

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KIMBERLY MILLER, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF SOCIAL
SERVICES – IN-HOME SUPPORTIVE SERVICES, Legally Uninsured,
Administered By YORK RISK SERVICE GROUP, INC., *Defendants***

**Adjudication Number: ADJ12201284
Salinas District Office**

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

Defendant In-Home Supportive Services (IHSS) seeks reconsideration of the December 15, 2020 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an in-home caregiver on July 17, 2018, sustained industrial injury to her right shoulder and lumbar spine, and claims to have sustained industrial injury to her left hip. The WCJ found that applicant's average weekly earnings were \$724.05, resulting in a temporary disability indemnity benefit rate of \$482.70, which included a regular stipend that applicant received from the Department of Veterans Affairs (VA).

Defendant contends that the WCJ erred in calculating applicant's average weekly earnings, arguing that the WCJ should not have included the stipend from the VA in his calculations. Instead, defendant argues that the WCJ should have found applicant's average weekly earnings to be \$543.63, resulting in a temporary disability indemnity benefit rate of \$362.42 per week.

We have reviewed applicant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, amend the December 15, 2020 F&O, and otherwise affirm the WCJ.

FACTS

While employed by defendant as an in-home caregiver on July 17, 2018, applicant sustained an admitted industrial injury to her right shoulder and lumbar spine, and claims to have sustained an industrial injury to her left hip.

On September 16, 2020, the parties appeared for a trial on the issue of applicant's average weekly earnings. (September 16, 2020 Minutes of Hearing and Summary of Evidence [MOH/SOE], p. 2:20-22.) The parties appear to agree that applicant's average weekly earnings based on the money she received from defendant IHSS was \$543.63. The parties' disagreement stems from an additional stipend that applicant received from the VA; applicant argues that this stipend should be included in the calculation, yielding an average weekly earnings of \$724.05, while defendant argues that it should be excluded from the calculation of applicant's average weekly earnings. (*Ibid.*)

At the September 16, 2020 trial, applicant testified as follows. In 2015, applicant began providing caregiving services to a quadriplegic veteran, Mr. Maddox. (September 16, 2020 MOH/SOE, p. 3:13-14.) Mr. Maddox required specialized care for bowel, bladder, and wound issues. (*Id.* at p. 3:14-15.) The VA paid applicant an additional stipend for her services related to bowel, bladder, and wound care. (*Id.* at p. 3:15-16.) Applicant worked approximately 40 hours a week throughout the three years she provided in-home caregiving services to Mr. Maddox. (*Id.* at p. 4:12-13.)

On July 17, 2018, applicant sustained her admitted and claimed industrial injury while falling down the stairs. (September 16, 2020 MOH/SOE, p. 3:20-22.) On September 11, 2018, Mr. Maddox died. (*Id.* at p. 3:20.)

In February 2019, applicant had to stop working due to the effects of her July 17, 2018 injury. (September 16, 2018 MOH/SOE, p. 3:21-23.) Applicant began receiving temporary disability indemnity benefits on April 24, 2019. (*Id.* at p. 2:9-10.)

Applicant received the VA stipend only in connection with her caregiving services for Mr. Maddox. (September 16, 2018 MOH/SOE, pp. 3:23-4:1.) She did not receive a VA stipend for any clients before she began caring for Mr. Maddox, and she did not receive a VA stipend for any clients after Mr. Maddox died. (*Id.* at p. 4:1-6.)

On December 15, 2020, the WCJ issued his F&O, in which he used applicant's proposed method for calculating applicant's average weekly earnings.

Defendant timely sought reconsideration, contending that the WCJ erred in including applicant's VA stipend in calculating applicant's average weekly earnings.

DISCUSSION

An injured worker's rate of temporary total disability indemnity benefits is calculated as two thirds of the worker's average weekly earnings at the time of the injury. (Lab. Code, § 4653.) Where the injured worker is employed "for 30 or more hours per 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).) Where the injured worker is employed by "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).) Where the injured worker is employed "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).)¹

In the matter before us, applicant argues that her average weekly earnings should be calculated using the method set forth in section 4453, subsection (c)(1), while defendant argues that applicant's average weekly earnings should be calculated using the method set forth in section 4453, subsection (c)(2). The WCJ appears to favor either section 4453, subsection (c)(1) or section 4453, subsection (c)(4).

As an initial matter, we reject defendant's argument that the stipend that applicant received from the VA created an employment relationship between applicant and the VA. Section 4453, subsection (c)(2) is therefore not the correct method for calculating applicant's average weekly earnings. Instead, we agree with applicant and the WCJ that the method set forth in section 4453, subsection (c)(1), is the correct one for calculating average weekly earnings here.

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

We do not agree, however, that applicant's average weekly earnings should include the VA stipend. Applicant's temporary disability indemnity rate should reflect what her earning capacity would have been during the period of disability but for the injury. (*Argonaut Ins. Co. v. Ind. Acc. Com. (Montana)* (1962) 57 Cal.2d 589, 594-595 [27 Cal.Comp.Cases 130].) Here, although applicant sustained her injury on July 17, 2018, she did not stop working because of the injury until February 2019, and she did not begin receiving temporary disability indemnity benefits until April 24, 2019. By the time she ceased working, Mr. Maddox had died, and applicant was no longer able to receive the VA stipend. It was thus Mr. Maddox's death, and not applicant's inability to perform her job because of her industrial injury, that led to the termination of applicant's VA stipend. Moreover, applicant has testified that she had never received the VA stipend either before or after her time working with Mr. Maddox. Including the VA stipend in applicant's average weekly earnings would not reflect applicant's earning capacity accurately. (See also *Herman v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 396 (writ denied) (reasonable to exclude an injured worker's history of higher earnings in calculating average weekly earnings based on actual earnings at the time of injury where evidence showed that the earlier higher earnings were no longer available due to changes in the economy).)

In this regard, we disagree with the WCJ's analysis of *Grossmont Hospital v. Workers' Compensation Appeals Board* (1997) 59 Cal.App.4th 1348 [62 Cal.Comp.Cases 1649]. Under *Grossmont Hospital*, “[w]here a wage increase or decrease is scheduled or would be reasonably anticipated during the anticipated duration of the disability, that increase or decrease is a factor that should be taken into account in calculating earning capacity under section 4453, subdivision (c)(4).” (*Grossmont Hospital*, 59 Cal.App.4th at 1363.) Here, while the termination of the VA stipend was not necessarily scheduled, it was reasonably to be anticipated; applicant had no expectation that the VA stipend would continue once Mr. Maddox died, and applicant had no other clients, either before Mr. Maddox or after his death, for whom she received the VA stipend.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 15, 2020 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 15, 2020 Findings and Order is **AFFIRMED**, **EXCEPT** that Finding of Fact No. 2 is **AMENDED** as follows:

FINDINGS OF FACTS

2. At the time of injury, applicant's average weekly wage was \$543.63, entitling her to a temporary disability rate of \$362.42 per week.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE ZALEWSKI, CHAIR

I DISSENT (see attached dissenting opinion)

/s/ KATHERINE DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2021

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

**KIMBERLY MILLER
RUCKA, O'BOYLE, LOMBARDO & MCKENNA
MACINTYRE & WHITE**

REB/*pc*

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

DISSENTING OPINION OF COMMISSIONER DODD

I dissent.

I would include applicant's VA stipend in the calculation of her average weekly earnings for several reasons. First, Labor Code section 4453, subsection (c)(1), requires that an injured worker's average weekly earnings be calculated as of "the time of the injury." (Lab. Code, § 4453(c)(1).) At the time of applicant's injury – that is, the date on which applicant sustained her injury – she was receiving the VA stipend. The plain language of the statute requires that this sum be included in calculating applicant's average weekly earnings. In this regard, I note that if applicant had a second job as of the day of her injury, such that the wages from that second job should be included when calculating her average weekly earnings, it would not matter if the second employer stopped operating after applicant's date of injury. Second, applicant testified that she was eligible to receive the VA stipend because she had gone through special training with a VA doctor to learn how to provide bowel, bladder, and wound care. (September 16, 2020 MOH/SOE, p. 3:17-29.) These skills should be accounted for in determining her future earning capacity. Finally, applicant had been providing in-home caregiving services to Mr. Maddox for three years prior to her injury, with some breaks for Mr. Maddox's hospitalizations, and received the VA stipend throughout this time. Calculating her average weekly earnings without including the VA stipend will yield a result that does not accurately reflect what applicant actually earned over the three years preceding her injury on an average weekly basis.

Additionally, I disagree with the majority's conclusion regarding how *Grossmont Hospital v. Workers' Compensation Appeals Board* (1997) 59 Cal.App.4th 1348 [62 Cal.Comp.Cases 1649] applies to this case. The majority reasons that, because applicant had no other clients for whom she received the VA stipend, the termination of the stipend was reasonably to be anticipated. But it could just as easily be speculated that, because of applicant's specialized training in bowel, bladder, and wound care, she would be a more competitive candidate to provide these services again, and could reasonably anticipate being hired to provide caregiving services to another veteran.

For these reasons, I would affirm the WCJ's December 15, 2020 Findings and Order.



WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE DODD, COMMISSIONER

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**KIMBERLY MILLER
RUCKA, O'BOYLE, LOMBARDO & MCKENNA
MACINTYRE & WHITE**

REB/*pc*

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