

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

ALYSSA McDONALD, *Applicant*

vs.

**FOREVER SARAH'S ELDERLY CARE;
UNINSURED EMPLOYER'S BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ16667184
Santa Rosa District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of September 27, 2024, wherein it was found that while employed on May 5, 2022 as an administrator/nurse's aide, she sustained industrial injury to her cervical spine and low back causing 104 weeks of temporary disability commencing on May 20, 2022. As relevant to the instant Petition, it was found that applicant's average weekly earnings at the time of injury were \$432.64 per week, entitling her to temporary disability indemnity at the rate of \$288.43 per week.

Applicant contends that the WCJ erred in finding average weekly earnings of only \$432.64 per week. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration and amend the WCJ's decision to defer the issues of average weekly wage, temporary disability indemnity rate, and the lien of EDD, pending further development of the evidentiary record.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on October 30, 2024, and 60 days from the date of transmission is Sunday, December 29, 2024. The next business day that is 60 days from the date of transmission is Monday, December 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, December 30, 2024, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on October 30, 2024, and the case was transmitted to the Appeals Board on October 30, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 30, 2024.

Turning to the merits, at trial the parties introduced a payroll journal to help determine the applicant's wages. The journal showed that applicant was paid \$22,497.50 and the WCJ divided this by 52 weeks to arrive at an average weekly wage of \$432.64. However, the payment journal shows payments made every two weeks commencing on October 1, 2021 and ending May 27, 2022. The checks presumably cover the two week period ending on the date of the check, and thus the payroll journal covers the period September 18, 2021 to May 27, 2022, which is a 36 week period. The total payments of \$22,497.50 should have been divided by 36 rather than by 52. Additionally, it is unclear whether applicant worked the entire pay period which predated the first check. Also, the journal covers periods after the injury when applicant may have worked less time as result of the injury. We note that until the pay period culminating on December 10, 2021, applicant was paid \$20 per hour. Then applicant began to be paid certain hours labeled "Admin Pay" at \$20 per hour and other hours at "Regular" at \$16 per hour. Commencing on the pay period ending March 18, 2022 applicant was given a raise on "Admin Pay" to \$25 per hour and all of her hours were listed as "Admin Pay."

Labor Code section 4453(c)(4) states:

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.

In deciding an injured worker's average weekly wage, consideration must be given "both the anticipated duration of the disability ... and any factors which reasonably would affect the worker's earning capacity during the anticipated period of disability." (*Grossmont Hosp. v. Workers' Comp. Appeals Bd. (Kyllonen)* (1997) 59 Cal.App.4th 1348, 1362 [62 Cal.Comp.Cases 1649].) The record must be further developed in order to determine what applicant's earnings would have been during the disability period but for the industrial injury. Clarification is required regarding whether any of applicant's hours would have been paid at less than \$25 per hour and

any difference between “Admin pay” and “regular.” To the extent that her hours would have all been paid at \$25 per hour, \$25 must be multiplied by a fair determination of her average weekly hours in order to determine her average weekly wage. However, we agree with the WCJ that the computation of average weekly wage should not include “on call” time that applicant was not compensated for.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. The WCAB has a constitutional mandate to ensure “substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ’s decision to defer the issues of average weekly wage, temporary disability indemnity rate, the EDD lien, and attorneys’ fees. We will delete the award of temporary disability pending further development of the record.

For the foregoing reasons,

IT IS ORDERED that Applicant’s Petition for Reconsideration of the Findings and Award of September 27, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of September 27, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. Alyssa McDonald, age 30 on the date of injury, while employed on May 5, 2022, as an administrator/nurse’s aide at Santa Rosa, California, by Forever Sarah’s Elderly Care, sustained injury arising out of and in the course of employment to her cervical spine/neck, and low back. Based on the mutual agreement of the parties, injury to the psyche is deferred.

2. At the time of injury, the employer was uninsured.

3. A determination of the alleged industrial injury to the applicant’s head is deferred upon further development of the record.

4. Applicant’s earnings at the time of injury are deferred with jurisdiction reserved.

5. The injury resulted in temporary disability for the period of May 20, 2022 and continuing subject to the 104 week cap pursuant to Labor Code section 4656(c)(2).

6. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

7. Applicant is entitled to reimbursement of medical-legal costs payable by defendant to QME Dr. Suchard pursuant to the Title 8, Cal. Code of Regs, 8, § 9795 in an exact amount to be adjusted by and between the parties with the WCAB retaining jurisdiction in the event of a dispute.

8. The issue of the lien of the Employment Development Department (EDD) is deferred, with jurisdiction reserved.

9. The issue of attorneys' fees is deferred with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of ALYSSA MCDONALD against FOREVER SARAH'S ELDERLY CARE; UNINSURED EMPLOYER'S BENEFIT TRUST FUND; of:

- a. Reimbursement of medical-legal costs in an amount to be adjusted by the parties; and
- b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 30, 2024

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

**ALYSSA McDONALD
MEECHAN, ROSENTHAL & KAPILOW
UNINSURED EMPLOYERS BENEFIT TRUST FUND
EDD**

DW/oo

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