WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOEL BYRNE, *Applicant*

vs.

GHILOTTI BROTHERS; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ17538139; ADJ17815628; ADJ20241702
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant, in pro per, seeks reconsideration of the Findings of Fact, issued by the workers' compensation administrative law judge (WCJ) on September 22, 2025, in case number ADJ17538139[1], wherein the WCJ found in pertinent part that applicant's average weekly wages were $1,011.68 per week, warranting temporary disability indemnity at the rate of $674.45 per week.

Applicant contends that the WCJ erred in concluding that applicant was not a full-time employee for purposes of calculating applicant's average weekly earnings. Applicant further asserts that the WCJ erred by omitting earnings from the year prior to the date of injury (DOI), as well as post-injury earnings, when calculating applicant's average weekly earnings. Additionally, applicant argues that defendant acted in bad faith and requests that defendant be ordered to pay any outstanding temporary disability indemnity.

We have not received an answer from defendant.

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

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[1] Applicant's petition for reconsideration was filed in case number ADJ17815628, despite seeking reconsideration of the Findings of Fact that issued in case number ADJ17538139 on September 22, 2025. As defendant is a party to both cases and was served with the Petition, it received notice of the Petition. Thus, pursuant to our authority to amend pleadings to conform to proof, we will treat the Petition as seeking Reconsideration in case number ADJ17538139. (Cal. Code Regs., tit. 8, § 10517.)

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 applicant's Petition, rescind the Findings of Fact issued by the WCJ on September 22, 2025, in case number ADJ17538139, and we will return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

We will briefly review the relevant facts and complicated procedural history of three separate cases: ADJ17815628, ADJ17538139, and ADJ20241702.

On April 7, 2023, applicant, through his former attorney, filed an Application for Adjudication of Claim (Application) claiming that he sustained industrial injury on January 31,2023 to his left elbow, arm, shoulder, and neck, while employed by defendant as a concrete finisher (ADJ17538139).

On June 13, 2023, applicant, through separate former legal counsel, filed an Application in which he claimed to have sustained injury on March 3, 2023 to his back, shoulders, neck, and upper extremities while employed by defendant as a cement mason (ADJ17815628).

On December 13, 2024, applicant, through a non attorney representative, filed an Application claiming he sustained industrial injury to his left bicep, back and neck while employed by defendant as a journeyman cement mason during the period January 31, 2023 through March 3, 2023 (ADJ20241702).

On June 10, 2025, trial went forward before WCJ Hengel in case number ADJ17815628, on the sole issue of injury arising out of and in the course of employment (AOE/COE) while employed by defendant on March 3, 2023.

On July 11, 2025, WCJ Hengel found that on March 3, 2023, applicant sustained injury AOE/COE with defendant to the back and neck, but not the left shoulder and left arm, in case number ADJ17815628. (Findings and Award issued July 11, 2025, in case number ADJ17815628, p. 1.)

Turning to the matter before us for which applicant seeks reconsideration, in case number ADJ17538139, applicant claimed injury to his arm, shoulders, and neck while employed by defendant as a journeyman cement mason on January 31, 2023.

On July 7, 2025, case ADJ17538139 went to trial. Per the Minutes of Hearing and Summary of Evidence, injury AOE/COE to applicant's left arm is admitted, and the matter proceeded to trial on the sole issue of the appropriate rate of temporary disability benefits. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 7, 2025 trial, p. 2.)

The parties offered evidence in the form of correspondence and a wage statement showing earnings from October 2022 through January 2023, as well as check activity, an Employment Development Department (EDD) notice of lien claim, and an indemnity payment history.

Applicant appeared in pro per and testified at trial. No other witnesses testified. The MOH/SOE note a summary of applicant's testimony as follows:

> Joel Byrne was injured while working on Highway 12 overnight. He felt a pop in his arm while working and eventually determined that he had popped the tendon connecting his biceps on his left arm.
>
> He reported the injury right away. He was terminated approximately 31 days later.
>
> His rate of pay was $42.85 per hour. He was hired to work 40 hours per week from 7:30 to 3:30.
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> He claimed to have only worked for 12 weeks. However, his average weekly earnings were calculated based on 16 weeks.
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> He was hired approximately August 3, 2022.
>
> He called the scheduler every day to get his work assignment for the next day, which included the job site that he would be working at.
>
> He testified that he was hired to be a full-time employee.
>
> However, there were certain days when he called in for work where no work was available. After the injury, his hours were cut.
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> He agreed that EDD paid him at the rate of $446 per week and that Zurich paid him at the rate of $674 per week.

(MOH/SOE, July 7, 2025 trial, at pp. 3-4.)

On September 22, 2025, the WCJ issued the following Findings of Fact:

> 1. Applicant Joel Byrne, born [], sustained injury to his left arm while employed as a journeyman cement mason by Ghilotti Brothers, Inc., on January 31, 2023.

2. At the time of injury, the employer was insured by Zurich American Insurance Company.

3. The applicant's Average Weekly Wages were $1,011.68 per week warranting temporary disability Indemnity at the rate of $674.45 per week.

(September 22, 2025 Findings of Fact, at p. 1.)

It is from these Findings that applicant seeks reconsideration.

DISCUSSION

I.

Former Labor Code section[2] 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, 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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under 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, case number ADJ17538139 was transmitted to the Appeals Board on October 27, 2025, and 60 days from the date of transmission is December 26, 2025. This decision is issued by or on December 26, 2025, so that we have timely acted on the Petition as required by section 5909(a).

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

[2] All statutory references are to the Labor Code unless otherwise stated.

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. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on October 27, 2025, and case number ADJ17538139 was transmitted to the Appeals Board on October 27, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 27, 2025.

II.

Section 4453, subdivision (c), governs the calculation of average weekly earnings for the purposes of calculating temporary disability indemnity. Specifically section 4453(c) provides:

> (c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows:
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> (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.
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> (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.
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> (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 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.
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> (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, § 4453(c).)

In *Argonaut Ins. Co. v. Industrial Acc. Comm.* (*Montana*) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130], the California Supreme Court held,

> When an employee is steadily employed at a full-time job his earning capacity is determined by an appropriate formula [Citation]. When the employment is for less than 30 hours a week or when a formula "cannot reasonably and fairly be applied" the commission must make its own estimate of weekly earning capacity at the time of the injury. [Citation.] The purpose of this provision is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of injury may be aberrant or otherwise a distorted basis for estimating true earning power. It would hardly be consistent with that purpose to foreclose a worker from a maximum temporary or permanent award simply because a brief recession had forced him to work sporadically or at a low wage. Nor in making a permanent disability award would it be consistent with the purpose of the statute to base a finding of maximum earning capacity solely on a high wage, ignoring irregular employment and low income over a long period of time. An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured.

(*Id.* at p. 594.)

With respect to earning capacity, the California Supreme Court went on to explain:

> Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse. Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability, the commission will ordinarily be concerned with whether an applicant would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. With regard to both awards all facts relevant and helpful to making the estimate must be considered. [Citations.] The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons

> similarly situated are all relevant. [Citations.] In weighing such facts, the commission may make use of "'its general knowledge as a basis of reasonable forecast.'" [Citations.] In weighing the evidence relevant to earning capacity the commission has the same range of discretion that it has in apportioning injuries between industrial and nonindustrial causes. [Citation.] It must, however, "have evidence that will at least demonstrate the reasonableness of the determination made." [Citation.]

(*Montana, supra*, at pp. 594-595.)

In *Goytia v. Workmen's Comp. Appeal Bd.* (1970) 1 Cal.3d 889 [35 Cal.Comp.Cases 27], the California Supreme Court held that,

> Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut "capacity" to the procrustean bed of the earnings at the date of injury.

(*Id.* at p. 894.)

A WCJ's decision must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

Applicant testified that he was hired to be a full-time employee, that he was hired to work 40 hours per week from 7:30 to 3:30. (MOH/SOE, at p. 3.) However, applicant also testified that there were certain days when he called in for work where no work was available. (*Id*.) Applicant contends that he was "dispatched by the union not a temp agency and there are no documents supporting their claim that I was part-time or on call." Applicant is correct that there are no documents admitted into the evidence which conclusively show that he was part-time. However, there are also no documents admitted into the evidence which conclusively show that applicant was full-time.

Applicant further asserts in his petition that he "only worked 12 weeks for [defendant]" and "I was injured on 1/31/25 and I thought it was based on earnings from the year prior to the DOI and they went from DOH ahead a year and they stopped at 1/28/25 3 days before DOI and just FYI I was employed before I started working for them." (Petition, p.2.)

"Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings." (Cal. Code Regs., tit. 8, § 10803.)

A wage statement worksheet (Exhibit 4 and Exhibit B) and check activity (Exhibit C) show a broad range of hours worked in different timeframes, including several weeks with zero hours worked. There is a Notice of Lien Claim stating that applicant began receiving State Disability Insurance benefits (also known as Unemployment Compensation Disability (UCO) benefits) on March 13, 2023, for a January 31, 2023, date of injury (Exhibit D), however there is no evidence in the record regarding unemployment benefits, or earnings from any other employment before applicant started working for defendant.

In the Report, the WCJ stated that applicant's average weekly earnings were calculated by reference to Exhibit B, a wage statement detailing all of applicant's earnings with the employer. Applicant contends that the WCJ erred by omitting earnings from the year prior to the date of injury (DOI), as well as post-injury earnings, when calculating applicant's average weekly earnings. However, as previously stated, there is no evidence in the record regarding other wages, employment for other employers, or union referrals to other employers. To the extent that applicant requests that other earnings be considered, he must provide some form of evidence.

There is evidence of post-injury earnings through March 4, 2023 (Exhibit C, pp. 7-9), which it does not appear that the WCJ considered. We also note that the fact that applicant called in each day to find out whether and where he would be working is not itself evidence that he was less than a full-time employee.

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal.App.4th 928, 937-938 [64 Cal.Comp.Cases 986].)

In light of the scant evidentiary record, combined with the errors in the Opinion on Decision (see Report, p. 2, fn. 2.), we return this matter to the trial level to develop the record on all the factors that would be relevant in determining applicant's earning capacity. (Lab. Code, §§ 5701,

5906; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ["principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

To the extent that applicant seeks penalties or alleges bad faith on defendant's part, these were not issues at trial and the WCJ made no findings on these issues. Therefore, these are not ripe for reconsideration.

Accordingly, we grant applicant's Petition, rescind the Findings issued in case number ADJ17538139 on September 22, 2025, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED** in case number ADJ17538139.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings issued by the WCJ on September 22, 2025, in case number ADJ17538139, are **RESCINDED** and this matter is **RETURNED** for further proceedings as consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 26, 2025

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

JOEL BYRNE (pro per)
PACIFIC WORKERS COMP
LAW OFFICES OF DOUGLAS G. MACKAY

JB/*pm*

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