

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

**ERIC BATES, *Applicant***

**vs.**

**CINCINNATI REDS, PERMISSIBLY SELF-INSURED, *Defendants***

**Adjudication Number: ADJ11861129  
Santa Ana District Office**

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

Applicant seeks reconsideration of our December 5, 2023 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O) wherein we determined, in relevant part, that applicant's average weekly earnings were \$209.69 for the purposes of determining applicable workers' compensation benefits.

Applicant contends the determination of his average weekly earnings should include consideration of both his earning capacity pursuant to Labor Code<sup>1</sup> section 4453(c)(4) and the value of his non-monetary remuneration per section 4454.

We have received an Answer from defendant. The WCJ has not prepared a Report and Recommendation on Petition for Reconsideration (Report) because the petition seeks reconsideration of a decision of the Workers' Compensation Appeals Board (WCAB).

We have considered the allegations of the Petition for Reconsideration and the Answer. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and amend our December 5, 2023 O&O to defer the issue of applicant's average weekly earnings.

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

On September 13, 2023, the WCJ issued his original decision finding in relevant part that applicant's average weekly wage was \$950.00, yielding the maximum available permanent disability rate of \$290.00 per week, and a temporary disability rate of \$633.33 per week. (Findings and Orders (F&O), September 13, 2023, Finding of Fact No. 7.)

On October 6, 2023, defendant sought reconsideration of the F&O.

On October 11, 2023, the WCJ issued his Report and Recommendation on Petition for Reconsideration (Report). Therein, the WCJ noted error in the calculation of applicant's average weekly wages, and that the correct figure for wage calculation under section 4453(c)(3) would be \$900.00 per month, rather than \$950.00 per week. (Report, at p. 10.) The WCJ recommended that we grant reconsideration of the F&O and amend the applicant's earnings to reflect \$209.69 per week.

On December 5, 2023, we issued our O&O, and in relevant part, determined that applicant's average weekly earnings were \$209.69 for the purposes of determining applicable workers' compensation benefits rates. (O&O, Finding of Fact No. 8.)

Applicant's Petition for Reconsideration (Petition) contends the calculation of his average weekly earnings should include an analysis of his earnings capacity pursuant to section 4453(c)(4), as well as the value of lodging, board, and other "advantages received by the injured employee as part of his remuneration" pursuant to section 4454.

Defendant's Answer avers that applicant's earnings are appropriately calculated pursuant to section 4453(c)(3), and do not exceed \$209.69 per week. (Answer, at p. 3:8.) Defendant further asserts that the claim is barred by the statute of limitations, and that there is no evidence that applicant was employed by the Cincinnati Reds. (Answer, at 4:15.)

We observe that the WCJ's September 13, 2023 F&O determined applicant's wages were sufficient to warrant the maximum available permanent disability rate of \$290.00 per week. (Lab. Code, § 4453(b).) Following defendant's Petition for Reconsideration, the WCJ reviewed his calculation of average weekly earnings and identified an error in the calculations warranting a lower weekly earnings rate of \$209.69. Following our grant of reconsideration, we amended the claim as per the WCJ's recommendations.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].)

“Due process requires notice and a meaningful opportunity to present evidence in regards to the issues.” (*Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acc. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Following our independent review of the record occasioned by applicant’s petition, we are persuaded that the reduction in applicant’s average weekly earnings rate was made without providing applicant the opportunity to respond to the issue. (*Fortich v. Workers’ Comp. Appeals Bd., supra*, 233 Cal.App.3d at pp. 1452-1454.)

We therefore conclude that applicant should be afforded the opportunity to offer evidence and argument responsive to the issue of his average weekly earnings, including whether the figure should reflect his earnings capacity under section 4453(c)(4), and/or alternative remuneration described in section 4454. Accordingly, we will grant applicant’s Petition and amend our O&O to defer the issue of earnings.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of our decision of December 5, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of December 5, 2023 is **AMENDED** as follows:

**FINDINGS OF FACT**

...

8. The issue of applicant's average weekly earnings is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



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

**February 27, 2024**

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

**ERIC BATES  
GLENN, STUCKEY & PARTNERS  
BOBER, PETERSON & KOBY**

**SAR/abs**

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