

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

**MARIA PEREZ, *Applicant***

**vs.**

**PARAGON SERVICES JANITORIAL, LLC;  
CYPRESS INSURANCE COMPANY administered by  
BERKSHIRE HATHAWAY COMPANY, *Defendants***

**Adjudication Number: ADJ11418892  
San Diego District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on March 14, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to her right knee and psyche; that applicant's earnings at the time of injury were \$426.42 per week, resulting in a temporary disability rate of \$284.28 per week and a permanent disability indemnity rate of \$284.28 per week. The WCJ also found that applicant's injury caused temporary disability, for which she has been adequately compensated, and that she was paid at the correct rate for the period of temporary disability. Other issues were deferred pending development of the medical record.

Applicant contends the WCJ erred by (1) deferring whether applicant sustained an industrial back injury, pending further development of the medical record; (2) finding that applicant's earnings at the time of injury were less than her hourly rate at the time of injury multiplied by 40 hours per week; and (3) finding the applicant was adequately compensated for her temporary disability and that she was paid at the correct rate.

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant the Petition, amend the F&O to defer findings regarding applicant's earnings at the time of injury, the temporary disability indemnity rate, the permanent disability indemnity rate, and whether applicant has been adequately compensated for temporary disability indemnity (Finding Nos. 3 and 4). Otherwise, we will we affirm the March 14, 2023 F&O.

### **BACKGROUND**

We will briefly review the relevant facts.

Applicant claimed injury to various body parts, including psyche, right knee, left ankle, and back, while employed by defendant as a day porter/janitor on February 3, 2016. Defendant admits industrial injury to applicant's right knee.

The matter proceeded to trial on September 27, 2022 and February 21, 2023, on the following issues.

1. Earnings:

(a) The employee claiming \$600.00 per week.

(b) The employer/carrier claiming \$426.42.

2. Permanent disability.

3. Apportionment.

4. Need for further medical treatment.

5. The lien of EDD is deferred at this time.

6. Attorney fees.

7. Other issues: Whether Labor Code Section 4660.1 precludes an add-on of permanent disability for the alleged psyche injury.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), September 27, 2022 trial, pp. 2-3.)

The parties stipulated that the carrier/employer paid temporary disability at the weekly rate of \$284.28 for the period of March 19, 2016 to March 16, 2018. (MOH/SOE, September 27, 2022, p. 2.)

Applicant testified at trial through a certified interpreter. Relevant here, applicant testified as follows:

Q. Do you remember whether you were regularly scheduled to work a certain number of hours every week?

A. Well, it was not really regular. We started at 7:00 a.m. some days, and some other days we started at 8:00 a.m.

They would change that.

Q. Were the number of hours you worked the same every week?

A. Well, it would depend if there was a holiday or a day off because sometimes I would work 40 hours a week, but if during that week there was a holiday, then I would have to go an additional or two or three hours to check that everything was okay.

Q. If there were no holidays, let me ask you this, did you get paid for holiday pay?

A. They did pay it to me, but they won't pay me if I was just to stop by to check on everything.

Q. Well, if it was a holiday and you didn't work because it was a holiday, did they pay you?

A. Well, that's what I'm saying basically. They would pay me even if it was a holiday, but then because I had to go anyways they wouldn't pay it double as a holiday.

Q. So if there was no holiday, would you work the same number of hours per week, or did they vary?

A. Yes, I did. It didn't vary.

Q. How many hours did you work if no holiday?

A. 40 hours a week.

Q. Did you ever work overtime?

A. Only when -- like I told you before, when it was a holiday and I had to go extra days.

(Reporter's transcript, February 21, 2023 trial, at 7:14-8:17.)

Relevant here, the WCJ admitted the following into evidence: Wage statement dated March 25, 2016. (Exhibit K, MOH/SOE, September 27, 2022, p. 10.)

The WCJ made the following findings:

1. Maria Perez, born [], while employed on February 3, 2016, as a Day Porter, Occupational Group Number 340, at San Diego, California, by Paragon Services Janitorial, LLC, whose workers' compensation insurance carrier was Cypress Insurance Company, sustained injury arising out of and occurring in the course of employment to her right knee and psyche.
2. Factual findings and determinations of other parts of the body being injured including back and left ankle are deferred pending the parties' development of the medical record. Jurisdiction is retained.
3. Applicant's earnings at the time of injury were \$426.42 per week producing a temporary disability rate of \$284.28 per week and a permanent disability indemnity rate of \$284.28 per week.
4. Applicant's injury caused temporary disability for which she has been adequately compensated. Applicant was paid at the correct rate for the temporary disability period.

5. Factual findings and determinations as to the permanent and stationary date are deferred pending the parties' development of the medical record. Jurisdiction is retained.

6. Factual findings and determinations as to permanent disability are deferred pending the parties' development of the medical record. The parties did not provide the Court with substantial medical evidence upon which a permanent disability finding could be made. Jurisdiction is retained.

7. All other issues including the Labor Code Section 4660.1 issue are deferred pending the parties' development of the medical record by the parties. (F&O, pp. 1-2.)

The WCJ issued the following order at the conclusion of trial:

a. The parties did not provide the Court with any substantial medical to make factual determinations concerning the nature and extent of parts of body injured, the permanent and stationary date, or the level of permanent disability sustained. As such, the parties are ordered to return to both Dr. James McSweeney, M.D. (orthopedics) and Dr. Michael Takamura, M.D. (psyche) for further evaluation and reporting on the issues presented in this matter. Once that discovery has been completed, the parties are ordered to file a Declaration of Readiness to Proceed for further proceedings.

(F&O, pp. 2-3.)

## DISCUSSION

A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.<sup>1</sup>) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

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<sup>1</sup> All statutory references are to the Labor Code unless otherwise noted.

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, at 1075 ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer, supra*, at 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kramer, supra*, at 45 ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues. A decision issued by the Appeals Board may also address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions. Here, the WCJ's decision includes findings on threshold issues, including the finding of injury AOE/COE and findings regarding temporary disability indemnity. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

The statutory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

In order to review the temporary disability rate, permanent disability rate, and whether applicant was adequately compensated for temporary disability indemnity, we must consider applicant's average weekly earnings at the time of injury. The Workers' Compensation Act provides for temporary and permanent disability indemnity. (Lab. Code, § 4650 et seq.) Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain steady stream of income. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Whereas permanent disability indemnity has a dual function: "to compensate both for actual incapacity to work and for physical impairment of the worker's body, which may or may not be incapacitating." (*Id.*)

In order to compute either temporary or permanent disability indemnity, a worker's earning capacity (or average weekly earnings) must first be determined under Labor Code section 4453. An estimate of earning capacity is a prediction of what a worker's earnings would have been had they not been injured. (*Argonaut Ins. Co. v. Industrial Acci. Com. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130].) The method of computation of average weekly earnings is provided in section 4453, subdivision (c). (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 632 [65 Cal.Comp.Cases 139].) Subdivision (c)(1)-(3) provides formulas that take a worker's actual earnings as a starting point, whereas subdivision (c)(4) is for irregular employment or other situations where the first three formulas cannot reasonably and fairly be applied. (*Montana, supra*, at 594-595; *Pham, supra*, 632-633; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 894-895 [35 Cal.Comp.Cases 27].)

Here, the WCJ states that applicant's earnings are based on a wage statement prepared by the employer (Exhibit K). However, the WCJ does not explain how applicant's average weekly earnings were calculated. Moreover, the wage statement is not a model of clarity and it is not clear how many hours per week applicant worked, nor her hourly or daily earnings, nor whether she was paid overtime. Additionally, the wage statement spans less than a year. Applicant's testimony provides additional information, but does not substantially clarify the information necessary to calculate average weekly earnings. Applicant testified that she generally worked 40 hours a week, but her schedule varied. Some days she started at 7:00 a.m., other days she started at 8:00 a.m., and sometimes she worked partial days on holidays.

To the extent that the WCJ relied on the Labor Code to calculate applicant's earnings, it is unclear whether he used section 4453(c)(1), 4453(c)(4), or indeed whether he relied on section

4453 at all. Section 4453(c)(1) provides that “[w]here 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.” (Lab. Code, § 4453(c)(1).) Section 4453(c)(4) provides in relevant part that “...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).) Based on the record before us we cannot evaluate the basis for the WCJ’s decision.

With respect to the WCJ’s order for further evaluation and medical reporting (F&O, pp. 2-3), we note that the WCJ has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc); see also *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) Moreover, as the WCJ notes, this is an interlocutory issue and subject to the removal standard rather than reconsideration. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); *Cortez*, supra; *Kleemann*, supra.) Additionally, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) With respect to the WCJ’s Order to develop the record, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner. As such, we will not disturb the WCJ’s interlocutory findings.

Accordingly, we grant the Petition to amend the F&O to defer findings regarding applicant's earnings at the time of injury, the temporary disability indemnity rate, the permanent disability indemnity rate, and whether applicant has been adequately compensated for temporary disability indemnity (Finding Nos. 3 and 4). Otherwise, we affirm the March 14, 2023 F&O.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the March 14, 2023 Findings and Order is **GRANTED**.



**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of March 14, 2023 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

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3. Applicant's injury caused temporary disability, for which the carrier/employer paid temporary disability at the weekly rate of \$284.28 for the period of March 19, 2016 to March 16, 2018.

4. The issue of average weekly earnings is deferred and the rates for temporary disability indemnity and permanent disability indemnity are deferred. Jurisdiction is retained.

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**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ NATALIE PALUGYAI, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JUNE 5, 2023**

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

**MARIA PEREZ  
LAW OFFICES OF PHILIP M. COHEN  
SIEGEL, MORENO & STETTLER**

**JB/cs**

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