

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

KEVIN RUSSELL, *Applicant*

**STATE OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF AUTOMOTIVE REPAIRS, legally uninsured;
administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ7376924
Riverside District Office**

**OPINION AND DECISION
AFTER REMAND**

The following Opinion and Decision after Remand is issued pursuant to the Opinion issued on December 12, 2024 by the Fourth District Court of Appeal (Div. 2) (the Court), in which the Court annulled the Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration issued by the Workers' Compensation Appeals Board on August 16, 2024 (2024 Decision), and remanded the matter to the Appeals Board for further proceedings. (See *Russell v. Workers' Comp. Appeals Bd.* (2024) 90 Cal.Comp.Cases 1, 2 [2024 Cal.App.Unpub. LEXIS 7855] (*Russell*).)¹

Applicant sought reconsideration of the Findings, Orders, and Award (F&O) issued by a workers' compensation administrative law judge (WCJ) on May 23, 2024, wherein the WCJ found, in pertinent part, in Finding of Fact number 9 (Finding no. 9), that the "applicant's permanent total disability rate is \$543.24 per week based on average weekly wage on 06/15/2009..." The WCJ awarded, in pertinent part, permanent disability pursuant to Finding no. 9. The Appeals Board affirmed the WCJ's F&O, including Finding no. 9, but amended the WCJ's Award to include "[p]ermanent total disability, payable for life..." (2024 Decision, pp. 4-5.)

Applicant then filed a Petition for Writ of Review (Writ) regarding the 2024 Decision contending that the WCJ and WCAB erred in calculating his permanent disability rate:

¹ We note that the Court erroneously referred to the 2024 Decision as an "order denying Russell's petition for reconsideration" given that the 2024 Decision granted Russell's petition for reconsideration. Remittitur was issued by the Court on February 18, 2025.

Nevertheless, the WCJ amended his prior finding and determined petitioner's permanent total disability indemnity was now payable at the rate of \$543.24/week based on his actual earnings on the date of injury relying heavily on *Duncan v. The Singer Co.* (1978) 43 CCC 467 and the provisions of Labor Code §4661.5. Applicant petitioned for reconsideration pointing out that Labor Code §4661.5 was not applicable to the case and had no bearing on the determination of his permanent total disability rate. In his petition, applicant contended that pursuant to Labor Code §4659(b), his permanent total disability rate shall be calculated using the methods provided under Labor Code §4453(c)(1-4) with subsection (4) being the most appropriate method. The WCJ recommended denial of reconsideration of the issue, a recommendation the WCAB adopted and incorporated.

(Petition for Writ of Review, p. 10.)

The Appeals Board responded to applicant's Writ by admitting error in the 2024 Decision and requesting that the Court annul the Decision and remand the matter to the Appeals Board.

(Letter Brief, November 13, 2024, p. 2.) The Appeals Board explained the error as follows:

Specifically, Labor Code² section 4453, subdivisions (c)(1), (2) and (3) all provide different methods for calculation of an applicant's rate for permanent disability payments using the applicant's actual earnings. (See *Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 633.) However, where an applicant works less than 30 hours per week *or* where the other methods in section 4453, subdivision (c), "cannot reasonably and fairly be applied," section 4453, subdivision (c)(4) ("section 4453(c)(4)") states that average weekly earnings "require an estimate of earning capacity from all relevant circumstances, not just past earning history or actual earnings at the time of injury." (*Ibid.*)

The Supreme Court in *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889 discussed "earning capacity" as involving "all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages..." (*Id.*, at p. 896 quoting *Colonial etc. Ins. Co. v. Industrial Acc. Com.* (1941) 47 Cal.App.2d 487, 491-492.)

The [*Goytia*] court explained that prior earnings, while important, are not the sole basis to determine earning capacity. They constitute only one factor to be considered. The subdivision necessarily refers to earning potential which may be reflected in postinjury earnings. (*Id.* at pp. 894-898.)

² All further references are to the Labor Code unless otherwise noted.

(Grossmont Hosp. v. Workers' Comp. Appeals Bd. (1997) 59 Cal.App.4th 1348, 1356.)

In the Decision, and despite the undisputed fact that applicant did not work “five or more working days a week,” the Appeals Board stated that application of section 4453, subdivision (c)(1) (“section 4453(c)(1)”) “is the most reasonable and fair method of calculation available given applicant’s full-time employment and regular and consistent earnings at the time of injury.” (Writ Exh. 1, p. 3.) The reasons given for this conclusion were that section 4453(c)(4) did not apply because “applicant did not work less than 30 hours per week but rather worked forty hours per week” earnings under section 4453(c)(1) is not reasonably and fairly applied.”

First, section 4453(c)(4) is not written in the conjunctive, but rather in the alternative: “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...” (Lab. Code, § 4453(c)(4), italics added.) **Therefore, the fact that respondent worked more than 30 hours per week is not dispositive of whether section 4453(c)(4) applies or does not apply.** It may be that the Appeals Board did consider the second part of the first sentence of section 4453(c)(4) and still rejected its application; however, the Appeals Board failed to include any explanation of its consideration as required by section 5908.5. (Lab. Code, § 5908.5.)³

Next, petitioner is correct that full-time, regular employment at the time of injury does not preclude application of section 4453(c)(4) in determining average weekly earnings, and that calculation of earning capacity is not limited to the date of injury. (See *Argonaut Ins. Co. v. Industrial Acci. Com. (Montana)* (1962) 57 Cal.2d 589, 595; *West v. Industrial Acc. Com. (Best)* (1947) 79 Cal.App.2d 711.)

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)

(Montana, supra, 57 Cal. 2d at pp. 594-595.)

Here, respondent produced evidence of “scheduled, contractually mandated annual increases as well as merit increases for his entire period of employment.” (Writ, p. 23; Writ Exhs. 12-13, 17-18; Party Stipulations at Writ Exh. 2, p. 2:19-20 and Exh. 11, p. 2:21-25.) The Decision failed to address the evidence at all. The Decision incorporated the Report and Recommendation

³ “Any decision of the appeals board...shall state the evidence relied upon and specify in detail the reasons for the decision.” (Lab. Code, § 5908.5, italics added.)

of the workers' compensation administration law judge ("WCJ") but **the WCJ also did not address the evidence when calculating respondent's average weekly earnings for total permanent disability.** (Writ Exh. 1, Decision, Report, at p. 10.) Again, it may be that the Appeals Board did consider the evidence, but there was no discussion of any such consideration included in the Decision as required by section 5908.5.

(Letter Brief, November 13, 2024, pp. 2-3, bold added.)

After no opposition was filed pursuant to the court's direction that the parties file opposition to the request of the Appeals Board, the Court summarily granted applicant's petition for writ of review, annulling the 2024 Decision and remanding this matter to the Appeals Board for further proceedings. (*Russell, supra*, 90 Cal.Comp.Cases at p. 2.)

On September 30, 2024, Kevin Russell (Russell) petitioned this court for review of the August 16, 2024 Worker's Compensation Appeals Board (WCAB) decision upholding the administrative law judge's method for calculating Russell's total permanent disability indemnity rate. In response to Russell's petition, the Department of Consumer Affairs filed an answer arguing that Russell's permanent disability rate was appropriately calculated. The WCAB subsequently notified this court they were never properly served with the petition, and had they been properly served, they would have granted reconsideration of the decision sua sponte. However, they have now lost jurisdiction to take such action. (Lab. Code, § 5909.) The WCAB concedes there was error in the decision and asks this court to grant Russell's petition, summarily annul the decision, and remand the case for further proceedings before the WCAB.

As a result of this request, this court issued an order notifying the parties that it was considering the WCAB's request to grant the petition, summarily annul the WCAB's August 16, 2024 decision, and remand the case for further proceedings. Our order directed the parties to file any opposition to such summary annulment within 10 days. No opposition was filed. We therefore grant the requested relief. (*Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1241 [82 Cal. Rptr. 2d 85, 970 P.2d 872].)

(*Russell, supra*, 90 Cal.Comp.Cases at pp. 1-2.)

Labor Code 5313 requires that after a matter is submitted, and together with findings of fact, orders, and/or awards, a WCJ "shall" serve "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22.) This opinion on decision must be based on admitted evidence

(*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500] (*Garza*); *Le Vesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Accordingly, it is our decision after remand to affirm the 2024 Decision except that we amend the decision to amend Finding no. 9 and the Award to defer calculation of applicant’s permanent total disability rate. It is our further decision after remand to return this matter to the WCJ for further proceedings consistent with this decision and Labor Code section 5313.

For the foregoing reasons,

IT IS ORDERED as the Decision after Remand of the Workers’ Compensation Appeals Board that the Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration of the Workers’ Compensation Appeals Board issued on August 16, 2024 is **AFFIRMED** except as **AMENDED** below:

...

9. Calculation of applicant’s permanent total disability rate is deferred, jurisdiction reserved.

...

AWARD

AWARD IS MADE in favor of **KEVIN RUSSELL** and against **STATE OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS BUREAU OF AUTOMOTIVE REPAIRS** as follows:

1. Permanent total disability, payable for life, is to be paid beginning after the last payment of temporary disability pursuant to Labor Code 4650, subdivision (b), along with increases pursuant to Labor Code 4659, subdivision (c), with credit to defendant for permanent disability payments paid on account thereof, less reasonable attorney’s fees of 15% of value of benefits awarded for permanent total disability, subject to proof, and payable to the Law Offices of

Lucy M. Bishop, all in amounts to be adjusted between the parties, with jurisdiction reserved at the trial level if there is any dispute.

2. Calculation of the rate of applicant's permanent total disability is deferred, jurisdiction reserved.

IT IS FURTHER ORDERED as the Decision after Remand of the Workers' Compensation Appeals Board that this matter is **RETURNED** to the workers' compensation administrative law judge for further proceedings consistent with this decision and Labor Code section 5313.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 28, 2026

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

**KEVIN RUSSELL
LAW OFFICE OF LUCY M. BISHOP
STATE COMPENSATION INSURANCE FUND**

AJF/mc

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