

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

JILL LEVANS, *Applicant*

vs.

CASTRO VALLEY UNIFIED SCHOOL DISTRICT; self-insured, *Defendant*

**Adjudication Numbers: ADJ13695301; ADJ13695314
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 deny reconsideration.

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.*)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 7, 2021

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

**JILL LEVANS
BOXER & GERSON
MULLEN & FILIPPI**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

- | | |
|--------------------------------|---|
| 1. Applicant's Occupation: | Paraprofessional |
| Dates of Injury: | October 10, 2019 (ADJ13695301);
October 18, 2019 (ADJ13695314) |
| Parts of Body Injures: | Head and Cervical Spine |
| 2. Identity of Petitioner: | Defendant |
| Timeliness: | Yes |
| Verification: | Yes |
| 3. Date of Findings and Award: | February 9, 2021 |
| 4. Defendants' Contentions: | The determination that applicant's average weekly earnings were \$471.70 pursuant to Labor Code section 4453(c)(4) ¹ was a distortion of applicant's earnings capacity because it was based on earnings during a limited term assignment and not her full earnings history, and that her average weekly earnings were actually \$285.32. |

II. STATEMENT OF THE CASE AND FACTS

Applicant sustained two injuries arising out of and in the course of employment to her head and cervical spine while employed by defendant as a certified paraprofessional. The first occurred on October 10, 2019 (ADJ12944023) and the second occurred on October 18, 2019 (ADJ14135565).

On January 21, 2021, the matters proceeded to an expedited hearing on the primary issue of the amount of applicant's average weekly wages.

As relevant herein, applicant testified as follows: She held a position similar to that of a substitute teacher, and picked the assignments she wished to accept. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 21, 2021, p. 5.) The number of hours she worked was impacted by her need to drop her daughter off at school at 8:10 a.m. and pick up her daughter at 2:30 p.m. on Mondays through Thursdays. (*Id.* at p. 6.) On Fridays, her daughter only had a half day of school. If not for her daughter's schedule, she would have worked more hours. (*Ibid.*) During the school year which began in 2018, she missed approximately 13 weeks from work and

¹ All future statutory references are to the Labor Code unless otherwise specified.

worked reduced hours for 17 weeks due to a non-industrial medical condition. (*Ibid.*) In August of 2019, she accepted a limited term contract which would end in December of 2019. (*Ibid.*) While working under that contract, she earned \$17.80 per hour, and she generally worked between five and five and a half hours per work day. (*Ibid.*) She wanted to obtain a permanent position with defendant, and she was on the eligibility list for permanent employment as a mod/severe paraprofessional. (*Ibid.*)

As relevant herein, Dustin Gacherieu testified as follows: He is defendant's human resources manager. (*Id.* at p. 8.) Applicant's need to accommodate her daughter's school schedule impacted her ability to accept assignments, and but for those limitations, applicant would have been able to work almost every day. (*Ibid.*) Applicant needed to be on the eligibility list for mod/severe paraprofessionals to complete the limited term contract, and if she was not on that eligibility list she would have only been able to perform the contract for 60 days. (*Ibid.*) He created a spreadsheet which showed that there was only one other such limited term contract for a mod/severe paraprofessional with a 24 hour work week. (*Id.* at p. 9.) The spreadsheet did show other limited term assignments for paraprofessionals with different classifications, which paid a lesser hourly rate than the mod/severe classification and required more hours of work. (*Id.* at pp. 9-10.) Applicant would not have been able to apply for some of those positions because she was not on the corresponding eligibility list. (*Id.* at p. 10.) If applicant worked five to five and a half hours a day, she would not have been able to pick up her daughter on Fridays, and to him, this reflected that applicant could make accommodations for her daughter on one day a week. (*Ibid.*)

As relevant herein, defendant's exhibits included the following:

- Applicant's time cards, reflecting in relevant part that during the period beginning on August 13, 2019 through October 18, 2019 applicant generally started working at 8:45 am and stopped at 2:30 pm or 2:45 pm. (Exhibit B at pp. 1- 8.) During the period July 1, 2019 through July 12, 2019, she generally worked four hour work days. (*Id.* at p. 9-10.) At times during the period beginning on May and April of 2019, she was able to work from 8:45 am until after 3:00 p.m., and in January of 2019, she was able to work from 8:00 a.m. until 2:40 pm. (*Id.* at pp. 19- 23; 33.)
- Applicant's time cards reflecting in relevant part that: During the 52 week period beginning on October 22, 2018 and ending on the week of October 14, 2019, applicant did not work for 10 weeks; During that 52 week period, there were 24 weeks in which applicant worked at least 20 hours. (Exhibit B.)

On February 9, 2021, I issued a Findings and Award determining that applicant's average weekly earnings should be based on her earnings capacity and that applicant had a capacity to work 26.5 hours per week while earning \$17.80 per hour, which translated to an average weekly earnings of \$471.70 and deferred defendant's request for credit related to its claimed overpayment of temporary disability indemnity.

III. DISCUSSION

Section 4453, which governs the calculation of average weekly earnings, states in pertinent part that,

[T]he average weekly earnings ... shall be arrived at as follows:

...

(3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the average weekly earnings ... shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(4) *Where the employment is for less than 30 hours per week*, or wherefor 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, § 4553(c), emphasis added.)

Usually, subdivisions (c)(1) through (c)(3), which use an injured workers' actual earnings as the calculation's starting point, will yield actual earnings that are equivalent to earnings capacity. (*Argonaut Ins. Co. v. Industrial Acc. Comm. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130] (*Montana*) [construing Lab. Code § 4453, former subd. (d)].) However, subdivision (c)(4) is for situations where the first three formulae do not yield a fair result and require an estimate of earning capacity based on more than past earnings or actual earnings at the time of injury. (*Id.* at pp. 594-595; *Goytia v. Workers' Comp. Appeals Board* (1970) 1 Cal.3d 889, 894-895 [35 Cal.Comp.Cases 27]; *Gonzales v. Workers' Comp. Appeals Bd.*, *supra*, 68 Cal.App.4th at p. 847.) Additionally, "earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury... [T]he term envisages a dynamic, not a static, test, and cannot be compressed into earnings at a given moment in time." (*Goytia v. Workers'*

Compensation Appeals Bd. (1970) 1 Cal. 3d. 889, 894.)

Here, defendant argues that applicant's wages should be calculated pursuant to subdivision (c)(3). This argument appears to be based applicant's hourly rate of pay fluctuating dependent upon the assignments that she accepted each day. However, at the time of her injury, applicant was on a limited term assignment and her hourly earnings were fixed at \$17.80 per hour. Further, it is undisputed that applicant worked less than 30 hours a week. Accordingly, applicant's average weekly earnings must be based on her earnings capacity. (Lab. Code, §4453 (c)(4).)

Defendant correctly asserts that the Opinion on Decision placed undue emphasis on applicant's earnings at the time of her injury. However, my determination of applicant's earnings capacity is unchanged. Applicant's time cards reflect that there were ten weeks during the fifty two weeks between the week of October 22, 2018 and the week of October 14, 2019 during which she did not work. (Exhibit B.) Similarly, applicant testified that a non-industrial medical condition caused her to miss approximately thirteen weeks from work and work reduced hours for seventeen weeks, but that she planned to obtain a permanent position working for defendant. (MOH/SOE, *supra*, p. 6.) Her testimony was credible. The three week discrepancy regarding the number of weeks she missed from work and her apparent previous lack of interest in a permanent position are insufficient to rebut her testimony, which was accepted as true. (*LeVesque v. Workmen's Comp. App.Bd.* (1970) 1 Cal.3d 627, 639.) Additionally, applicant's time cards reflect that there were 24 weeks during the 52 week period before her date of injury where applicant worked at least 20 hours and that she had the ability to begin working before and after her daughter's school hours. (Exhibit B.) Further, the spreadsheet that defendant's witness created reflected the existence of other permanent positions. Moreover, applicant demonstrated the capacity to work 26.5 hours per week and earn \$17.80 per hour by actually doing so while performing the limited term assignment. Accordingly, applicant's average weekly wages are \$471.80

Based upon the above, I recommend that defendant's Petition for Reconsideration be denied.

DATE: MARCH 15, 2021

ALISON HOWELL
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

FACTUAL BACKGROUND

On October 10, 2019, applicant sustained an injury arising out of and in the course of employment to her head and cervical spine while employed by defendant as a certified paraprofessional (ADJ12944023). On October 18, 2019, applicant sustained a second injury to those body parts while employed by defendant in the same occupation (ADJ14135565).

As a result of these injuries, defendant provided applicant with temporary disability indemnity at the weekly rate of \$370.40 per week for the period beginning on October 21, 2019 through September 16, 2020, and temporary disability indemnity at the weekly rate of \$194.14 for the period September 17, 2020 and ongoing.

On January 21, 2021, the matter proceeded to an expedited hearing on the primary issue of how applicant's average weekly wage should be calculated. Defendant also asserted that it paid applicant the equivalent of 104 weeks of temporary disability indemnity based on its calculation of applicant's average weekly wage.

As relevant herein, applicant testified as follows: She held a position similar to that of a substitute teacher, and she would pick which assignments she wished to accept. The number of hours she could work was affected by her need to drop her daughter off at school at 8:10 a.m. and pick up her daughter at 2:30 p.m. on Mondays through Thursdays. On Fridays, her daughter had a half day of school. If not for the need to pick up her daughter, she would work more hours. During the school year beginning in 2018, she missed approximately 13 weeks from work and worked reduced hours for 17 weeks due to a non-industrial medical condition. In August of 2019, she accepted a limited term contract which would end in December of 2019. While working under that contract, she earned \$17.80 per hour, and she generally worked between five and five and a half hours per work day. She wanted to obtain a permanent position with defendant, and she was on the eligibility list for permanent employment as a mod/severe paraprofessional.

As relevant herein, Dustin Gacherieu testified as follows: He is defendant's human resources manager. Applicant's ability to accept assignments was impacted by her

need to accommodate her daughter's school schedule. But for those limitations, applicant would have been able to work almost every day. Applicant needed to be on the eligibility list for mod/severe paraprofessionals to complete the limited term contract, and if she was not on that eligibility list she would have only been able to perform the contract for 60 days. She likely applied to be on the eligibility list in September of 2019, and she was placed on the list. He created a spreadsheet which showed that there was only one other such limited term contract for a mod/severe paraprofessional with a 24 hour work week. The spreadsheet did show other limited term assignments for paraprofessionals with different classifications, which paid a lesser hourly rate than the mod/severe classification and required more hours of work. Applicant would not have been able to apply for some of those positions because she was not on the corresponding eligibility list. If applicant worked five to five and a half hours a day, she would not have been able to pick up her daughter on Fridays, and to him, this reflected that applicant could make accommodations for her daughter on one day a week. Children become more independent as they age.

As relevant herein, defendant's exhibits included the following:

- Applicant's time cards, reflecting in relevant part that during the period beginning on August 13, 2019 through October 18, 2019 applicant generally started working at 8:45 am and stopped at 2:30 pm or 2:45 pm . (Exhibit B at pp. 1- 8.) During the period July 1, 2019 through July 12, 2019, she generally worked four hour work days. (*Id.* at p. 9-10.) At times during the period beginning on May and April of 2019, she was able to work from 8:45 am until after 3:00 p.m., and in January of 2019, she was able to work from 8:00 a.m. until 2:40 pm. (*Id.* at pp. 19- 23; 33.)

DISCUSSION

Section 4453, which governs the calculation of average weekly earnings, states in pertinent part that,

[T]he average weekly earnings ... shall be arrived at 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.
- (2) Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employments other than the employment

in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.

(3) If the earnings are at an irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period, then the average weekly earnings ... shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

(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, § 4553(c).)

Usually, subdivisions (c)(1) through (c)(3), which use an injured workers' actual earnings as the calculation's starting point, will yield actual earnings that are equivalent to earnings capacity. (*Argonaut Ins. Co. v. Industrial Acc. Comm. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130] (*Montana*) [construing Lab. Code § 4453, former subd. (d)].) However, subdivision (c)(4) is for situations where the first three formulae do not yield a fair result and require an estimate of earning capacity based on more than past earnings or actual earnings at the time of injury. (*Id.* at pp. 594-595; *Goytia v. Workers' Comp. Appeals Board* (1970) 1 Cal.3d 889, 894-895 [35 Cal.Comp.Cases 27]; *Gonzales v. Workers' Comp. Appeals Bd.*, *supra*, 68 Cal.App.4th at p. 847.)

Here, it applicant falls under subdivision (c)(4) as is it appears that she worked "less than 30 hours per week." Accordingly, her average weekly earnings are to be based upon the earnings capacity she had at the time of her injuries in October of 2019. (Lab. Code § 4552(c)(4); *Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348, 1363.) Applicant's earnings capacity is best described by the actual earnings she received while working on the limited term assignment. This is not speculative because she actually received those wages. Furthermore, applicant was able to work in that position despite her daughter's school schedule. In fact, her time cards reflect that even before these injuries, she had the capacity to work around her daughter's school schedule. As noted above, her time cards show that she was begin work before 8:00 a.m. and work until after 3:00 p.m. There is no evidence reflecting that applicant would not have been able to continue working between five and five and a half hours per day. In fact, both witnesses

agreed that there would usually be substitute work available every day, and that applicant could have applied for other limited term assignments. Additionally, although applicant may have initially been motivated to apply for the mod/severe permanent employee eligibility list so that she could complete the limited term assignment, this does not rebut her testimony that she planned to seek permanent employment upon the completion of that assignment. Finally, in calculating applicant's earnings capacity, it would not be appropriate to consider the wages she earned during the school year beginning in 2018 because applicant's un rebutted testimony was that she had to work fewer hours due to a non-industrial medical condition.

Applicant's time cards for the limited term assignment reflect that she usually worked 5.25 hours a day Monday through Thursday and 5.5 hours a day on Fridays, for a total of 26.5 hours a week. (Exhibit B at pp. 1-8.) Applicant did not work on September 2, 2019 (Labor Day), September 10, 2019, September 30, 2019, October 9, 2019, or October 10, 2019 (the date of injury for case number ADJ12944023), and applicant worked two hours on August 29, 2019. The parties did not present any evidence addressing why applicant did not work or only worked limited hours on these days, and therefore, they should not be considered in calculating her earnings capacity. (*Hamilton v. Lockheed Corp.* (2001) 66 Cal. Comp. Cases 473, 476 (Appeals Bd. en banc): Furthermore, school was most likely closed on Labor Day, and applicant must have worked for a portion of October 10, 2019 because the parties agree that she had an industrially caused injury on that date.

Based upon the above, Applicant's average weekly earnings are \$471.70 per week based on her earning \$17.80 per hour and working 26.5 hours per week. This entitles her to receive temporary disability indemnity at the weekly rate of \$314.67 per week and a permanent disability indemnity at the weekly rate of \$290.00 per week.

It is premature to render a decision regarding whether defendant is entitled to a credit for its overpayment of temporary disability. This was not listed as an issue on the declaration of readiness to proceed to expedited hearing, defendant did not prepare a petition seeking a credit for the overpayment of temporary disability, and defendant did not present any evidence establishing why it would be entitled to such a credit.

DATE: FEBRUARY 9, 2021

ALISON HOWELL
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE