WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JULIANA LOWE, *Applicant*

vs.

FN LOGISTICS LLC;
insured by administered by SENTRY SELECT STEVENS POINT, *Defendants*

Adjudication Number: ADJ22182508
Los Angeles 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 and Recommendation on Petition for Reconsideration (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 as quoted below, and for the reasons stated below, we will deny the Petition for Reconsideration.

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code[1] section 5909, which states 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

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 August 19, 2026 and 60 days from the date of transmission is Sunday, October 18, 2026. The next business day that is 60 days from the date of transmission is Monday, October 19, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on October 19, 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 shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 19, 2026, and the case was transmitted to the Appeals Board on August 19, 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 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 August 19, 2026.

[2] 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.

II.

The WCJ provided the following discussion in the Report:

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

FACTS

Juliana Lowe, born [], while employed on November 17, 2025, as an inventory factory worker at Santa Fe Springs, California by FN Logistics LLC, sustained injury arising out of and in the course of employment to right foot.

The primary treating physician is Dr. Lawrence Miller.

The matter was set for Expedited Hearing on May 27, 2026. This case involves an admitted claim wherein parties disputed temporary disability rate, temporary disability period, permanent and stationary date, whether Applicant was a seasonal worker, whether Dr. Ko's report is substantial, and attorney fees. The parties were ordered to amend PTCS and file a joint PTCS. And Expedited Hearing was trailed to June 3, 2026.

At Expedited Hearing on June 3, 2026, the defense counsel mis-calendared this hearing. At 11:00 am, Expedited Hearing was trailed to June 9, 2026, and the defense counsel appeared shortly after 11:00 am. This WCJ reviewed PTCS and exhibits with the parties. Due to the pay stub showing various overtime rates, this WCJ asked the defense counsel to inquire about the methodology to calculate overtime.

The case proceeded to Expedited Hearing on June 9, 2026. This WCJ again asked the defense counsel to contact the Claims to figure out the mathematical formula used to derive the various overtime rates. Defense counsel contacted the Claims and could not provide any answer.

Applicant testified. Defendant did not have witness.

On July 10, 2026, this WCJ issued a Findings and Award with Opinion on Decision, wherein it was found that:

1. Applicants' earnings at the time of injury, for purposes of determining temporary disability rates, were $1,057.90 per week producing a temporary disability rate of $705.27 per week.
2. Applicant is not a seasonal worker.
3. The injury resulted in temporary disability for the period November 17, 2025, and ongoing payable at the rate of $705.27 per week, credit for modified work provided, subject to proof.
4. The primary treating physician is Dr. Lawrence Miller.

5. Dr. Ko's report is not substantial.
6. The reasonable value of the services of applicant's attorney is 15% of the retroactive portion of the Award.

Defendant is seeking reconsideration on the following issues:
A. The Employment Contract Establishes a Seasonal Engagement as a Matter of Law.
B. Judge Wang's Reasoning that Applicant Was Not a Seasonal Worker Is Flawed and Not Supported by the Admitted Evidence.
C. The Evidence Within the Pay Stubs Fail to Support Judge Wang's Finding that Applicant was Not a Seasonal Worker
D. An Overview as to Why and how Judge Wang Acted in Excess of His Powers and Found an Average Weekly Wage Not Supported by the Evidence.
E. An In-Depth View as to Why and How Judge Wang acted in Excess of His Powers and Providing an Average Weekly Wage Not Supported by the Evidence

No Answer received from Applicant.

DISCUSSION

A.

The evidence does not justify the Findings of Fact that Applicant was a Seasonal Worker as the Job Offer Clearly Defines Applicant as a Temporal Seasonal Worker and the Pay Stubs Corroborate This.

A) The Employment Contract Establishes a Seasonal Engagement as a Matter of Law.
B) Judge Wang's Reasoning that Applicant Was Not a Seasonal Worker Is Flawed and Not Supported by the Admitted Evidence
C) The Evidence Within the Pay Stubs Fail to Support Judge Wang's Finding that Applicant was Not a Seasonal Worker

Defendant contends that Applicant is a seasonal employee. The burden of proof rests upon the party holding the affirmative of the issue. Labor Code, § 5705; Lantz v. Workers' Comp. Appeals Bd. (2014) 226 Cal.App.4th 298, 313,79 Cal.Comp.Cases 488; Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier) (1995) 34 Cal.App.4th 1204, 60 Cal.Comp.Cases 289.

This WCJ determined that based on Applicant's credible testimony, and pursuant to Jimenez v.San Joaquin Valley Labor (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc), Applicantis not a "true" and bona fide seasonal employee.

It is well established that ambiguous contract clauses are construed against the drafter. 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 757, p. 848. And Defendant failed to prove that Applicant is a seasonal employee.

Per Defendant Exhibit A, the relevant section stated that:

"**…Fashion Nova Logistics (FNL)** is pleased to make you a conditional offer of employment in the **Temporary Seasonal** position of Inventory at **12588 Florence Avenue, Santa Fe Springs, CA 90670**. The following will convey information pertaining to your conditional offer:

This position will be a **Temporary Seasonal** position from **September 19, 2025 to March 19, 2026**. However, as detailed below, your employment will be at will at all times and *may be terminated* by you or the Company prior to the end of your assigned time with or without cause. If not terminated earlier by you or the Company, your temporary seasonal employment will end by its own terms as of **March 19, 2026** unless it is either extended by the Company in its sole discretion. If your assignment is *extended or you are offered regular employment* you will be issued a new offer letter with the terms and conditions of the new assignment." [**Original emphasis**, *emphasis added*], **Defendant Exhibit A**, p 1.

…

"At-Will Employment: Please note that your employment with FNL is "at will" employment and *is not for a specified period*." [*Emphasis added*], **Defendant Exhibit A**, p 2.

As to the phrase "temporary seasonal" on the conditional offer letter, per 8 CCR §10116.9(q), "seasonal work" means employment as a daily hire, a project hire, or an annual season hire.

In *Jimenez v. San Joaquin Valley Labor (2002) 67 Cal.Comp.Cases 74, 78 (Appeals Board en banc)*, the Appeals Board stated that:

"We emphasize that our holding is limited to cases involving the earning capacity of true "seasonal" employees, i.e., employees who work reasonably identifiable and defined seasons of reasonably identifiable and defined duration, such as the agricultural worker in this case. Our holding does not apply to cases of intermittent employment (such as in the building trades or with temporary employment agencies), where the duration of a particular project may be limited, but the evidence establishes the employee has worked (and/or likely will work) periodically throughout the year."

"For intermittent employment, an employee's temporary disability indemnity rate should ordinarily be determined based on his or her

> actual wages at the time of injury (Lab. Code, § § 4453 (c)(1) through (c)(3)), if the period of temporary disability would have lasted as long as the employment. (*Cal. Comp. & Fire Co. v. Industrial Acc. Com. (Colston*) (1962) 57 Cal.2d 598 [371 P.2d 285, 21 Cal. Rptr. 549] [27 Cal. Comp. Cases 135].) Otherwise, the employee's temporary disability indemnity rate should ordinarily be determined under section 4453(c)(4), consideration being given to his or her representative past earnings history and reasonably anticipated future earnings. (E.g., *Cal. Comp. & Fire Co. v. Industrial Acc. Com. (Stevens)* (1962) 57 Cal.2d 600 [27 Cal. Comp. Cases 136]; *West v. Industrial Acc. Com. (Best)* (1947) 79 Cal.App.2d 711, 723–724 [12 Cal. Comp. Cases 86]; *A. Teichert & Sons, Inc. v. Workers' Comp. Appeals Bd. (Tulleys)* (2001) 66 Cal. Comp. Cases 491 (writ den.); cf., *Argonaut Ins. Co. v. Industrial Acc. Com. (Montana)*, supra, 57 Cal.2d at pp. 595–596 [27 Cal. Comp. Cases at pp. 133–134]].)" *Jimenez*, at p. 79, fn. 9.

The first problem with the employment contract is that it was vague and ambiguous as to the employment duration. Based on Defendant's conditional offer, Applicant's temporary seasonal position was from September 19, 2025, to March 19, 2026. However, it also emphatically stated that this at will employment "is not for a specified period." See **Defendant Exhibit A**, p 2. This collaborates with Applicant's unrebutted testimony that "she knew people who are long-term employees; some coworkers have worked there for three years. Her friend Jonathan Vanderlinden is a long-term worker." **MOE/SOE p 6, lines 9-10.**

Thus, the duration is self-contradicting and ambiguous.

The second problem with the employment contract is that it was vague and ambiguous as to whether the position was temporary. Per **Defendant Exhibit A,** the offer letter, Applicant's position can be terminated anytime without cause. If not terminated, the temporary seasonal employment will end as of March 19, 2026, unless it is extended or offered regular employment by the employer in its sole discretion. In sum, Applicant's employment could be either 1) terminated at will, 2) extended at will, or 3) became a regular employee.

Based on the offer letter, it stated that Applicant's employment could be extended or offered regular employment in the sole discretion of the employer. Moreover, per the offer letter, the employment duration has no "specified period," this contract created an expectation of continuous employment if Defendant chose to extend the employment or made Applicant a regular employee.

By giving the opportunity to extend the contract or become a regular employee, these clauses contradict the plain meaning of temporary seasonal. These clauses showed employer's intention to recruit the most eligible workers to become permeant employees. This is collaborated with Applicant's testimony that "the

company's hiring process never stopped; people come and go." **MOE/SOE p 6, lines 8-9.**

Thus, the "temporary seasonal" status is self-contradicting and ambiguous.

The third problem with the employment contract is that there is no identifiable off-season. In *Jimenez v. San Joaquin Valley Labor (2002) 67 Cal.Comp.Cases 74 (Appeals Board en banc),* the parties stipulated that the grape-picking season is from August 16, 1994, through October 25, 1994. *Id*. at 77. In our case, there is no stipulation to identify and defined season or off-season. In fact, Applicant credibly testified that Defendant operates year-round and never closes; and there are three shifts every day. Defendant only closes on Christmas and New Year's Day. **MOH/SOE p. 5, lines 9-11**. There are no identifiable and defined seasons as required by *Jimenez*, *supra* at p. 79, fn. 9.

Applicants' contract is best described as intermittent employment, such as in the building trades or with temporary employment agencies, where the duration of a particular project may be limited, but the evidence establishes the employee has worked and/or likely will work periodically throughout the year. See *Jimenez*, *supra* at p. 79, fn. 9.

When interpreting an ambiguous contract, an effort must be made to discern the intent of the contracting parties. Interpretations which result in a binding agreement are preferred over interpretations which cause the contract to fail. Ambiguities are resolved against the party that caused the ambiguity to exist. *Marin v. Bldg. Materials Holding Corp*., 2014 Cal. Wrk. Comp. P.D. LEXIS 594. "The intention of the parties must be first determined from the language of the contract itself. … However, where the language of the contract is ambiguous, it is the duty of the court to resolve the ambiguity by taking into account all the facts, circumstances and conditions surrounding the execution of the contract … ." *Frankel v. Board of Dental Examiners* (1996) 46 Cal. App. 4th 534, 544 [54 Cal. Rptr. 2d 128], citing *Floystrup v. City of Berkeley Rent Stabilization Bd*. (1990) 219 Cal. App. 3d 1309, 1317–1318 [268 Cal. Rptr. 898], internal citations omitted.

Per Applicant's testimony, she signed a lot of documents on 9/18/2026 **(MOE/SOE p 5, lines 16-17)**; and there is no evidence to show that the employer and Applicant negotiated the contract.Applicant credibly and repetitively testified that no one had told her that the job was temporary or seasonal. **MOH/SOE p. 5, lines 12, 17-18**. Thus, based on the conflicting and ambiguous clauses on the offer letter, the ambiguities are resolved against the party that caused the ambiguity to exist; in our case, the ambiguities are against the employer.

Therefore**,** Applicant is not a seasonal employee.

B.

Because Applicant Should Have Be Classified as a Seasonal Worker, the Time Frame of Temporary Disability Found by WCALJ Is Incorrect.

An injured employee who is terminated from his or her employment for good cause is not entitled to temporary disability; however, the defendant has the burden of proving that the applicant was terminated for cause. *Butterball Turkey Co. v. Workers' Comp. Appeals Bd. (Esquivel)* (1999) 65 Cal.Comp.Cases 61 (writ den.); *Peralta v. Party Concepts* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 100 (Appeals Board panel decision).) "Good cause" in this context relates to the employee's misconduct, [*6] (e.g., *Romero v. Sunbelt USA, Inc.* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 728 (Appeals Board panel decision)

An employer remains liable for temporary disability after terminating an employee if it fails to establish good cause by showing employee misconduct. *Manpower Temporary Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 (writ den.) [applicant entitled to temporary disability where, although there was evidence, he had ongoing attendance and performance problems, these problems were not the basis for his discharge]; cf. *Reynoso v. Lusamerica Foods* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 134 [employer's at-will termination of probationary employee is not equivalent to termination for cause and did not bar the employee's entitlement to temporary disability].) Moreover, this is not a situation where the injured employee is not entitled to temporary disability because he or she voluntarily left work and/or choose to retire. *Gonzales v. Workers' Comp. Appeals Bd*. (1998) 68 Cal.App.4th 843 [81 Cal. Rptr. 2d 54, 63 Cal.Comp.Cases 1477]; *King v. Anaheim Police Dept*. (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 153 (Appeals Board panel decision).

Also, "Under the 'odd lot' doctrine, a worker who is only partially disabled may receive temporary total disability payments if his partial disability results in a total loss of wages." *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Stroer)* (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144]. This doctrine places the burden on the employer to show that work within the capabilities of the partially disabled employee is available. If the employer does not make this showing, the employee is entitled to temporary total disability benefits. Id., at 422; *General Foundry Service v. Workers' Comp. Appeals Board (Jackson)* (1986) 42 Cal.3d 331, 339, fn. 5 [51 Cal.Comp.Cases 375]; *Hardware Mutual Casualty Co. v. Workers' Comp. Appeals Bd*. (1967) 253 Cal.App.2d 62 [61 Cal. Rptr. 205, 32 Cal.Comp.Cases 291].

The effects of stipulation are discussed clearly in a Court of Appeals decision in *Sacramento v. Workers' Compensation Appeals Board (Whetherall)*, (2000) 77 Cal. App. 4th 1114, 92 Cal. Rptr. 2d 290, 65 CCC 1.

In our case, Defendant failed to show why Applicant was terminated on January 26, 2026. Defendant did not provide any justification or explanation to show good cause termination.

Pursuant to Stipulations, the primary treating physician is Dr. Lawrence Miller. PTP Dr. Miller did not indicate that Applicant has reached MMI status, and Dr. Miller assigned work restrictions which would be necessary if applicant was to return to work. **Joint Exhibits 1 and 2**. P

TP Dr. Miller provided following work restrictions: "semi-sedentary duties, no climbing, and no stairs." **Joint Exhibits 1 and 2**. The employer failed to provide modified duty to comply with PTP's work restrictions. Due to Applicant was not terminated for good cause, there was no evidence in the record that applicant was working or that defendant offered Applicant modified work within the work restrictions given by Dr. Miller; Applicant is entitled to temporary total disability benefits.

Not only the parties stipulated that Dr. Miller is the Primary Treating Physician. This WCJ also determined Dr. Ko's report is not substantial. Dr. Ko's 1-page MMI report consisted of four (4) phrases, specifically:

> "Release from care.
> Actual MMI date: 1/20/26.
> Return to full work/activity today.
> Patient may work their entire shift." **Defendant Exhibit B**.

Applicant credibly testified that Dr. Ko informed her that, due to the denial of the right foot MRI, Dr. Ko released her to full duty. **MOH/SOE p 4 line 17**. This WCJ determined that Dr. Ko's report is not in compliance with Labor Code § 4628 and CCR § 10682. And Dr. Ko's opinion is speculative and fails to set forth reasoning in support of its conclusions. See *Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal. App. 4th 922, 928; *Escobedo v. Marshalls* (2005) 70 Cal .Comp. Cases 604, 612 (Appeals Board en banc). Thus, Dr. Ko's MMI report is not substantial.

Under the circumstances of this matter, Applicant's lack of employment was not due to an unwillingness to work and, therefore, her earning capacity was diminished by the Defendant's action. In fact, Applicant's testimony clearly demonstrated her willingness to work, in that: she was looking for work; she was willing to work and tried to find a job; and she went back to work after Dr. Ko released her. **MOH/SOE p 5 lines 21-23**. Thus, Applicant is entitled to temporary disability benefits because it was Defendant's action that interfered with Applicant's plans to continue working.

This WCJ has determined that Applicant is not a seasonal worker. Thus, Applicant is entitled to temporary total disability benefits.

C.

Even if, Arguendo, Applicant Were Considered to Be a Regular Employee, the Evidence Does Not Justify the Findings of Fact that Applicant Earned $1,057.90 When She Has Never Earned More than $940.86/Week

Regarding the correct temporary disability rate, based on the same pay stubs, Applicant contends average weekly earnings at $895.06/week, and Defendant contends at $660.00/week. This WCJ used Labor Code § 4453(c)(4) to determine AWW.

In Defendant's Reconsideration, Defendant contends that Applicant's average weekly wage never exceeded $940.86/Week. To derive AAW of $940.86/Week, defendant added various weekly earnings and divided by number of weeks worked. Basically, Defendant contends that *Labor Code* § 4453(c)(1) should be used to determine AWW, instead of Labor Code § 4453(c)(4). Defendant also had misread this WCJ's discussion on Labor Code § 4453 (c)(3), as earning capacity is the benchmark of AWW in California. *West v. IAC (Best)* (1947) 12 CCC 86, 91; *County of San Joaquin v. WCAB (Davis)* (2007) 72 CCC 187, 190-91; *Jimenez v. San Joaquin Valley Labor* (2002) 67 CCC 74, 79..

However, Defendant failed to justify why California Supreme Court's decisions on earning capacity should not be followed. See *Goytia v. Workers' Comp. Appeals Bd*., (1970) 1 Cal.3d 889, and *Argonaut Insurance Co. v. IAC (Montana)* (1962) 27 CCC 130. Also, Defendant failed to cite any cases to distinguish from the Supreme Court cases on earning capacity.

Labor Code § 4453 provides four methods for calculating an employee's average weekly wages.

Labor Code 4453(c)(1) relates to full-time employees who work 30 hours or more per week for five or more days a week, for one employer, on a regular basis. This method calculates AWW by multiplying the number of working days a week times the daily earnings at the time of injury.

Labor Code § 4453(c)(2) applies when the employee is employed by two or more employers at the same time. That is not the case here.

Labor Code § 4453(c)(3) applies when the employee is paid at an irregular rate. The employees' actual weekly earnings are added together and then averaged for up to one year preceding the date of injury.

And Labor Code § 4453(c)(4) applies when the applicant is working 30 or fewer hours per week, or when other methods cannot reasonably and fairly be applied, and earning capacity is utilized to determine AWW.

LC § 4453(c)(1) appears to apply when the employee's wages are expected to continue at the same level at the injurious job. *John Livacich-Inada Ranches v. WCAB (Baragas)* (1978) 43 CCC 1148 (writ denied). It often applies to salaried employees, but Applicant is not a salaried employee at FN Logistics LLC. It is generally also only applied when the wages of the employee are expected to continue at the same level, at the same job. This would seem to indicate that the employee had a constant rate of pay, the number of hours he worked is constant, and when the employees' earnings are consistently the same from one week to another. But that is not the case here.

In our case, Applicant testified that she worked from 70 hours to 95.38 every two weeks at FN Logistics. There were mandatory overtimes referred as the mandatory 6-day. Based on the pay stub, her hourly rate increased to $17.00 from $16.50.

Applicant did not work regular hours at a regular constant rate. Her earnings were not consistently the same from week to week, and in fact, fluctuated. See **Joint Exhibits 3 and 4**. Applicant also testified that there were mandatory overtimes, the mandatory 6-day. In light of applicant's testimony with Joint Exhibits 3 and 4, this WCJ does not believe that LC 4453(c)(1), in a strict interpretation, is the fairest method of calculation.

LC § 4453(c)(3) is used when there are irregular earnings. The statute applies when there is payment at an irregular rate, but this method has also quite commonly been used when the hourly rate is fixed, but the number of hours worked in a week fluctuates. This often comes into play when an employee is on call or works overtime. In *Knipprath v. WCAB* (1997) 62 CCC 1166 (writ denied), the court found that the Judge did not err in using this method to calculate AWW when the applicant had employment that was very inconsistent in the number of hours worked.

LC § 4453(c)(3), appears to be a proper method of determining the AWW, and therefore, the temporary disability rate. As Applicant had worked irregular hours, at varying rates for different shifts, and higher rate for overtime. See **Joint Exhibits 3 and 4**.

But earning capacity is the benchmark of AWW in California. *West v. IAC (Best)* (1947) 12 CCC 86, 91; *County of San Joaquin v. WCAB (Davis)* (2007) 72 CCC 187, 190-91; *Jimenez v. San Joaquin Valley Labor* (2002) 67 CCC 74, 79. Thus, the various methods of computation of average weekly earnings set forth in LC 4453(c)(1)(2)(3) are valid to the extent they truly reflect actual earning capacity at the time of injury. *Id.* In the seminal case of *Argonaut Insurance Co. v. IAC (Montana)* (1962) 27 CCC 130, the Supreme Court of California stated that the purpose of this sub section 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." *Id*. at 133. The Court added, "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." *Id*. at 133-4.

In *Goytia v. Workers' Comp. Appeals Bd*., (1970) 1 Cal.3d 889, 894, [83 Cal. Rptr. 591, 464 P.2d 47, 35 Cal.Comp.Cases 27], the California Supreme Court has explained:

> "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. A comparison of the first three subdivisions of section 4453 with the fourth shows that the Legislature deliberately established earning capacity as the test for the fourth subdivision as distinguished from the actual earnings for the other three subdivisions." *Goytia v. Workers' Comp. Appeals Bd*., (1970) 1 Cal.3d 889, 894, [83 Cal. Rptr. 591, 464 P.2d 47, 35 Cal.Comp.Cases 27].

"Capacity to earn money necessarily contemplates all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment, and the condition of his health [citation]." *Goytia, supra*, 896.

In order to compute either temporary or permanent disability indemnity, a worker's earning capacity (or average weekly earnings) must first be determined under section 4453. An estimate of earning capacity is a prediction of what a worker's earnings would have been had they not been injured. *Argonaut Ins. Co. v. Industrial Acci. Com. (Montana)* (1962) 57 Cal.2d 589, 594 [27 Cal.Comp.Cases 130]. The method of computation of average weekly earnings is provided in section 4453, subdivision (c). *Pham v. Workers' Comp. Appeals Bd*. (2000) 78 Cal.App.4th 626, 632 [93 Cal. Rptr. 2d 115, 65 Cal.Comp.Cases 139]. Labor Code subdivision (c)(1)–(3) provides formulas that take a worker's actual earnings as a starting point, whereas subdivision (c)(4) is for irregular employment or other situations where the first three formulas cannot reasonably and fairly be applied. *Montana, supra*, at 594–595; *Pham, supra*, 632–633; *Goytia v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 889, 894–895 [83 Cal. Rptr. 591, 464 P.2d 47, 35 Cal.Comp.Cases 27].

LC § 4453(c)(4) is the most accurate method for determining AWW in this case. Here, Applicant credibly testified that she worked full-time plus overtime.

Per the pay summary for 10/19/2025 – 11/1/25, Applicant worked 82.7 hours at $16.50/hour and earned $1,881.71.

Per the payroll summary for 1/11/2026 -1/30/2026, and she worked 88.06 hours at $17.00/hour and earned $1,760.43.

Defendant failed to offer explanation as to why Applicant worked more hours at higher hourly rate and received less pay. Moreover, no explanation offered as to why the overtime rate at $17/hour was less than $16.50/hour. See **Joint Exhibit 3 (**re: pay periods of 10/19/2025 – 11/1/25 and 1/11/2026 -1/24/2026). It appeared that Applicant did not receive proper 8.06 overtime hours during the period of 1/11/2026 -1/24/2026. Also, Defendant failed to offer any explanations as to the pay variations for Shift 3 Flx Diff and Weekend Diff Reg for both pay periods.

As such, under LC § 4453(c)(1), (3) and (4), this WCJ finds that the fairest method ofdetermining actual earning capacity at the time of the injury is to take the 88.06 hours worked in 1/11/2026 -1/24/2026 at $17/hour and incorporate with rates in 10/19/2025 – 11/1/25.

Therefore, 80 x $17 = $1,360, plus 8.06 OT hours x $27.6889 = $223.17, plus peak increase $2.5 x 88.06 hours = $220.15, plus Shift 3 Flx Diff $3.00 x 88.06 = $264.18, plus Wknd Diff Reg $2.00 x 24.15 hours = $48.30 in the total amount of $2,115.80; and $2,115.80/2 = $1,057.90.

Thus, $1,057.90 is the fair and accurate AWW, and AWW $1,057.90 x 2/3 = TD rate of $705.27. And the ongoing TD rate shall be $705.27.

Therefore, Labor Code § 4453(c)(1) is wrong method to determine Applicant's AWW.

Pursuant to Labor Code § 4453(c)(4), based on Applicant's earing capacity, $1,057.90 is the fair and accurate AWW.

D

Judge Wang Acted Without or in Excess of His Power in Deciding that the Employer Calculated Overtime Rates Incorrectly and The Evidence Does Not Justify Judge Wang's Use of Labor Code Section 4453, subd. (c)(4) or His Finding of $1,057.90 as the Average Weekly Wage

A. An Overview as to Why and how Judge Wang Acted in Excess of His Powers and Found an Average Weekly Wage Not Supported by the Evidence.

Defendant further contends that Labor Code § 4453(c)(3) should be used to calculate average weekly wage instead of Labor Code § 4453(c)(4).

Again, Defendant failed to justify why California Supreme Court's decisions on earning capacity should not be followed. See *Goytia v. Workers' Comp. Appeals Bd*., (1970) 1 Cal.3d 889, and *Argonaut Insurance Co. v. IAC (Montana)* (1962) 27 CCC 130.

As discussed above, Labor Code § 4453 (c)(4) is the fairest method to determine AWW, as Labor Code §§ 4453 (c)(1) – (3) cannot reasonably and fairly be applied. And earning capacity must be utilized to determine AWW.

Thus, Applicant's AWW is $1,057.90/week.

B. An In-Depth View as to Why and How Judge Wang acted in Excess of His Powers and Providing an Average Weekly Wage Not Supported by the Evidence

In Defendant's Reconsideration, Defendant provided additional information for calculating the overtime rate which is not admitted into evidence. **Petition for Reconsideration, p 15-18.**

Expedited Hearing was initially set on May 27, 2026, and it was trailed to June 3, 2026, for parties to amend PTCS. Then, due to mis-calendar by Defendant, Expedited Hearing was trailed second time to June 9, 2026. On June 3, 2026, and June 9, 2026, this WCJ asked Defendant to provide the methodology for calculating overtime, Defendant could not provide any explanation.

Per *DPR Construction v. Workers' Comp. Appeals Bd. (McClanahan)*, 111 Cal. App. 5th 1136 (2025), evidence not disclosed on the pre-trial conference statement is excluded. This WCJ had given ample opportunities to Defendant to provide the methodology for calculating overtime rates, and Defendant failed to do so. Comes now Defendant provided new information in Petition for Reconsideration, p 15-18, Defendant failed to show that information provided in Reconsideration was not available nor not discoverable prior to Expedited Hearings. Moreover, Defendant did not call witness to testify to the overtime calculation.

Thus, the Board should exclude pages 15 to 18 of Reconsideration pursuant to *DPR Construction v. Workers' Comp. Appeals Bd. (McClanahan)*, 111 Cal. App. 5th 1136 (2025).

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Petition for Reconsideration be denied.

(Report, at pp. 2-15.)

We have given the WCJ's credibility determination 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].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*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/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 19, 2026

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

JULIANA LOWE
SOLOV & TEITELL, APC
DAVID JANE & ASSOCIATES

PAG/cm

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