

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

**KEVIN RUSSELL, *Applicant***

**vs.**

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

**Adjudication Number: ADJ7376924  
Riverside District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration for the sole purpose of amending the Award to reflect a life pension award and to conform to proper format. For the reasons stated in the WCJ's Report, which we adopt and incorporate except as noted below, and for the reasons stated below, we will otherwise restate the WCJ's decision.

Preliminarily, we note that the Award entered by the WCJ failed to explicitly provide for payment of a life pension. Accordingly, we will amend the Award to clarify that a life pension is being awarded. Therefore, we do not adopt or incorporate the recommendation that we deny reconsideration.

Next, we turn to the merits. At trial on August 2, 2022, the parties' stipulated that "[i]n 2013, from January 25, 2013 to September 30, 2013, the applicant's average weekly earnings were \$1,133.31 with a temporary disability rate of \$755.54 per week." (Minutes of Hearing (MOH), 8/2/22, at p. 2:19-20.) That stipulation was adopted as a Findings of Fact in the November 18, 2022 Findings and Award and Orders and was left undisturbed by our February 6, 2023 Opinion

and Order Granting Petition for Reconsideration and Decision After Reconsideration. Nevertheless, we agree with the WCJ that that stipulation and the subsequent finding of fact are not dispositive on the issue of the rate of permanent total disability.

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 steady stream of income. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) Whereas permanent disability indemnity has a dual function: "to compensate both for actual incapacity to work and for physical impairment of the worker's body, which may or may not be incapacitating." (*Id.*)

Labor Code<sup>1</sup> section 4452.5 defines "[p]ermanent total disability" as "a permanent disability with a rating of 100 percent permanent disability only." (Lab. Code, § 4452.5.) Section 4659 states that "[i]f the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life." (Lab. Code, § 4659(b).)

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 [65 Cal.Comp.Cases 139].) 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 [35 Cal.Comp.Cases 27].)

In relevant part, section 4453 states:

(c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows:

---

<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise noted.

(1) 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*.

(2) 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.

(3) 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.

(4) 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), emphasis added.)

On the date of injury, applicant worked full-time, 40 hours per week. (Minutes of Hearing and Summary of Evidence (MOH/SOE, 3/26/24, at p. 6:5-6.) A payroll spreadsheet shows consistent and regular earnings at the time of the injury on June 15, 2009. (Applicant's Exhibit 14.) Therefore, section 4453(c) is the appropriate subsection under which to calculate his average weekly earnings. The pertinent time frame for calculation of average weekly earnings under subsection (c)(1) is "*at the time of the injury*." That being so, reliance on subsection 4453(d)'s language that "disability indemnity benefits shall be calculated according to the limits in this section in effect on the date of injury" is unnecessary and we do not adopt or incorporate the Report's reliance on that subsection. The parties stipulated that the average weekly earnings on the date of injury, June 15, 2009, was \$814.85, producing a temporary disability rate of \$543.24. (Pretrial conference Statement, 9/18/23, entered in EAMS on 11/13/23, at p. 2, paragraph 7.)

While we acknowledge that applicant worked 10 hours per day, four (4) days per week (MOH/SOE, 3/26/24, at p. 6:5-6) and not the "five or more working days a week" noted in section

4453(c), subsection (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. Subsection (c)(2) applies where the employee works for two or more employers at or about the time of the injury; subsection (c)(3) applies to irregular rates such as piecemeal work or commission basis; and subsection (c)(4), upon which applicant relies, applies "[w]here 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).) As noted above, applicant did not work less than 30 hours per week but rather worked forty hours per week. Moreover, we are not persuaded that calculation of the average weekly earnings under subsection (c)(1) is not reasonably and fairly applied.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the May 23, 2024 Findings, Orders, and Award is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 23, 2024 Findings, Orders, and Award is **AFFIRMED, EXCEPT** as **AMENDED** below:

\* \* \*

**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, at the rate of \$543.24, beginning after the last payment of temporary disability pursuant to Labor Code 4650(b), along with increases pursuant to Labor Code 4659(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.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 16, 2024**

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

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

**PAG/abs**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I**

**INTRODUCTION**

Date of injury: Specific injury 06/15/2019 to low back, right leg, right hip, right thigh, right foot, urological system, excretory system, reproductive system, and psyche. The application was filed on 07/02/2010.

Hearings set: None set.

Age on date of injury: Age 48 on 06/15/2009.

Identity of Petitioner: Lucy Bishop, attorney for applicant Kevin Russell, Petitioned for Reconsideration of Findings, Orders, and Award and Opinion on Decision issued 05/23/2024.

Parts of body injured: The applicant had industrial injury to low back, right hip, right leg, right thigh, right foot, urological, excretory system, reproductive system, and psyche.

Occupation: Air Quality Representative, Occ Group 251.

Date of Decision: 05/23/2024

Petition for Reconsideration was filed: 06/17/2024

Timeliness: The petition was timely.

Verification: The petition was verified by an attorney.

Petitioner's Contentions: Petitioner contends that the evidence does not justify the Findings of Fact and by the order, decision, or award, the Board acted without or in excess of its powers, and the Findings of Fact do not support the Order, Decision or Award.

Applicant, by and through his attorney of record, has filed a timely Petition for Reconsideration (EAMS DOC ID 52445248) challenging the Findings of Fact, Orders, and Opinion on Decision dated May 23, 2024.

The defendant has filed an answer. The defendant argued that all of Labor Code section §4659 applied, and that Labor Code §4453(c)(1) applied over Labor Code §4453(c)(4). Use of Labor Code §4453(c)(1) is fairly and reasonably applied due to applicant being full-time on date of injury and working over 30 hours per week. Merit increases were not guaranteed and each year the applicant has to be considered for a merit increase, and therefore his increases were insufficient for calculating earning capacity.

It is recommended that reconsideration be denied.

## II

### **FACTS AND PROCEDURAL HISTORY**

The application for adjudication alleging injury to back, hips, legs, thigh, and foot on June 15, 2009 was filed on July 2, 2010 by the applicant in *propria persona*. Robin Woolsey substituted in as attorney of record on 01/18/2013. Lucy Bishop substituted in as applicant attorney on 10/08/2014.

Applicant attorney filed a declaration of readiness on August 23, 2021. Mandatory settlement conferences were held multiple times. Trial was initially set on with Judge Hill on 03/21/2022. After a few continuances the trial commenced in person with the undersigned on 08/03/2022. Trial on 09/20/2022 was in person and testimony was completed on 09/20/2022. The case was considered submitted on 09/20/2022.

The parties submitted a letter dated September 23, 2022 (EAMS DOC ID 43220905) in which they jointly requested four corrections. Three changes have been made and Amended Supplemental Minutes of Hearing and Summary of Evidence issued on 10/20/2022 (EAMS DOC ID 76011828).

Original Findings and Orders issued on November 18, 2022. The defense attorney filed a timely Petition for Reconsideration on December 7, 2022. The applicant attorney responded. Reconsideration was granted and Findings and Award and Orders, but amended to include:

5. As a result of the applicant's injury, applicant is permanently and totally disabled (100%).
7. The issue of attorney fees is deferred.

Deferred Award:

- (a) The award of permanent total disability is deferred.
- (c) The allowance of attorney fees is deferred.

The case proceeded to trial again on March 26, 2024. Findings, Orders and Award issued on May 23, 2024, finding that the permanent total disability rate was TTD rate at time of injury and applicant attorney fees were reasonably 15% of the amount of impairment awarded to be adjusted between the parties. Applicant attorney filed a timely Petition for Reconsideration on June 17, 2024 (EAMS DOC ID 52445248) and defendant filed a timely Answer on June 25, 2024 (EAMS DOC ID 52573459).

### III

#### **DISCUSSION**

In relevant part, the undersigned found the applicant's total permanent disability rate is \$543.24 per week based on average weekly wage on date of injury, 06/15/2009, and is payable after the last payment of temporary disability pursuant to Labor Code §4650(b) and applicant attorney is entitled to 15% of the impairment awarded.

The undersigned concluded that temporary total disability indemnity payments made two years or more from the date of the injury must be paid in accordance with the statutory limits in effect on the date each payment is made is inapplicable to permanent disability benefits (*Duncan v. The Singer Co.* (1978) 43 CCC 467 (*en banc*); *Crutcher v. WCAB* (1981) 46 CCC 843 (*writ denied*); *Tucker v. WCAB* (1979) 44 CCC 643 (*writ denied*); *McCarty v. Oak Grove Construction Co.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 71; *Jansen v. Folger Graphics*, 2017 Cal. Wrk. Comp. P.D. LEXIS 241). The applicant's average weekly wage on June 15, 2009 was \$814.85 producing a temporary disability rate of \$543.24.

The applicant attorney contends the following:

1. The WCJ erred in failing to acknowledge and rely upon the parties' stipulation to applicant's average weekly wage (hereinafter "AWW") and temporary total disability rate (hereinafter "TTDR") in his determination of applicant's rate of permanent total disability indemnity payments.
2. The WCJ erred in application of the provisions of Labor Code §4659(b) in determining the proper rate of applicant's permanent total disability (hereinafter "PTD") indemnity payments.

#### **PRIOR STIPULATION REGARDING AVERAGE WEEKLY WAGE**

The petitioner asserts that the sole issue raised at trial was application of the provisions of Labor Code §4659(b) and the parties repeatedly stipulated applicant's AWW at the time he first became eligible for TTD benefits was \$1,133.31 warranting a TTDR of \$755.54/week. The petitioner also asserts that Stipulations between counsel are a "substitute for proof" and binding on the parties "if within the authority of the attorneys," and on the Court if "not contrary to law, court rule or policy." (*Greator v. Board of Administration* (1979) 44 CCC 553). A stipulation is evidence just as a stipulated judgment is a decision on the merits (4 Witkin, Cal. Procedure (2d ed. 1971) Res Judicata, §170, p. 3312; *Ibid*). It was also contended that the WCALJ ignored that the stipulation becoming a fact or a "substitute for proof."



In short, the petitioner argued that no calculation was required to establish applicant's average weekly earnings as the parties stipulated to his earnings at the time of the initial trial held on August 2, 2022.

In the MOH, SOE at the trial on 08/02/2022, the stipulations read as follows (EAMS DOC ID 75789291, p. 2, stipulation 3 and 6):

Temporary total disability was paid at a rate of \$543.24 for the period January 25, 2013 to September 30, 2013. Permanent disability was paid at \$230 or \$310.50 for the period December 5, 2009 to November 19, 2020, totaling \$151,578.46. An additional permanent disability amount of \$377.54 was issued to applicant on July 30, 2022. Industrial Disability Leave was paid for the period June 30, 2009 to July 27, 2009.

In 2013, from January 25, 2013 to September 30, 2013, the applicant's average weekly earnings were \$1,133.31 with a temporary disability rate of \$755.54 per week.

There is an ambiguity in that there was no stipulation to the temporary disability earnings at the time of injury and there was no explicit stipulation to rate for permanent total disability.

In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted (CCR 10330).

Pursuant to Labor Code §5300(a), A WCALJ has authority to decide issues “For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.” Further, “The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division.” (Labor Code §5301)

The commissioners granted reconsideration (EAMS DOC ID 7641132) and issued a decision after reconsideration based on the Petition for Reconsideration and report of the WCJ and incorporated the WCJ's reasons for granting reconsideration. The award of permanent disability and allowance of attorney fees was deferred as well.

Since there was an ambiguity regarding applicant's permanent total disability rate, the WCJ had power to decide the issue and resolve the ambiguity and there was no appeal of the WCAB granting reconsideration, the stipulation to a certain rate for paid temporary total disability did not fully and finally determine the issue.

Further, “After a decision after reconsideration has become final, subsequent orders and decisions in a case shall be made by any trial level workers' compensation judge.” (CCR 10986). The undersigned, as the assigned WCJ, was required to decide the issue and make determination on the issues for which reconsideration was granted and deferred.

## **METHOD FOR CALCULATING AVERAGE WEEKLY EARNINGS FOR TOTAL PERMANENT DISABILITY**

Petitioner asserts earning capacity is the appropriate method for calculating applicant's average weekly earnings pursuant to Labor Code §4453(c)(4) given applicant received regularly scheduled, contractual and anticipated pay raises which would not be captured under any other method of calculation.

In this case, the parties stipulated to the applicant having average weekly wage on date of injury 06/15/2009 as being \$814.85 with temporary total disability rate of \$543.24. The parties also stipulated to that the applicant's monthly wage in 2013 was \$4,911.00 and this produced an average weekly wage of \$1,133.31 and a temporary disability rate of \$755.54.

The applicant started with the Bureau in March 2005 and his last day worked was in July 2020 (Further MOH, SOE p. 5 lines 14-15). Although he received cost of living increased every year he was only eligible for merit increases ever year for the first five years and every two years after that.

The applicant testified that during his employment he worked full time, 40 hours per week and was paid once a month as a salaried employee. A merit increase was not guaranteed (Further MOH, SOE p. 6 lines 5-10).

It has essentially become a question of using Labor Code §4453(c) (1) with the earnings at the time of injury or Labor Code §4453(c) (4) with earnings approximately four years after the injury. The calculation pursuant to Labor Code §4453(c)(1) and Labor Code §4453(d) produced a reliable, appropriate, reasonable and fair figure of \$543.24 for applicant's rate of temporary disability and total permanent disability.

### **APPLICATION OF LABOR CODE §4659(b)**

The petitioner argues in short that pursuant to Labor Code §4659(b) and §4453, applicant's PTDR is not fixed at the time of injury; rather, it is only limited by the statutory minimum and maximum rates in place for TTD as of the date of injury. Therefore, applicant whose earnings never exceeded the statutory maximum rates for 2009 may use the earnings capacity method of calculating his average weekly earnings for purposes of determining his PTDR.

There was no limitation of consideration of Labor Code §4659 at trial on March 26, 2024. The undersigned discussed Labor Code Section 4659(c) as it allowed for annual payment increases. In this case, the petitioner is focusing on Labor Code §4659(b) and using earning capacity pursuant to Labor Code §4453(c) (4). The calculation pursuant to Labor Code §4453(c) (1) is fairly applied in this case and reasonably represented the applicant's earning capacity at the time of the injury. The applicant did receive IDL from 06/30/2009-07/27/2009. This would have been in lieu of temporary disability benefits. His last day working was in July 2020 (Further MOH and Summary of Evidence March 26, 2024, P. 5, lines 14-15).

The petitioner cited *Grossmont Hosp. v. Workers' Comp. Appeals Ed.*, 59 Cal. App. 4th 1348 to support and argument that earning capacity method for calculating permanent total disability rate is permissible. There is additional citation to *Richard Cochran v. Ericsson, Inc.*;

*CHUBB administered by Constitution State Services, ADJ12190515 (Cochran)*, again for the proposition that earning capacity argument for permanent total disability rate is permissible.

These cases are not directly on point with the present case as *Grossmont* was solely regarding temporary disability and a change in earning while on temporary disability. The Appeals Court concluded the decision with the following: From the record, we cannot determine whether the wage increase should have been considered in awarding benefits, e.g., it is not apparent whether the wage increase was scheduled or reasonably anticipated at the time Kyllonen was injured. Moreover, the Board erred in awarding increased benefits rather than calculating one consistent benefit amount for the term of the disability. The case was remanded to the Board for further proceedings.

The additional case (*Cochran*) appears to be a highly contentious case regarding whether the records sought, i.e. earnings and earning capacity were relevant inquiries to permanent disability inquiry. As this was more of a discovery issue and discovery rights are generally liberally construed toward allowing the discovery it is not directly on point. It should be noted that the commissioner stated the following: Section 4453(c) (4) permits the use of earning capacity to calculate an applicant's average weekly wage if the other methods of computation listed in subsections (c) (1)-(3) cannot be reasonably and fairly applied.

In this case, Labor Code §4453(c)(1) combined with Labor Code §4453(d) can be fairly and reasonably applied as the applicant's earnings at the time of injury were a fair representation of his earnings, earning capacity, and reasonably calculated to reach a permanent total disability rate. He worked there for approximately four-five years and was a salaried full time employee and not otherwise irregular. The applicant's permanent total disability rate is \$543.24

It is concluded that \$814.85 is the average weekly wage on date of injury and therefore the permanent total disability rate is \$543.24.

#### IV

#### **RECOMMENDATION**

It is recommended that the applicant's Petition for Reconsideration be denied.

Respectfully submitted,

DATE: 06/28/2024

**Eric Thompson**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE