhibit 7) The decision does not take into account this documentary evidence of Applicant's earning capacity. The focus in the decision was on the testimony of the witnesses and the alleged cash payments.

For that reason, it is requested that this matter is return to the trial level for an amended determination of the earnings of Applicant. In addition, it would also allow this judge to address what are clearly clerical errors in the Opinion on Decision and Findings and Award.

IV RECOMMENDATION

It is respectfully recommended that Applicant's Petition for Reconsideration be granted for the reasons stated above and returned to the trial judge for a revised decision as stated above.

DATED: 4/20/2022

JACQUELINE A. WALKER
Workers' Compensation Administrative Law Judge