

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

CELESTINO LECHUGA, *Applicant*

vs.

**GATES AND RODRIGUEZ BUILDERS, INC.; REDWOOD FIRE AND CASUALTY
INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE
COMPANIES, *Defendants***

**Adjudication Number: ADJ10253709
Oxnard 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 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 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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2024

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

**CELESTINO LECHUGA
LAW OFFICES OF RAUL CASTRO
COLEMAN CHAVEZ & ASSOCIATES**

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I **INTRODUCTION**

Celestino Lechuga, a 39-year-old carpenter for Gates & Rodriguez Builders, filed an Application for Adjudication on 1/7/16, alleging that on 9/21/15, he sustained injury arising out of and occurring in the course of employment to his right upper extremity as a result of a fall from a second story. The claim was accepted by the employer.

Defendant has filed a timely, verified, Petition for Reconsideration of the Findings, Decision, and Order dated 1/11/24 alleging that:

- a) The evidence does not justify the Findings of Fact, and;
- b) The Findings of Fact do not support the Order, Decision, or Award, and;
- c) That by the Order, Decision, or Award, the Workers Compensation Judge acted without or in excess of his powers.

Petitioner contends that:

- 1) The Court did not sufficiently explain the decision;
- 2) The Court erred in the method used in calculating Applicant's average weekly wage.

II **FACTS**

The issue is earnings. At the trial on 4/2/22, Applicant testified that his job duties involved putting up plywood sheets which would be nailed in by a "nailer" (Summary of Evidence (SOE), page 4, lines 13-16). He did not have an assistant helping him with putting up the sheets (SOE, page 4, line 16). He was paid by check (SOE, page 4, line 18). His pay was based on the number of plywood sheets he put up (SOE, page 5, line 14). He was paid \$2.50 per sheet unless he was working on a roof, in which case he would be paid by the size (SOE, page 5, line 15).

Applicant testified further that he entered into an agreement with Benjamin Rodriguez Sr.¹ whereby Applicant's pay would be split into two separate checks. One check would be made out to Applicant, and the other check made out to Applicant's nephew Carlos Lechuga (SOE, page 5, lines 20-23 and page 6, line 6). The purpose for this agreement was to hide the fact that Applicant

¹ The role Mr. Rodriguez Sr. had with the company was never explicitly spelled out at trial or in his deposition, but from Applicant's testimony it is inferred that he was in a position of supervision or administration.

made more money than his foreman (SOE, page 4, lines 20-22 and page 5, lines 21-22). At the beginning of 2014, Applicant began receiving multiple checks made out separately to himself and his nephew Carlos (SOE page 6, lines 3-4 and page 4, lines 22-23). Mr. Rodriguez would determine how the earnings would be split up between the two checks (SOE page 5, lines 17-18). Applicant provided Carlos Lechuga's social security card to the employer so that checks for Carlos could be processed (SOE page 6, lines 6-8). Applicant reported the earnings of Carlos as his own for taxation purposes (SOE page 5, lines 7-8). Applicant was able to cash the checks made out to Carlos Lechuga at a store where no identification was required (SOE page 6, lines 6-7).

The deposition of Benjamin Rodriguez Sr. taken on 3/28/18 (Applicant's 3) confirmed that Applicant was not paid by the hour, but paid by piecework (page 6, lines 19-25). Mr. Rodriguez Sr. had very limited knowledge about Carlos Lechuga (Page 11, lines 8-13). He was not questioned about the alleged agreement with Applicant to split the earnings into two checks.

The deposition of Benjamin Rodriguez Jr. taken on 11/17/17 (Applicant's 4) established that he was an officer of the corporation whose job duties included hiring and firing personnel, making and collecting payments, and supervision (Page 8 lines 21-25 and page 9, lines 1-24). It was further established that Applicant was not paid an hourly rate, but on a piecemeal basis (page 15 lines 3-12) It was his opinion that Carlos Lechuga actually worked for the company because there is an employment application on file, and Applicant had a helper on the job (page 20, lines 7-25, page 21, lines 1-25, and page 22, lines 1-25). However, he testified that he did not know Carlos Lechuga (Page 23, lines 16-19) and did not remember when Carlos was hired or when Carlos last worked for the company (Page 23, lines 10-25 and page 24, lines 1-5).

The records of Gates & Rodriguez Builders include separate payroll calculation sheets (Applicant's 1 and 2) for Applicant and Carlos Lechuga. Both sheets reflect final payments being made to Applicant and Carlos Lechuga for work performed for the period ending on 9/25/15. The sheets also reflect that Applicant began receiving payments in late October 2014, with Carlos Lechuga receiving his first payment one week later. Both sheets reflect a date of injury of 9/21/15.²

² Defendant, independently of the employer records, submitted a payment calculation sheet for Carlos Lechuga which was identical in all respects to the payment calculation sheet included in the employer's records except that the earnings only begin in 2015, and reference to the date of injury is omitted. It is not clear whether this document was altered to hide the fact that Applicant's injury date was stated at the top of the sheet in the employer records version, or whether it is a new creation intended to hide the 2014 earnings attributable to Carlos Lechuga.

The matter was tried on 4/12/22. In the resulting decision dated 6/7/22, it was determined that Applicant's average weekly earnings were \$543.69. Thus the earnings of Carlos Lechuga were not deemed to be the earnings of Applicant. The Court opined that Applicant's story did not add up for a number of reasons including the fact that there were some weeks reflected on the payment calculation sheets (Defendant's E&F) where only one of the two individuals had earnings, the apparent lack of motivation of the employer to enter into such an agreement given that the foreman had no knowledge of Applicant's earnings, Applicant's lack of motivation for entering into such an agreement since he was not in fear of losing his job if he did not agree, as well as the testimony that Applicant could cash Carlos Lechuga's checks without presenting identification.

Applicant filed a Petition for Reconsideration on 6/30/22 which the Court found quite persuasive on a number of points. As a result, the Court rescinded its decision on 7/11/22 and set the matter for a status conference. At the status conference on 8/10/22, the Court opined that substantial justice dictated additional evidence. In particular, the Court requested to see Applicant's 2015 tax return because Applicant testified that he reported Carlos' earnings as his own, as well as obtaining additional testimony from Benjamin Rodriguez Sr. since he was never questioned regarding the alleged split check agreement. The Court also wanted the testimony of Carlos Lechuga.

Applicant's 2015 tax return which in fact reflected that the earnings attributed to Carlos Lechuga, were reported as the earnings of Applicant, was e-filed with the Court on 9/26/22. Subsequently two Mandatory Settlement Conferences took place as the parties attempted to resolve the issue to no avail. The matter was again submitted for decision on 5/19/23 at which time Applicant offered the 2015 tax return as well as an IRS Account transcript (Applicant's 5 and 6). Those exhibits were marked for identification subject to Defendant's objection that the documents were not admissible pursuant to Labor Code section 5502(d)(3). No further testimony was offered.

The Court issued a new decision on 7/11/23 wherein Applicant's exhibits 5 & 6 were admitted into evidence, and Applicant's earnings were determined to be \$1,153.33 per week based on the reported tax earnings as well as the number of weeks reflected in the payroll calculations sheets. Defendant filed a Petition for Reconsideration of that decision on 8/3/23 arguing that, among other things, Applicant's 2014 earnings should have been considered, and that exhibits 5 and 6 should have been excluded per Labor Code section 5502(d)(3). The Court agreed in part and

rescinded the 7/11/23 decision. Ultimately the matter was again submitted on 11/15/23. The subject decision issued on 1/16/24 wherein Applicant's exhibit 5 was admitted but Exhibit 6 was excluded, and the average weekly wage was determined to be \$1,055.89 per week.

III **DISCUSSION**

WHETHER THE OPINION ON DECISION PROVIDED ADEQUATE EXPLANATION AND REASONING RELATIVE TO THE CALCULATION OF THE AVERAGE WEEKLY WAGE

The Opinion on Decision set forth exactly how the calculation was arrived at. Thus it is unclear how it could be argued otherwise. If Petitioner takes issue with the method of calculation, he is free to do so, but there was no hiding the ball there. However, any potential deficiency in that regard will be addressed in this report in accordance with the case of Smales v. WCAB (1980) 44 CCC 1026(W/D).

It is noted that Petitioner also argued that the Court did not provide a clear explanation as to why the payment calculation sheets for both Applicant and Carlos Lechuga, in addition to the 2015 tax return were used in the determination. However Petitioner did not explicitly raise these issues as a point of grievance with the decision. As such, those issues are arguably waived. That being said, those contentions will be addressed as well.

CALCULATION OF EARNINGS/LC 4453/NUMBER OF WEEKS

Labor Code section 4453(c)(3) provides:

“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 mentioned in subdivision (a) 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.”

The method specified for calculating wages applies here because Applicant was paid at an irregular rate since he was paid by the piece. Thus the use of average pay over a period of time is appropriate. In that regard, the Court agrees with Petitioner and in fact the Court utilized the method proposed by Petitioner. The Court did not use section 4453(c)(1) to make the determination as seemingly implied by Petitioner because that section does not apply to the situation where earnings are based on piece work.

As delineated in the Opinion on decision, the calculation was arrived at by utilizing the total earnings in 2015 pursuant to the 2015 tax return (\$44,210.00) added to the total earnings for the 9 weeks worked by Celestino Lechuga in 2014 as reflected in the payment calculation sheet (\$4,3610.00), which total \$48,571.00, divided by the total of the 46 actual weeks worked in 2014 and 2015, as established by the employer's payment calculation sheets attributed to both Celestino and Carlos Lechuga. Petitioner argues that the calculation should be based on 52 weeks. However, the evidence presented does not reflect 52 weeks of earnings. The payment calculation sheet for Applicant reflects earnings beginning the week of 10/18/14 through 10/24/14 with the final earnings period ending on 9/25/15. The sheet reflects five weeks where there were no earnings at all, those being the weeks ending 12/12/14, 1/2/15, 8/7/15, 8/14/15, and 8/21/15. The payment sheet for Carlos Lechuga reflects earnings beginning the week of 10/24/14 through 10/31/14 with the final earnings period mirroring that of Applicant ending on 9/25/15. The payment sheet for Carlos includes earnings for four of the five weeks where no earnings were recorded for Celestino Lechuga, those being the weeks ending 12/12/14, 1/2/15, 8/7/15, and 8/14/15. As such, the only pay period between 10/18/14 through 9/25/15 without any documented earnings attributable to Applicant and Carlos Lechuga was the week ending 8/21/15. Therefore, the total number of weeks with documented earnings for Celestino and Carlos Lechuga totals 46. It would not be fair to include weeks with zero earnings where no work was performed. That is why only 46 weeks was used in the calculation. It should be noted that LC section 4453(c)(3) indicates that a period of 52 weeks is the maximum to be considered, not the minimum. Obviously, if Applicant didn't work for a period of 52 weeks, it would make no sense to factor in a full year into the calculation.

Petitioner also mentioned, but did not specifically raise as a grievance, the court's declination to consider hourly and daily earnings. The Court did not consider the spreadsheet included in the employer's records reflecting hours worked as well as overtime (Applicant's 1&2) because it has been clearly established that Applicant was paid on a piecemeal basis, thus hours worked are irrelevant. The more reliable evidence for determining the average weekly wage was determined to be the payment calculation sheets which were contained in the employer's own records.

CALCULATION OF EARNINGS/CONSIDERATION OF CARLOS LECHUGA'S EARNINGS.

Although not specifically raised as an issue in the Petition other than to argue that the determination was not sufficiently explained, the Court utilized the payment calculation sheets for Applicant and Carlos Lechuga because the 2015 tax return confirmed that Applicant reported the earnings of Carlos Lechuga as his own. The tax return was considered because it tends to corroborate Applicant's testimony regarding the nature of the earnings. The payment calculation sheets also tend to corroborate Applicant's testimony since payments by the employer just happened to cease at the time of Applicant's injury. It also did not go unnoticed that the payment calculation sheet for Carlos Lechuga that was included in the subpoenaed records of the employer include a notation at top of the document of a date of injury of 9/21/15. The version of that same document submitted by Defendant had the reference to the date of injury removed. Thus it appears that there was an attempt to conceal the fact that the employer may have acknowledged that for purposes of earnings, Applicant and Carlos Lechuga were one and the same. Another factor in considering these aforementioned documents was the testimony of Rigoberto Melo who confirmed that Applicant did not work with an assistant. That testimony tends to vitiate the testimonial opinion of Benjamin Rodriguez that Carlos Lechuga worked for the company because Applicant had a helper. It is also noted that the employment application that Benjamin Rodriguez Jr. cited as a reason for his opinion that Carlos Lechuga worked for the employer, was not completed or signed. Thus, when considering all of the above factors, the Court determined that the reported earnings of Carlos Lechuga were actually the earnings of Applicant.

**IV
RECOMMENDATION**

For the foregoing reasons, the undersigned WCALJ recommends that the Petition for Reconsideration be **DENIED**.

DATE: 2/20/24

Jeffrey Morgan
WORKERS' COMPENSATION
JUDGE