

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

ELLEN JACOBOWITZ, *Applicant*

vs.

**PROCARE PHARMACY, LLC; doing business as
CVS SPECIALITY PHARMACY, INC.;
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA;
administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ19532643
Marina del Rey District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the First Amended Findings and Award (F&A) issued on January 28, 2026, by the workers' compensation administrative law judge (WCJ). By the F&A, as relevant here, the WCJ found that applicant was entitled to temporary disability benefits, from September 7, 2024, which is after applicant's retirement date, to the present and continuing, subject to Labor Code section 4656(c)(2), at a weekly rate of \$1,619.15.

Defendant contends that the WCJ erred by awarding temporary disability benefits beyond applicant's retirement date because applicant intended to retire from the labor force, and in the alternative, applicant's post-retirement earnings capacity was not properly calculated.

We received an Answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report as quoted below, and for the reasons discussed below, we will deny reconsideration.

FACTUAL BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to the bilateral knees and right shoulder arising out of and occurring in the course of employment with defendant as a specialty pharmacist on January 4, 2024. Consistent with email notice that applicant provided to her manager on December 19, 2023 (Def. Exh. E, Notice of Retirement by Applicant, p. 1), on January 12, 2024, applicant retired from defendant, CVS Specialty Pharmacy, INC. (CVS).

Defendant paid applicant temporary disability benefits at the weekly rate of \$1,619.15 for the period January 8, 2024 through January 9, 2024 and for the period July 25, 2024 through September 6, 2024. (F&A, p. 2, Finding 2.)

In connection with applicant's claim, she was deposed on September 6, 2024. (Def. Exh. C, Deposition Transcript of Applicant.) Applicant's deposition testimony included the following line of questioning:

Q And are you still working at CVS?

A No.

Q When is the last day that you actually went to work at CVS?

A January 12th, 2024.

Q Do you intend to return to work at CVS?

A No.

Q Why not?

A I retired.

Q When did you decide to retire?

A End of December.

Q And when you decided to retire at the end of December, were you intending to completely retire from the labor force?

A Yes.

(Def. Exh. C, Applicant's Deposition, p. 12, lines 11-25.)

* * *

Q And do you remember why you decided to retire in December of last year?

A The length of the workday, and I had been at that location, the new location; so I had been there about seven, eight years, and I had wanted to be able to do a little traveling and to visit the grandchildren.

(Def. Exh. C, Applicant's Deposition, p. 13, lines 11-16.)

By a letter dated September 12, 2024, defendant informed applicant that temporary disability benefits were ending because of her retirement status as of January 12, 2024. (Joint Exh. AA, Notice Regarding Termination of Temporary Disability by Sedgwick, p. 1, ¶ 2).

On November 11, 2024, applicant filed a declaration of readiness (DOR) in connection with her temporary disability benefits ending.

The parties proceeded to trial on July 28, 2025, at which time evidence was submitted. Applicant testified on her own behalf and no other witnesses were called. (Amended Expedited Minutes of Hearing and Summary of Evidence (MOH/SOE).)

The WCJ's Report summarized the following additional facts:

... The first issue presented was whether or not the Applicant was entitled to TD [temporary disability] benefits after retiring from CVS Pharmacy, which in turn rests upon whether she intended to retire from the labor market in its entirety, or whether she intended to retire only from this employer and to seek other employment in the future. The second issue raised was whether Applicant's rate of pay for TD, should the WCJ award TD benefits, is subject to Labor Code Section 4453(c)(4). Her rate of pay at the time of injury was \$3,550.15, with a TD rate of \$1,619.15. All TD benefits to date have been paid at this rate. Petitioner argues that since she had no showing of post-retirement earnings, then even assuming it were to be determined that she is entitled to TD benefits, the rate would be "zero".

An F&A and Opinion on Decision issued on 10/22/2025, finding in favor of the Applicant on both counts. Both parties filed Petitions for Removal to address clerical inaccuracies, and the WCJ issued an Order Vacating the Findings & Award on 11/25/2026. Petitioner had also filed a Petition for Reconsideration simultaneously with the Petition for Removal. A second trial was held on 1/7/2026, on the identical Stipulations and Issues, and Exhibits presented at the first trial, with no additional testimony. The clerical errors were rectified, and the case was again submitted on 1/7/2026. The First Amended F&A issued on 1/28/2026.

* * *

By way of background, the trial addressed the issue of whether the Applicant is entitled to Temporary Disability (TD) benefits after her retirement date of 1/12/2024. Her industrial injury occurred on 1/4/2024. Defendant paid TD from 1/8/2024 to 1/9/2024 (Ex. AA). Thereafter, Applicant continued to receive medical treatment past her retirement date. Based upon the Primary Treating Physician (PTP), Dr. Dini's report of 7/25/2024, which indicated that she was TD, (Ex. 3), Petitioner again picked up TD benefits as of that date and continued paying until 9/12/2024, (Ex. AA). Temporary Disability benefits were terminated based upon Applicant's deposition testimony of 9/6/2024, (Ex. AA).

(Report, p. 2, ¶¶ 2-3, p. 3, ¶ 1.)

Thereafter, defendant sought reconsideration of the First Amended Findings and Award.

DISCUSSION

I.

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 March 18, 2026 and 60 days from the date of transmission is Sunday, May 17, 2026. The next business day

that is 60 days from the date of transmission is Monday, May 18, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, May 18, 2026, so that 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 March 18, 2026, and the case was transmitted to the Appeals Board on March 18, 2026. 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 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 March 18, 2026.

II.

The Workers' Compensation Act provides for temporary and permanent disability indemnity. (Lab. Code, § 4650 et seq.) Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Unlike permanent disability, which compensates an injured employee for diminished future earning capacity or decreased ability to compete in the open labor market, temporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753; see also *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044].)

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.

In *Gonzales v. Workers' Compensation Appeals Bd.* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477], the court set out the framework in analyzing whether a worker is entitled to temporary disability after retirement. Earning capacity is the touchstone in determining the amount of temporary disability benefits. (*Id.* at p. 846.) The elements of earning capacity include the ability to work, willingness to work, and opportunity to work. (*Id.* at p. 847.) The court in *Gonzales* elaborated as follows:

That a worker retires after sustaining a job-related injury should not cause any radical departure from these general principles. Our touchstone is still earning capacity.

In our view, the decision to retire implicates the element of “willingness to work” in the earning capacity calculus, and the primary factual component of the analysis must be whether the worker is retiring for all purposes, or only from the particular employment. (See *Van Voorhis v. Workmen's Comp. Appeals Bd.* (1974) 37 Cal. App. 3d 81, 90 [112 Cal. Rptr. 208] [“matter of common knowledge” people often work at other jobs after retirement].) If the former, then the worker cannot be said to be willing to work, and earnings capacity would be zero. If the latter, then it would be necessary to determine an earning capacity from all the evidence available. A subsidiary question is whether the decision to retire is a function of the job-related injury. If the injury causes the worker to retire for all purposes or interferes with plans to continue working elsewhere, then the worker cannot be said to be unwilling to work and would have an earning capacity diminished by the injury. Thus, the worker may establish by preponderance of the evidence an intent to pursue other work interrupted by the job-related injury. (§ 3202.5, 5705; cf. *West v. Industrial Acc. Com.*, *supra*, 79 Cal. App. 2d at p. 726 [burden on worker to explain reason for periods of unemployment].)

(*Id.* at pp. 847- 848.)

As discussed below, based upon our review of the record and the WCJ’s analysis of the merits of defendant’s arguments in the Report, we find no basis to disturb the WCJ’s findings.

Defendant argues that based on *Gonzales*, applicant’s temporary disability benefits should be zero because she “unequivocally retired for all purposes from the labor force, because her work-related injury did not cause her to retire, and because there is no evidence of wage loss after applicant’s retirement on January 12, 2024.” (Petition, p. 4, line 9-p. 6, line 20.) As explained by the WCJ in the Report:

Petitioner’s decision to terminate TD [temporary disability] benefits on 9/12/2024, was based upon the Applicant’s deposition testimony on 9/6/2024. At that deposition, Petitioner asked, “And when you decided to retire at the end of December, were you intending to completely retire from the labor force?”.

Applicant answered, “Yes”. Other than confirming that this was Applicant’s intent as of December of the previous year, when she gave notice of her retirement (Ex. C, page 12, lines 22-25), there were no follow-up questions on this issue.

At trial, when the Applicant was presented with this deposition testimony, she explained that she may have misspoken at the deposition, and that it was more a desire to retire just from CVS, (MOH/SOE page 6, lines 12-14). She stated that she is planning to renew her pharmaceutical license, and that as of the date of trial, she was taking the necessary classes towards that end, (MOH/SOE page 5, lines 9-12). She further testified that a job in the pharmaceutical field was offered to her sometime in April or May of 2024, but due to her shoulder injury, she did not accept it, and that she does not [at this time] feel comfortable returning to the work force, (MOH/SOE page 5, lines 17-25). She is currently looking online for work opportunities, and testified that when she retired from CVS, she told management that she was intending to retire from that company only, (MOH/SOE page 6, lines 1-5). No witnesses from management at CVS provided testimony contradicting the last statement.

Regarding her financial status post-retirement, she testified that she is receiving some disbursements from her 401(k) fund, and that she has not applied for Social Security, (MOH/SOE page 8, lines 7-11).

The WCJ found that this testimony showed a “willingness to work”, (*Gonzales v. WCAB (1998) 63 CCC 1477, 1479*). Petitioner argues in its Petition for Reconsideration that there is no evidence that the Applicant worked or attempted to work during the period from 1/13/2024 through 7/25/2024, the date Dr. Dini found her to be TD. However, the Applicant testified that within that period of time her pain level was increasing, that she was offered a job with a pharmacist/friend of hers and that she declined because she felt she could not handle the job at that time due to her shoulder injury, (MOH/SOE page 5, lines 17-21). It should be noted that Petitioner offered no evidence to the contrary.

(Report, p. 3, ¶ 3-p. 4, ¶ 2.)

Further, we recognize an important distinction between the facts in *Gonzales* and those in the instant case. In *Gonzales*, the injured worker stipulated that she did not intend to look for work elsewhere upon retirement from her current employment. (*Gonzales*, supra, at p. 850.) Here, applicant made no such stipulation, and, on the contrary, provided trial testimony that she planned to retire from CVS only, not the entire work force in general. (Amended Expedited MOH/SOE, p. 5, lines 8-10, p. 6, lines 4-5, 12-14, p. 8, lines 15-17.) Applicant also testified that she held off on going back to work due to her injury and the pain she experienced, but she planned to return to the pharmaceutical field after treatment. (Amended Expedited MOH/SOE, p. 5, lines 12-15, 25, p. 6, line 1.) Thus, though applicant’s retirement was unrelated to the work-related injury, she is not

precluded from temporary disability benefits because her trial testimony demonstrated a willingness and intention to return to work in the pharmaceutical industry after she completes treatment for her work-related shoulder injury, which includes surgery. Despite defendant's contentions, defendant presented no witnesses, such as applicant's former manager or co-workers, nor other documentary evidence to rebut applicant's testimony. As a result, defendant did not offer clear and convincing rebuttal evidence as to applicant's intentions about her future work plans that would warrant reversing the WCJ's findings.

The WCJ found applicant's trial testimony credible. (Report, p. 3, Section Heading A, p. 4, ¶ 5.) We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Defendant's arguments regarding applicant's credibility are not persuasive. Moreover, following our independent review of the record, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations (*Garza, supra.*)

Specifically, defendant asserts that the WCJ's factual background summary and analysis regarding whether applicant intended to retire from the labor market omits evidence that would "tip the scale in favor" of finding applicant intended to completely retire from the labor force. (Petition, p. 7, lines 3-6.) We disagree because the evidence cited by defendant does not unequivocally contradict applicant's testimony nor unequivocally demonstrate that applicant intended to retire from the entire workforce. (Petition, p. 7, lines 7-21.)

Defendant also argues that the WCJ's credibility finding is not based on substantial evidence because "the totality of the evidence" contradicts applicant's claim that she intended to retire only from CVS and did not intend to completely retire from the work. (Petition, July 9, 2025, p. 7, lines 5-7.) We disagree with defendant's characterization of the evidence. As the WCJ observed, the trial testimony was "more nuanced" than the deposition testimony and where applicant "readily admitted that she may have misspoke" at the deposition. (Report, p. 4, ¶ 4.) A review of applicant's deposition testimony reflects she acknowledged she no longer worked *for CVS*, and she did not intend to return to work *at CVS* because she retired. (Def. Exh. C, Applicant's Deposition, p. 12, lines 11-19.) Such statements are not necessarily inconsistent with her trial testimony that when she retired from CVS, she only intended to retire from CVS, not to retire from the workforce completely. (Amended Expedited MOH/SOE, p. 5, lines 8-9.) Also at the July 28,

2025 trial, applicant acknowledged the accuracy of her deposition testimony, that *at the time she decided to retire in December 2023* she wanted to travel and spend more time with her grandchildren (Amended Expedited MOH/SOE, p. 6, lines 17-20), but she indicated that traveling did not currently preclude her ability to work. (Amended Expedited MOH/SOE, p. 8, line 18.) Further, as emphasized above, defendant provided no evidence in rebuttal of applicant's trial testimony.

Additionally, defendant claims that applicant's "formal Notice of Retirement emailed to her employer more than two weeks before her injury does not support her claim that she told management she intended to retire from that company only." (Petition, July 9, 2025, p. 8, lines 8-10) Defendant's characterization is in direct contradiction to that documentary evidence, which states, "Please accept this note as formal notice of my retirement *from CVS Specialty 2801*. My last day will be January 12, 2024." (Def. Exh. E, p. 1, emphasis added.) Applicant's notice of retirement clearly states she is retiring from CVS Specialty 2801, and nowhere in her statement does she state she is retiring from the workforce.

In sum, we conclude that there are no obvious and impeachable inconsistencies to disturb the WCJ's assessment of credibility.

III.

Defendant also takes issue with the WCJ's calculation of applicant's temporary disability rate. However, as explained by the WCJ:

Petitioner takes the position that Applicant's TD rate should be based upon her earnings post-retirement, which would be "zero" as she has not been gainfully employed since 1/12/2024, her date of retirement. Labor Code Section 4453(c)(4) applies when an employee works less than 30 hours per week or when the methods for calculating average weekly wages found in Sections 4453(c)(1), (c)(2), or (c)(3) are inapplicable or do not result in a just outcome. Where the customary method of determining average weekly wages, i.e., relying on the total amount the Applicant earned in the year prior to the date of injury, is inadequate to calculate average weekly earnings, Labor Code Section 4453(c)(4) is invoked in order to assess an injured worker's earning capacity. The purpose of Labor Code Section 4453(c)(4) is to provide parity for employees who have experienced irregularities in their employment history which does not allow for the simple calculation of determining average weekly wage.

Petitioner argues that since the Applicant was not working from 1/13/2024 to 7/25/2024, any TD rate she may be entitled to would be zero. This analysis ignores the fact that Applicant testified that during this period she was worsening and in

fact turned down a job offer due to her injury. Furthermore, at the time she retired on 1/12/2024, she continued to receive treatment at Kaiser Occupational Medicine, until she transferred to an MPN doctor, Dr. Dini. She continued treatment with Dr. Dini, who initially indicated she could work in a modified capacity, and subsequently determined that she was totally temporarily disabled on 7/20/2024. Petitioner paid TD from 7/25/2024 to 9/6/2024, at the rate of \$1,619.15, when they terminated TD payment for the reasons stated above. Petitioner paid TD payments until it determined that Applicant had no willingness to continue working, a factor which has been discredited after trial. Even assuming that Labor Code Section 4453(c)(4) applies here, there would need to be consideration of all these factors in order to determine her earning capacity.

The case cited by Petitioner, *Godinez v. City of Los Angeles*, (2021) Cal. Wrk. Comp. P.D. Lexis 28, is distinguishable as the Applicant in that case filed his claim 4 years post-employment and had other employment after his retirement, thereby creating the “irregular employment” situation that would require the application of Labor Code Section 4453(c)(4). Here, Applicant’s average weekly wages are easily ascertained in that they were based on her average weekly wages of \$3,550.15, at the time of the industrial injury of 1/4/2024. She was deemed TD approximately 6 months after the date of injury, after ongoing and continuous medical care. The TD rate should remain the same. The fact that she was deemed capable of working a modified job until Dr. Dini’s report of 7/20/2024, and did not work, should not in and of itself reduce her TD rate to zero. Applicant should be awarded her TD rate of \$1,619.15 per week. As the WCJ found that Applicant has a willingness to work post-retirement, she is entitled to TD at the rate determined as of the date of injury.

(Report, p. 5, ¶¶ 1-3.)

IV.

In the alternative, defendant claims that even if applicant were not barred from receiving temporary disability benefits due to retirement, applicant failed to meet her burden of proof to receive temporary disability benefits from February 28, 2025 and continuing because the most recent medical report commenting on applicant’s work status is dated February 27, 2025. We disagree because the record as a whole does not support finding that temporary disability ended.

Temporary disability ends when (1) the employee returns to work, (2) the employee is deemed medically able to return to work, or (3) the employee’s medical condition becomes permanent and stationary. (*Huston v. Workers’ Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806]; *Bethlehem Steel Company v. Industrial Acc. Com. and Harvey Lemons* (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250, 252]; *Industrial*

Indemnity Exchange v. Industrial Acc. Com. and Riccardi (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25, 26-27].)

Although there are no primary treating physician reports from after February 27, 2025, the other medical evidence shows there was no material change in applicant's condition and no further treatment recommended except surgical intervention, which remained pending as of the date of trial. November 8, 2024 medical reporting of the panel qualified evaluator (PQME), Michael Smith, M.D., found applicant's condition was not yet permanent and stationary. (App. Exh. 1, p. 5, Causation.) In a supplemental orthopedic report by Dr. Smith dated February 11, 2025, Dr. Smith concluded that if applicant continued to be significantly symptomatic, then right shoulder arthroscopy was advised. (App. Exh. 2, p. 10, Discussion.) The primary treating physician report dated February 27, 2025, reflects "all manners" of conservative treatment were found to provide only temporary relief. (App. Exh. 3, p. 27.) Surgery was requested and now approved. (App. Exh. 3, p. 27.) Applicant planned to schedule surgery to correspond with her schedule. (App. Exh. 3, p. 27.) There is no evidence applicant declined surgery or did not plan to pursue surgery. At trial, applicant testified she intended to undergo surgery, but she was not sure with whom and she was looking for a surgeon with whom she felt comfortable. (Amended Expedited MOH/SOE, p. 6, lines 1-3.) Thus, the record is insufficient to establish that applicant's condition materially changed since February 27, 2025 so as to warrant finding that temporary disability ended, as applicant is still awaiting surgery. Should defendant become aware of circumstance that would warrant a cessation of applicant's temporary disability benefits, defendant has the option to file a petition to terminate temporary disability benefits pursuant to WCAB Rule 10540. (See Cal. Code Regs., tit. 8, § 10540.)

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the First Amending Findings and Award issued on January 28, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 18, 2026

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

**ELLEN JACOBOWITZ
BERKOWITZ AND COHEN, APC
MICHAEL SULLIVAN & ASSOCIATES, LLP**

DC/cs

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