WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ASA CLEVELAND, *Applicant*

vs.

HILTON HOTEL EMPLOYER, LLC/BEVERLY HILTON HOTEL; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ20892439, ADJ20892454
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of Findings of Fact and Orders (F&O) issued on November 13, 2025. The workers' compensation administrative law judge (WCJ) found that applicant's average weekly wage is $1410.00 per week based on Labor Code sections 4453(c)(1) and 4453(c)(2).[1]

Defendant argues that the WCJ erred by relying on the testimony of the applicant without documentary evidence and that by not allowing defendant to question applicant about his tax records the WCJ denied defendant due process.

Applicant did not file a response. The WCJ issued a Report and Recommendation (Report) recommending denial of the Petition.

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, for the reasons discussed below, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

DISCUSSION

I

Former 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, 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 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 December 11, 2025 and 60 days from the date of transmission is February 9, 2026. This decision is issued by or on February 9, 2026, 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 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 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 December 11, 2025, and the case was transmitted to the Appeals Board on December 11, 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 December 11, 2025.

II

We agree with the reasoning set forth in the WCJ's Report, and we also note the following additional points.

Petitioner asserts that they were denied due process when the WCJ did not allow questioning regarding applicant's compliance with Internal Revenue Service (IRS) regulations for reporting income from tips. Petitioner's argument that applicant waived his right to privacy related to the tax records when he answered questions in the deposition is without merit. Applicant answered general questions in his deposition and answered the same questions at trial regarding reporting to the employer. Applicant is not obligated to turn over tax records (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718-723 (*Schnabel*); *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd*. (*Rhooms*) (1996) 42Cal.App.4th 1260, 1289 [61 Cal. Comp. Cases 149, 170] (*Rhooms*)). Applicant did not waive privilege to the records in the deposition. Defendant did not seek to subpoena, demand, or compel those records prior to trial either. Thus, it was appropriate and within judicial discretion to bar such questioning.

It is not specified in the Petition or the record what Petitioner was seeking to accomplish through questioning on applicant's specific compliance with tax regulation. We note that applicant testified that he did not receive tips while training which spanned the period from his date of hire through the end of 2024 (Minutes of Hearing/Summary of Evidence (MOH/SOE), 3:32). Thus, there would have been no tax filing or W-2 that would reflect reporting of tips in 2024. In 2025, the applicant already testified, both in deposition and at trial, that he did not report his tips to the employer and that they did not require him to. Thus, any purported reporting violation that defendant seeks to establish has already been discussed in prior testimony. Further, at the time of trial and perhaps even at the time of this opinion, he was unlikely to have a W-2 available or have filed taxes for 2025. Thus, there is no additional information that could be obtained regarding taxes for 2025.

Petitioner also cites to *Acosta v. Floyd's 99 Barbershop* 2011 Cal. Wrk. Comp. P.D. LEXIS 458 as standing for the proposition that a W-2 form is the only evidence that one may provide to support tip income. We note at the outset that panel decisions are not binding precedent on other

Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) Moreover, we agree with the WCJ that this case is not persuasive in this case. WCJ aptly notes that the WCJ in *Acosta* simply did not find applicant credible and therefore relied only on the available W-2. In short, the W-2 was available and did rebut applicant's deposition testimony. Likely, because applicant in *Acosta* did not testify at trial, the WCJ could not have assessed her credibility. Here, as noted, a W-2 for 2025 would not have been available at the time of trial *and* applicant testified credibly at trial.

Petitioner fails to acknowledge that unrebutted credible testimony can be substantial evidence to support a finding of fact. The board must accept as true a witness' testimony if it is both uncontradicted and unimpeached. (*McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660], *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal. 3d 627, 639 [35 Cal.Comp.Cases 16], *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Western Electric Co. v. Workers' Comp. Appeals Bd.* (*Smith*) (1979) 99 Cal. App. 3d 629, 642 [44 Cal.Comp.Cases 1145]; *Amico v. Workers' Comp. Appeals Bd.* (1974) 43 Cal. App. 3d 592 [39 Cal.Comp.Cases 845]) The fact that testimony is self-serving does not render it inadmissible. (*Gillette v. Workers' Comp. Appeals Bd.* (1971) 20 Cal. App. 3d 312, 321 [36 Cal. Comp. Cases 570]). But the board may also choose to disbelieve relevant uncontradicted and unimpeached evidence if it has grounds other than mere speculation and conjecture. (*Lamb*, *supra* 11 Cal.3d 274, 283, citing *Garza v. Workmen's Comp. App. Bd.,* (1970) 3 Cal.3d 312, 319).

Petitioner did not provide any evidence to rebut applicant's testimony regarding the rate of tips and the frequency of guest interaction which the WCJ uses to estimate tip income. Petitioner did call employer witness but did not inquire about the average tips for bellmen, number of guests during applicant's shifts, on/off seasons, busy versus slow hours, or any other information that would rebut applicant's testimony. With respect to witness testimony, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand...." (*Garza*, *supra*, 3 Cal.3d at pp. 318-319.) Only evidence of considerable substantiality

would warrant rejecting the WCJ's credibility determinations. (*Id.*) Without evidence rebutting applicant's testimony, we accept the WCJ's determination here.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 9, 2026

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

ASA CLEVELAND
LEVIN NALBANDYAN
HANNA BROBHY

TF/md

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The Applicant is a 33-year-old Bellman for the Defendant, Hilton Hotel Beverly Hills. The Petitioner is the Defendant who has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred in finding that Applicant's average weekly wage was $1.410.00 per week entitling him to temporary disability at the rate of $940.00 per week.

The undersigned will recommend that the Petition be denied.

II STATEMENT OF FACTS

The Applicant worked as a bellman at the Hilton Hotel in Beverly Hills commencing in December 2004. He was injured on 3/15/2025. The injury is admitted, and he has been on temporary disability from that date to the present and continuing.

He works full time. He works five days per week and eight hours per day with varying shifts. He is a permanent employee. His work involves primarily assisting guests to and from their accommodation, which includes luggage and presentation to all the amenities one expects from such a hotel. He spends a small amount of time looking after the lobby.

He was hired in December 2024 and was trained in this position. His entry salary was $16.00 per hour. But he testifies (and Ex. C confirms) that his hourly rate on the date of injury was $16.50 per hour.[1]

Obviously as a bellman tips are an important source of income. He estimates that he would work for anywhere from 20 to 25 guest parties per day. He estimates tips from each guest party vary from $5 to $10. Incidental tips from intermittent services such as flowers, package delivery and the like are signed out by each employee on a log. Those tips are calculated by the HR people and are included in his wages ($28 in Ex. C).

He chooses not to report his tips to the hotel, which is apparently optional. Why it is optional was unknown to the employer witness. He does not keep track of his tips.

The employer told Applicant that this job is a "tip-based position." (Min/Hrg, p. 3:24).

Questions regarding his reporting tips to the IRS were not allowed.

The Applicant testified. There was brief testimony from the employer's representative. It was pointed out that there was a pool for small tips for personal services performed during the day such as delivering flowers to a room and the like. But those tips were pooled and reported to the employer so that they would show up on his W-2 (Ex.C).

[1] Ex. B reflects earnings when he was only training. Hence the exhibit does not reasonably reflect the average weekly wage once Applicant began working in his regular job which includes tips.

The undersigned issued a Findings of Fact on 11/13/2025. For tips the undersigned found that the Applicant could assist as many as 20 guests per day to and from their accommodations. The undersigned noted that an estimate of more than 20 guests per day was not credible. The Applicant estimated his tips to be between $5 and $10 per guest.

Therefore, tips were estimated at 20 per day times $7.50 per tip or $150.00 per day or $750 per week. His base salary is $16.50 per hour times 40 hours per week or $132.00 per day or $660.00 per week. Combining the base salary ($660) with tips ($750) it was determined that the average weekly wage was $1,410 per week warranting a rate of $910.00 per week for temporary disability.

Defendant files a Petition for Reconsideration claiming:

(1) Applicant's testimony regarding tips was not credible.

(2) Failure to account for tips using a tip log was a violation of Federal Law, and hence his testimony cannot be utilized to support the claim of average weekly wages under the Labor Code.

(3) The case of *Acosta v. Floyd's 99 Barbershop* 2011 Cal. Wrk. Comp. P.E. LEXIS 458 should bar a claim for earnings unless documentary evidence can be presented to support the employee's otherwise unreliable testimony.

III DISCUSSION

Cal. Lab Code sec. 4454 allows the use of "overtime and the market value of board, lodging, fuel, and other advantages received by the injured employee as part of his remuneration, which can be estimated in money…" as the basis for determining average weekly wage.

It is well established that tips are included under sec. 4454. *Hartford Accident and Indemnity Co. v. IAC* (1919) 41 Cal. App. 543.

Cal Lab. Code sec. 4453(c)(1) calculates average weekly wage for full-time permanent employees working five days per week or more and for more than 30 hours during the week. In order to obtain the average weekly wage under subsection (c)(1) one takes the number of days worked per week times the daily wage.

Cal. Lab. Code sec. 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."

This Applicant's earnings come under both subsection (c)(1) and (c)(3).

As stated above, the Applicant's average weekly wage under subsection (c)(1) is $660 per week.

The only issue under this Petition is how to calculate tip earnings under subsection (c)(3).

The undersigned found the testimony to be credible. Applicant states that 100% of the guests do tip for the bellman's services to and from their rooms. It seemed perfectly credible that tips at a fashionable hotel would be between $5 and $10 per guest. It was assumed by the undersigned that there is approximately 6 ½ to 7 working hours in an eight-hour day. If the employee serviced 20 guests per day, then that would be approximately 20 minutes per guest. This seemed quite reasonable to load and unload luggage, transport the guests, help with bags and acquaint the guest with the amenities that the hotel offers.

This all by way of saying that this scenario set forth by the Applicant's testimony seems reasonable to the undersigned.

The testimony regarding income taxes must come strictly from memory. But the undersigned recalls that the questioning centered on how he kept track of tips for purposes of the IRS.

The undersigned did not allow questioning which focused on his personal tax liabilities. The Applicant specifically indicated that he did not keep a tip log, and more importantly, the employer did not require it either.

The Petition suggests that the tax log is legally required in order to determine tax liability. Whether or not this is true is beyond the jurisdiction of the Appeals Board. But the Appeals Board needs to determine what tips he received, not what tax liability he may have incurred.

The most important point raised by Petitioner is the case of *Acosta (supra).* Indeed, in *Acosta* the WCJ did not find the employee's testimony to be credible. Hence the WCJ in *Acosta* did not include tips in the average weekly wage. This is a very significant difference from this case. In *Acosta* the WCJ did not consider tips at all! The unreliable employee was unable to produce any other evidence. Hence the average weekly wage was based upon the employee's W-2 reported wages only.

The Petitioner urges that the situation herein is the same, and hence Applicant's average weekly wage should be based solely upon his W-2 earnings.

The employee in *Acosta* was a hair stylist. Her testimony (in deposition only) was not credible according to the WCJ. No detail was given. Hence it is unknown why the WCJ did not believe that a hair stylist would receive as much as $500 per week in tips.

One can speculate it had something to do with the actual number of customers, but again, it is mere speculation. The fact remains that the WCJ in *Acosta* simply did not believe the Applicant. And in this case, the undersigned found Applicant's sworn testimony to be credible.

Hence the significant difference between this case and *Acosta* is that in *Acosta* non-credible testimony coupled with a lack of corroborating evidence led to a finding of "no tips." In this case the Applicant is credible, and hence a finding of fact can be determined based on sworn testimony alone.

The sworn testimony of the Applicant is sufficient to support the finding of fact herein. If the Applicant's testimony is found to be credible then it should be the basis of a finding of fact unless rebutted by substantial evidence. *Lamb v. WCAB* (1974) 11 Cal. 3d 274, 39 CCC 310.

The Applicant did not testify in *Acosta.* The Applicant did testify in this case to afford the WCJ to determine credibility.

The employer has stated to the employee that his job is a "tip-based employment." Hence to calculate average weekly wage without tips is not only inconsistent with the facts, but equally inconsistent with the law cited above.

To put it simply, the question of fact herein is not to determine *if* Applicant received tips. The question of fact is to determine how much he received under Cal. Lab. Code sec. 4453.

There was no testimony or evidence to rebut the Applicant's characterization of tips that he received. Hence it is accepted as $1,410 per week.

The Petitioner did note one item that was of some interest. In the Pre-Trial Conference Statement it is note that Applicant's "claim" for earnings was only $1,239 per week. The Pre-Trial Conference Statement is not evidence. And in fact, the PTCS is amended at the time of trial (see Minutes of Hearing, 10/30/2025, p.2:14). Since Applicant's claim of earnings were not accepted by Defendant, then the ultimate Findings of Fact must be determined solely by the evidence presented at trial. Hence this observation is not relevant.

Based upon the sworn testimony from the employee that was unrebutted in any fashion, the finding of an average weekly wage of $1,410 per week is based upon substantial evidence.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based upon the evidence and law cited above, it is respectfully recommended that the Petition for Reconsideration herein be DENIED.

DATE:12/11/2025

Dean Stringfellow
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE