WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VITALIE GRADUNOV, ***Applicant***

vs.

CHARLES HOPE CONSTRUCTION; STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ22231572
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Pro per applicant filed a Petition for Reconsideration (Petition) in response to the Findings and Award (F&A) dated May 22, 2026, in which the presiding workers' compensation administrative law judge (PWCJ) found in pertinent part that applicant, while employed on April 29, 2025 as a machine operator/laborer by defendant, sustained injury arising out of and in the course of employment to his left hand and bilateral wrists; and that the injury resulted in temporary disability payable at the rate of $596.47 per week based on average weekly earnings (AWE) of $894.71.

Applicant raises several contentions and ultimately argues his earnings should be taken at $1,800.00 per week representing $45.00 per hour for a 40-hour week.

Defendant did not file an Answer.

In the Report and Recommendation (Report) the PWCJ recommends that the Petition for Reconsideration be denied.

We have reviewed the allegations in the Petition and the contents of the Report. After review of the record, and for the reasons discussed below, we will grant applicant's Petition for Reconsideration, amend the F&A to find applicant's AWE is $1,800.00, and otherwise affirm the F&A.

I.

Applicant's Petition for Reconsideration was filed on June 15, 2026.

Up through July 1, 2024, petitions for reconsideration were subject to former Labor Code section 5909, which 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.)[1]

During the period from July 2, 2024 through June 30, 2026, petitions for reconsideration were subject to former section 5909, which stated 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) (in effect from July 2, 2024 through June 30, 2026), 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 31, 2026, and 60 days from the date of transmission is Friday, October 30, 2026. This decision is issued by or on Friday, October 30, 2026, so that we have timely acted on the petition as required by section 5909(a) (in effect from July 2, 2024 through June 30, 2026).

Section 5909(b)(1) (in effect from July 2, 2024 through June 30, 2026) 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)

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

(in effect from July 2, 2024 through June 30, 2026) 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 August 31, 2026, and the case was transmitted to the Appeals Board on August 31, 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) (in effect from July 2, 2024 through June 30, 2026), because service of the Report in compliance with section 5909(b)(2) (in effect from July 2, 2024 through June 30, 2026) provided them with actual notice as to the commencement of the 60-day period on August 31, 2026.

II.

Applicant, while employed on April 29, 2025, as a machine operator/laborer by defendant sustained injury arising out of and in the course of employment to his left hand and bilateral wrists.

On March 23, 2026, the case was tried and submitted with the sole issue listed as "the appropriate rate of temporary disability." (Minutes of Hearing and Summary of Evidence (MOH), March 23, 2026, p. 2, lns 4-17.) Exhibits were admitted, and testimony was taken from applicant, the employer Charles Hope, and defendant's senior workers' compensation adjustor Miranda Morgan.

On May 22, 2026, the WCJ issued the F&A which found "[t]he injury resulted in temporary disability payable at the rate of $596.47 per week based on average weekly wages of $894.71," and awarded "[t]emporary disability indemnity at the rate of $596.47 per week based on average weekly wages of $894.71."

It is from the May 22, 2026 F&A that applicant seeks reconsideration.

III.

A.

In finding an AWE of $894.71, the PWCJ explained in the Opinion on Decision (Opinion) that "applicant was not full time" and that "applicant's total included pay was $46,525.00 for the 52 weeks preceding the industrial injury." (Opinion, pp. 1-2.) The PWCJ applied section 4453(c)(4) to find AWE because "[g]iven the *intermittent nature of the applicant's job as well as*

his multiple employments, this method most accurately reflects the applicant's earning capacity at the time of his injury." (*Id*. at p. 2, emphasis added.)

It is apparent that the PWCJ relied on subsection 4453(c)(4) to make earnings findings. Section 4453, however, provides four possible methods to calculate applicant's average weekly earnings. Due to the varied earnings information provided in this case, it is necessary to consider all four methods before an earnings determination may be made. We therefore turn to the facts of the case at hand, noting there is a large volume of potentially relevant data that must be parsed.[2]

1.

The first method available when calculating average earnings for benefit purposes pursuant to section 4453 provides that:

> Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.

(Lab. Code, § 4453(c)(1).)

Here, the relevant record begins with a May 8, 2025 SCIF Notice Regarding Temporary Disability Benefits. The notice states: "Your weekly compensation rate is $1200.00 based on your earnings of $1800.00 per week." (Exhibit 10, p. 1.) Working backwards from the information in this notice it appears reasonable that at the time of the notice SCIF calculated the hourly rate at $45.00 per hour for a 40-hour week. This is because $1,800.00 AWE divided by a 40-hour week yields a $45.00 hourly rate.

Next, there is a SCIF Wage Information Form which shows applicant's rate of pay as $45.00 per hour for 40 hours per week. The second page of the exhibit is a declaration signed by the employer pursuant to section 4906(h) dated August 25, 2025. (Exhibit 101.) At trial, employer Charles Hope testified that he completed this wage information form. (MOH, p. 9, lns 40-41.)

Then there is a Description of Employee's Job Duties (DWC – AD 10133.33) Job Title "Operator/Laborer" for applicant which indicates 8 hours worked per day, 40 hours worked per week, which was signed by the employer as "Charles Hope Owner/Sole Proprietor" on August 25, 2025. (Exhibit 1.)

[2] Senior workers' compensation adjustor Miranda Morgan testified extensively at trial. (MOH, pp. 13-19) Although we have reviewed this testimony, it appears primarily directed at how the witness interpreted documents and hearsay statements in making earnings calculations. Here, we independently review the record before us.

Applicant testified at trial that "[a]t the time of the injury, he was paid $45 an hour." (MOH, p. 4, ln 37.)

From the record before us, applicant was employed at the rate of $45.00 per hour for 30 or more hours a week and for five or more working days a week. Therefore, under section 4453(c)(1) the applicant's average earnings are $1,800.00 per week based on working 5 days a week times $360.00 daily earnings ($45.00 per hour times an 8-hour day).

2.

We must next consider whether the applicant had at least one additional employer at or about the time of the injury. This is because the next possible method to calculate AWE is stated as:

> Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.

(Lab. Code § 4453(c)(2).)

From the SCIF Wage Information Form, we discern that applicant was hired on January 25, 2025, which was three months before his injury on April 29, 2026. (Exhibit 101.) Although the form indicates applicant's first day of work occurred on April 28, 2025, the day before applicant's injury, this date appears to actually reflect the day the employer started work at the particular jobsite where applicant was injured and thus was not applicant's first day working for this employer. We therefore consider if applicant was working for two or more employers from his date of hire up until the day of injury.

We must determine if applicant was self-employed during this period because at trial applicant testified: "There was a gap in payroll checks from February 8, 2025 through April 20, 2025. During that time, the applicant was working at [the employer's] house. He is not sure if this is the basis for his 1099 payments, but it's possible. He believes that he worked in 2025 and earned over $4,000 doing 1099 work." (MOH, p. 6, lns 4-8.)

Applicant also testified that he "received payment in two different ways. One was via payroll, which was paid biweekly. The other way was not on payroll and whenever the applicant needed money. He was paid in check and cash 5% of the time." And further, '[*h*]*e does not receive income from any other source*.'" (MOH, p. 4, lns 37-43, emphasis added.)

While testifying at trial, the employer was referred to the employer's 1099 detail (Exhibit C) and testified it "represents all payments made to the applicant for doing projects when there were no set construction projects to do; *The witness tried to get as much work for the applicant as he could*." (MOH, p. 10, lns 39-44, emphasis added.) "He would give the applicant a hundred dollars in cash 'here or there.' Other than the earnings previously discussed, there were no benefits paid to the applicant." (MOH, p. 11, lns 6-8.)

During the period under consideration, the record is devoid of earnings from any source other than the employer. There is, however, an implication that because the employer provided applicant with "1099" payments, at least some of the work performed by applicant for the employer may have been performed as a self-employed independent contractor.

In *Dynamex*, the Supreme Court provided the "ABC test" for determining employment. This test was subsequently codified in section 2775, and pursuant to section 3351(i), it became applicable to workers' compensation injuries after July 1, 2020. Section 2775(b) states in pertinent part:

> (1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> > (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
> >
> > (B) The person performs work that is outside the usual course of the hiring entity's business.
> >
> > (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Lab. Code § 2775(b); see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 957 [83 Cal.Comp.Cases 817].)

Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (Lab. Code, § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to

the hirer to affirmatively prove that the worker is an independent contractor. (Lab. Code § 5705(a); *Cristler v. Express Messenger Sys., Inc.* (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167].)

Because it is undisputed that applicant was presumed to be an employee during the period under consideration, it is important to recognize that the employer must satisfy all three factors of the "ABC test" to meet the burden of showing that applicant was an independent contractor. Although there is evidence the employer made payments to applicant as a "1099" employee, there is no evidence that such payments established anything beyond the normal employer/employee relationship.

We need look no further than the first prong of the ABC test, for example, to find there is no evidence that applicant was "free from the control and direction of the hiring entity in connection with the performance of the work." (Lab. Code, § 2775(b)(1)(a).) Although applicant testified he left his tools at the employers' cabin where he was working, such work was clearly part of the broader employment arrangement. This is evident because when there was weather the employer had applicant work "inside jobs, including the cabin or equipment." The employer acknowledged trying "to get as much work for the applicant as he could." The employer also testified he "wanted the applicant to be on payroll the whole time, but he didn't want to be." It is apparent the use of "1099" payments was a fiction and that applicant was working for the employer as an employee even when receiving such payments. Defendant has not met the burden to establish that applicant was an independent contractor.

Applicant worked solely for one employer, the defendant, at the time of injury. As such, section 4453(c)(2) does not apply to this case.

3.

The third method of calculating earnings is:

> 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.

(Lab. Code, § 4453(c)(3).)

We therefore next consider whether applicant was performing full-time work, or if he was engaged in intermittent, temporary, seasonal, or some other type of employment. In doing so, we

note that trial testimony was taken in this matter on March 23, 2026, almost one year after applicant's injury on April 29, 2025.

Applicant testified that he "worked depending on what needed to be done, maybe they were working on equipment or [the employer] was on vacation or other employees showed up. They did whatever needed to be done. Sometimes the work was affected by the weather." And the "applicant provided the Court with weather delays because Irene, the State Fund adjustor, said there were expected times of not working. However, according to the applicant, when that happened, they had inside jobs, including the cabin or equipment. There were always projects to be done." (MOH, p. 6, lns 30-41.)

Applicant also testified, "[t]he expectation was that the applicant would work as long as there were projects to do. There was no contract." (MOH, p. 8, lns 3-5.) "There was an ongoing project at [the employer's] cabin at the time of his injury." "He was never told by [the employer] that he was an intermittent or seasonal employee." (MOH, p. 8, lns 27-32.)

And finally, applicant testified, "it is not true that the job he was working on had ended." (MOH, p. 5, lns 34-35.) "He had many different projects that he would be doing. When he worked for [the employer] he would do one project, *but there was always other stuff to do*." (MOH, p. 8, lns 37-39, emphasis added.) "*There are crews still working for* [the employer] *until the end of the year*." (MOH, p. 9, lns 25-26, emphasis added.)

The employer, Charles Hope, testified that he "*tried to get as much work for the applicant as he could*." (MOH, p. 10, lns 43-44, emphasis added.) And that, "[t]he witness and the applicant *did not* have a conversation about being an intermittent employee. *The agreement was that he would work and the witness would pay him*." "*The jobs are still incomplete*, although, they are almost done." (MOH, p. 11, lns 20-26, emphasis added.)

An October 14, 2025 handwritten "To Whom It May Concern" letter signed by applicant and the employer provides:

> I [applicant] and [the employer] state that "The end day for the job on [illegible] never was to be a termination of employment date." As long as we had work lined up there would have been employment. *The crew still working*.

(Exhibit 6, PDF p. 1-2, emphasis added.)[3]

[3] Exhibit 6 includes two copies of the same letter dated October 14, 2025.

The employer acknowledged the letter and explained "the purpose of the handwritten note listed as Applicant's Exhibit 6 was to try to relieve the applicant's wife's concern about employment." (MOH, p. 12, lns 1-2.) The employer also testified that:

> The applicant was not full time. There were no full-time employees, but they were on call. The crew worked up until the end of the weather. The witness recalls the atmospheric rivers and how it impacted a job on Greenwich. The weather forced the job to shut down.
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> -0-
>
> Most of the time the work was piecemeal. The witness did not have continuous work for the crew from April to December of 2025.

(MOH, p. 12, lns 9-13; 20-22.)

On the SCIF Wage Information Form for applicant, the employer marked boxes for employment status of "temporary," "seasonal," "on-call," and "part-time." Work was not promised for a particular period and was to start on "4/28" and was expected to end and did end on "8/8/25" because "Finished projects." (Exhibit 101, p. 1.)

It is apparent from the above that the employer viewed each project as independent while also acknowledging that as long as there were other projects applicant would be employed. It is also clear that the employer would find work other for applicant when there was weather or the employer was in between projects. Although the employer completed a wage information form indicating the project on which applicant was injured ended on August 8, 2025, the employer also testified at trial "[*t*]*he jobs are still incomplete*, although, they are almost done." This is consistent with applicant's testimony that "[t]*here are crews still working for* [the employer] *until the end of the year*."

From the record it is apparent that although the employer would move from job to job, applicant was hired with the expectation of full-time continuous work, and that such work was available to applicant had he not been injured through the day of trial and more probably than not beyond that day.

It further appears that weather, whether seasonal or a unique event such as an atmospheric river, reasonably did not affect applicant because the employer provided applicant with indoor work and other work when weather was a factor.

Therefore, applicant's earnings were not at an irregular rate, such as piecework, or on a commission basis, or specified to be by week, month, or another period.

From the evidence and testimony of record, we discern that applicant was not earning at an irregular rate and therefore section 4453(c)(3) does not apply.

4.

Finally, we must consider the last possible method available to calculate earnings which provides:

> Where the employment is for less than 30 hours per week, *or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied*, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

(Lab. Code, §§ 4453(c)(4), emphasis added.)

Although it might appear there is demarcation in section 4453 between employment for more than 30 hours per week and employment for less than 30 hours per week, it is clear by the phrase "or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied" that the inquiry is broader and more complex.

The 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, [35 Cal.Comp.Cases 27].)[4]

Further, when considering earnings:

> [T]he Board must consider whether, barring the injury, anything would have occurred during the anticipated duration of the disability that would have affected the injured worker's earning capacity in a manner that makes it unreasonable or

[4] In *Goytia*, *supra*, the Supreme Court considered a predecessor version of current section 4453 which, as relevant here, is the same as the current section. The reorganized current statute does not impact the *Goytia* analysis. For clarity, it is noted after the Supreme Court's decision in *Goytia*, and after further proceedings at the trial level, the case again came before the Supreme Court with the court again remanding to have applicant's post-injury earnings considered in keeping with its original decision. (*Goytia v. Workers' Comp. Appeals Bd*. (1972) 6 Cal.3d 660 [37 Cal. Comp. Cases 104].)

> unfair to use actual wages to calculate temporary disability benefits. In doing so, the Board should consider only those factors existing at the time of injury or those that could reasonably be anticipated at that time. Where there is specific demonstrable evidence that such factors exist which would have affected an injured worker's earning capacity other than in a de minimis manner, the Board should consider those factors to calculate one sum that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability.

(*Grossmont Hospital v. Workers' Comp. Appeals Bd.* (1997) (*Kyllonen*) 59 Cal.App.4th 1348, 1363 [62 Cal.Comp.Cases 1649].)

In essence, there is a balancing test between hourly rate and earning capacity to determine which method is reasonable and fair in the case at hand. If section 4453(c)(1) cannot reasonably and fairly be applied to arrive at AWE, we must review all the surrounding circumstances and conditions disclosed by the evidence to determine applicant's earning capacity. The use of alternative "earning capacity" method of calculation pursuant to section 4453(c)(4), however, should not be used to reduce temporary disability benefits when loss of earnings was not reflective of applicant's training, experience, and willingness to work. (*State of California/Dept. of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Salcido*) (2012) [77 Cal. Comp. Cases 836].)

Here it appears there are two viable paths to explore as conduits to apply catchall section 4453(c)(4). The first is weather, including the phenomena of atmospheric rivers. The second is the potential disconnect between applicant's stated hourly rate and the available earnings documentation.

It appears weather affected the employer's business. It does not appear, however, that weather affected applicant's earnings.

As noted above, applicant testified: "*Sometimes the work was affected by the weather.*" "However, according to the applicant, *when that happened, they had inside jobs, including the cabin or equipment*. *There were always projects to be done*." (MOH, p. 6, lns 33-34; 38-41, emphasis added.)

This is consistent with the employer's testimony that the 1099 detail "represents all payments made to the applicant for doing projects when there were no set construction projects to do; The witness tried to get as much work for the applicant as he could." (MOH, p. 10, lns 39-44.)

Included in the record is a January 6, 2026 County of Sonoma "Extension and Continuation of Proclamation of Local Emergency Due to February 2025 Atmospheric River Storm Event." (Exhibit 5; with attached supporting documents.) This event occurred before applicant's injury on April 29, 2025, and hence did not affect his earning capacity during any period of disability. We further note that due to the nature of the employer's business, it is plausible such storm events would reasonably have resulted in additional job opportunities for the employer due to the need for infrastructure repair.

It appears that here the references to atmospheric rivers are made with the implication that such events limit applicant's earning capacity. This is a misunderstanding of how such events affect earning capacity. Although the State of California may be seeing a greater number of atmospheric rivers, such events are by no means regular or predictable. Even when the conditions for an atmospheric river are identified, it is difficult to predict the effect on an area of the state with certainty, let alone a specific work location.[5] Without reasonably probable evidence to support that an applicant's work would be shut down by an atmospheric river over a period of time, the existence and effect of an atmospheric river becomes speculative in application. An atmospheric river is, of course, different from expected seasonal weather changes that routinely affect some employers, but as discussed above, do not appear to have an impact on this applicant's earning capacity.

Because it appears weather did not affect the applicant's earning capacity, we do not find weather to be a factor in determining AWE.

To complete our assessment, we next review the evidence to identify if there is a sum which reasonably better represents the earning capacity of the injured employee at the time of his injury, due consideration being given to earnings from all sources and employments.

Applicant testified he "was paid in check and cash 5% of the time." (MOH, p. 4, lns 40-41.) There "were times where the applicant worked over eight hours a day. He was not paid overtime. Instead, the extra hours would accumulate to the next pay period or to the next time that he was not working." (MOH, p. 7, lns 33-36.)

[5] For example, the National Oceanic and Atmospheric Administration (NOAA) published a story on March 17, 2026 titled "Experimental AR Forecast Model Goes Online" in which it noted its new system now allowed tracking of atmospheric rivers up to five days in advance. (https://wpo.noaa.gov/experimental-atmospheric-river-forecast-model-goes-online/). Although such improvements are significant, an improvement in tracking of up to five days in advance highlights how difficult it is to meaningfully predict such events in a way that may be considered for AWE.

The employer testified that both "payroll checks" and "not payroll checks" were issued to applicant, in an apparent reference to "1099" payments to applicant. (MOH, p. 11, lns 28-35.) The employer also testified that "1099 work has to be over $600." (MOH, p. 11, lns 33-35.) Finally, the employer testified that he would give applicant a hundred dollars in cash "here or there." (MOH, p. 11, lns 6-7.)

Based on the testimony of both applicant and the employer, it is clear that applicant was paid both by check *and in cash*. Unfortunately, there is no record of these cash payments being made to the applicant. The 2025 form W-2 shows total wages of $9,697.50. (Exhibit I.) The employer's payroll "all transactions" record, which *only shows payment by check*, also totals $9,697.50. (Exhibit L.) Even the employers 1099 Detail *only reflects payments by check* in 2025 totaling $4,012.50. (Exhibit K.) We discern that although both applicant and the employer testified to payments by cash, such payments are not captured by the 2025 payroll documentation, and as such, the documentation likely under-reports applicant's earnings.

Further complicating reliance on the employer's payroll documentation is a January 29, 2025 check numbered 5621 for $500.00 payable to applicant that does not show up on either the payroll or 1099 records and has no notation as to why it was issued. (Exhibit 3, PDF p. 1.) While this check may be a payroll advance which was repaid as a credit against wages paid in the January 31, 2025, paycheck number 5620, as reflected on that check's employee pay stub, we are left guessing if that is what happened. (Exhibit 102, PDF p. 4.) Without any clear documentation or testimony explaining the checks beyond a line item on a pay stub that states "payroll advance repayment," we are left without substantial evidence as to the meaning of these specific transactions.

Next, applicant's uncontradicted testimony is that he occasionally worked over eight hours a day and was not paid overtime, instead the extra hours would accumulate to the next pay period or to the next time that he was not working.

Such an arrangement impermissibly undervalues applicant's earning capacity because state law provides that any work performed in excess of eight hours in one day or forty hours in one week shall be compensated "at the rate of no less than one and one–half times the regular rate of pay for an employee." (Lab. Code, § 510(a).) We are aware of no exemptions or exceptions that would exempt applicant from the coverage of section 510(a). Applicant's earnings are underrepresented in the wage documents because "[n]otwithstanding any agreement to work for a

lesser wage, any employee receiving less than . . . the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime compensation." (Lab. Code, § 1194(a).)

In addition, although the employer testified that "1099 work has to be over $600," the record does not clarify if the employer understood this 1099 threshold to be per job or annual, nor does it clarify if applicant was paid for any work in 2025 that totaled less than $600.00 and which was not reported as 1099 income. It is not clear from the record that all of the "1099" earnings were recorded.

While we do not draw any inferences as to motive from the less than clear documentation of wage payments made in this case, we cannot find the payment record here sufficient to apply section 4453(c)(4). The additional documentary evidence is not reliable as to applicant's earnings during the potential disability period.

Finally, many of the exhibits predate applicant's employment in 2025. (See e.g. 2024 Form 1099-NEC (Exhibit D); March 30, 2026 employer 1099 Detail with additional checks in November 2024 (Exhibit C); 2024 Form W-2 (Exhibit H); and wage documents covering 2014 through 2016 (Exhibit 7).) Because of the insufficiency of the 2025 earnings record, any attempt at averaging in pre-hire wages would only compound the insubstantial nature of the calculation. Indeed, some of the older earnings documents could even be seen as supporting a higher earning capacity. (See e.g. payroll summary April 29, 2024 through May 9, 2025, which lists a higher prevailing hourly wage for "Marin" of $65.29 per hour (Exhibit B); and multiple instances of applicant having a higher hourly rate in 2014 and 2015, including $64.34 per hour for a September 26, 2014 pay date (Exhibit 7, PDF p. 9).)

Emblematic of the possible swings in benefit calculations under section 4453(c)(4) is the September 5, 2025 SCIF temporary indemnity benefits notice that determined a greatly reduced AWE of $227.64 because the employer reported applicant's work was "intermittent and not year-round." (Exhibit 10, p. 4.)

According to the Report, applicant was 48 on the date of injury. There appears to be no reason to suspect his earning capacity would diminish or increase during the potential temporary disability period resulting from his injury.

The record establishes that applicant was hired at $45.00 per hour for an 8-hour day, 40 hour week. This hourly rate reflects applicant's training, experience, and willingness to work at

the time of injury. Because the section 4553(c)(1) framework can be reasonably and fairly be applied and there is no reliable or substantial evidence that supports the use of the alternative "earning capacity" method, there is no reason to invoke section 4553(c)(4).

On this record there is no substantial evidence supporting a deviation from a section 4453(c)(1) calculation.

B.

In the Petition, applicant alleges both fraud and newly discovered evidence, identifies four "newly discovered" documents as Petition Appendixes 1-4, and provided a description for each appendix.

> A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer *unless a ground for the petition for reconsideration is newly discovered evidence.*

(Cal. Code Regs., tit. 8, § 10945(c)(2), emphasis added.)

Although the Petition lists newly discovered evidence as grounds for reconsideration, it is clear from each document's description that the documents were in applicant's possession or control well before the matter proceeded to trial and could have been identified as an exhibit to be submitted at trial. As such we have not considered the documents listed as Petition Appendixes 1-4 in reaching our decision.

We further note that fraud was not raised as an issue for trial and is therefore not addressed herein.

IV.

Following our independent review of the record occasioned by applicant's Petition, we grant applicant's Petition for Reconsideration, amend the May 22, 2026 F&A to find applicant's average weekly earnings is $1,800.00, and otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that applicant's June 15, 2026 Petition for Reconsideration is **GRANTED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 22, 2026 Findings and Award issued by the PWCJ is **AFFIRMED** except that it is **AMENDED** as follows:

Findings of Fact

-0-

3. The injury resulted in temporary disability payable at the rate of $1,200.00 per week based on average weekly wages of $1,800.00.

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Award

AWARD IS MADE in favor of VITALIE GRADUNOV against STATE COMPENSATION INSURANCE FUND; of:

a. Temporary disability indemnity at the rate of $1,200.00 per week based on average weekly wages of $1,800.00, for period or periods to be adjusted by the parties, less credit for sums paid previous, and with jurisdiction reserved to the PWCJ over any disputes.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 30, 2026

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

VITALIE GRADUNOV
STATE COMPENSATION INSURANCE FUND

PS/*cs*

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