WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

OLGA MAGANA, ***Applicant***

vs.

PARTNERS PERSONNEL MANAGEMENT SERVICES;
LIBERTY MUTUAL INSURANCE COMPANY, administered by CORVEL, ***Defendants***

Adjudication Number: ADJ19747880
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant filed a Petition for Reconsideration (Petition) of the Findings and Order (F&O) issued August 4, 2025, wherein the workers compensation judge (WCJ) found in pertinent part that applicant's average weekly wage is $445.03 by applying Labor Code section 4453(c)(4).[1]

In the Petition, applicant asserts the use of section 4453(c)(1) is mandatory and results in average weekly earnings of $640.00.

Defendant has filed an Answer.

The WCJ's Report and Recommendation (Report) recommends the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons discussed below and for the reasons stated in the WCJ's Report, we will deny reconsideration.

I.

Former section 5909 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. (Former Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

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

> (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.
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> (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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(Lab. Code, § 5909.)

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 27, 2025, and 60 days from the date of transmission is Sunday, October 26, 2025. The time limit is also extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here October 26, 2025, is a Sunday which by operation of law means this decision is due by the next business day, which is Monday, October 27, 2025. This decision issued by or on October 27, 2025, 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.

According to the proof of service, the Report was served on August 27, 2025, and the case was transmitted to the Appeals Board on August 27, 2025. 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 27, 2025.

II.

As found by the WCJ in the August 4, 2025, F&O, applicant, while employed on July 13, 2024, by defendant as a production worker, sustained injury to the back and shoulders.

Applicant asserts the sole way to calculate earnings for her case is through section 4453 subsection (c)(1), because she worked 5 days a week, 8 hours a day, for 40 hours a week. Applicant further asserts that her average weekly earnings are $640.00 based on an hourly rate of $16.00. (Petition, page 2, lines 19-21.)

When calculating average earnings for benefit purposes section 4453 provides in relevant part:

> (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.
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> (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)(1) and (c)(4), emphasis added.)[2]

Although it might appear there is demarcation in approach between employment for 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 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

[2] Subsection two of section 4453(c) involves work for two or more employers while subsection three addresses work at an irregular rate, neither of which applies to the case at hand. (Lab. Code, §§ 4453(c)(2) and (c)(3).)

> 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].)[3]

"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*, page 896, emphasis added.)

At trial applicant testified through an interpreter that she "applied for a full-time job" with defendant temporary staffing agency, that she was hired for "a long period of time" through the agency at the location where she was injured, and that the staffing agency did not tell her when this assignment ended. Applicant also "confirmed that *she was told assignments would be temporary* at the time she signed up with" defendant. (Minutes of Hearing and Summary of Evidence (MOH), May 21, 2025, page 4, lines 17-19, 22-25, page 6, lines 1-2, emphasis added.)[4]

Applicant was not employed in a permanent position with defendant as she was employed through a temporary agency, has a history of working through temporary agencies, and admitted she was told assignments would be temporary. Although she worked 30 or more hours per week and five or more days per week, that is not the whole story and further evaluation under section 4453(c)(1) is required.

Here applicant seeks to use section 4453(c)(1) as both sword and shield to reach a desired outcome and avoid the more comprehensive analysis required in *Goytia*, *supra*. Applicant cites three cases to that end. (Petition, page 4, line 20 to 5, line 14.) None of the cases cited are helpful to applicant and instead illustrate the need to fully review the facts of each case. (*John Livacich-*

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[3] 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 remanding again to have applicant's post-injury earnings considered in keeping with its' original decision. (*Goytia v. Workers' Comp. Appeals Bd*. (1970) 6 Cal.3d 660 [37 Cal. Comp. Cases 104].)

[4] Although defendant's answer makes multiple references to a "temporary assignment acknowledgement," this document is entirely in Spanish, with no translated copy appearing in the record. (Exhibit E.) We are unable to consider this document without a translated version. As our decision rests on the substantial evidence of record, we do not discuss Exhibit E further.

Inada Ranches v. WCAB (*Barajas*) (1978) 43 Cal.Comp.Cases 1148 (writ denied), earnings based on facts applicant worked all year round as a permanent (seasonal) employee and would still be working if he had not been injured; *Herman v. WCAB*, (1966) 61 Cal.Comp.Cases 396, (writ denied), no evidence concerning applicant's education or her specific job skills, other than prior work in appraisal of real estate, the real estate appraisal market was poor thus earnings in that business would be misleading, and the best predictor of earnings was applicant's current job as photo lab technician; *California Compensation & Fire Co. v. IAC*, (*Colston*) (1962) 57 Cal. 2d 598, [27 Cal.Comp.Cases 135], in calculating earnings it was reasonable to conclude the employee would have been steadily employed on the project during the time he was disabled.)

Here, applicant was employed at the time of her injury through a temporary agency, and, as applicant concedes, her employment assignments were temporary in nature. This was not permanent, full-time employment. Due to applicant's employment clearly being a temporary assignment, the first three subsections of 4453(c) are "methods of arriving at the average weekly earnings [that] cannot reasonably and fairly be applied" and we must look to "all the surrounding circumstances and conditions disclosed by the evidence." (Lab. Code, § 4453(c)(4); *Goytia*, *supra*, page 896.)

Applicant testified at trial to a work history including working around the year 2015 for Magic Laundry. This employment may have been a position provided by the Aevitas Agency and lasted approximately six years, until a workers' compensation injury left her off work for about two years. (MOH, page 6, line 19 to page 7, line 2.) The applicant then worked for a short period, possibly with KBS Staffing, which resulted in a 2018 work injury for which she was off work approximately one year. (MOH, page 6, lines 15-18.) It appears the applicant then worked through either Elite or KBS staffing agencies at a garment-related job for approximately six months until the season ended and the work slowed down. Applicant next may have worked approximately nine months involving cosmetics through a staffing agency named Empire Workforce. In this employment she had a work injury in 2021 that was settled in 2023. (MOH, page 6, lines 4-15.)

Applicant did not work for approximately two years before beginning employment with defendant. This was at least partially because of her prior work injury as well as because she was taking care of her grandchildren. (MOH, page 6, lines 3-8, line 21-23.)

Applicant applied for a position at defendant, temporary staffing agency Partners Personnel Management, around May of 2024. Although applicant applied for a full-time job, applicant later confirmed she was told assignments would be temporary. (MOH, page 4, lines 17-19, page 6, lines 1-2.) Applicant's first job was at Porto's and she may have worked two or three days to cover a sick employee's position. (MOH, page 4, lines 20-21, page 5, lines 16-22.) After this job it was approximately two weeks before applicant was assigned to a different location. (MOH, page 5, lines 23-25.)

The applicant then worked at Kitsch LLC, where she sustained the current industrial injury. Applicant testified she received her last earnings on July 28, 2024, she stopped working because work within her restrictions was no longer available, and she would have continued working if work was available. (MOH, page 5, lines 8-10.)

Applicant submitted three pay stubs from both before and after applicant's injury which show weekly earnings of $640.00. (Exhibits 1, 2, and 5.) Applicant testified two additional paystubs submitted that show the lesser amount of $512.00 per week were the result of not being paid on a day when attending a medical appointment. (Exhibits 3 and 4; MOH, page 5, lines 5-7.)

Defendant submitted an undated wage statement and an assignment history printout dated July 18, 2024. (Exhibits B and F.) As relevant here the documents confirm applicant's assignment to Portos' working 15.98 hours sometime between May 28, 2024, and June 7, 2024, resulting in total gross pay of $297.57.

The WCJ noted "[a]pplicant's testimony regarding her employment circumstances with [defendant] was not entirely credible as there were multiple incidents wherein she conceded her initial testimony was either inaccurate or incorrect." (Report, page 3.) When calculating average weekly earnings the WCJ properly focused "on the undisputed facts of this case." (F&O, page5.) We give 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, 319 [35 Cal.Comp.Cases 500].)

In the F&O the WCJ found applicant's average weekly earnings to be $445.03. (F&O, page 2, Finding 3.) In reaching this amount the WCJ considered the record and concluded applicant's earnings capacity was best represented by earnings from a closed period consisting of work both before and after injury. This period was appropriate because of applicant's recent return to employment after a two-year absence, the temporary nature of her work, and the limited earnings information before the date of injury. In doing so the WCJ considered applicant to have worked the last two days applicant was assigned to work at Porto's, June 6 and 7, 2024, through her last paid day working light duty with defendant, July 28, 2024. The period of June 6, 2024, through July 28, 2024, is 53 days. Crediting applicant with one day unpaid wages of $128.00 for the day of injury, the WCJ used gross earnings for this period of $3,369.53. Dividing the gross wages by 53 days and multiplying by 7 days in a week yielded average weekly earnings of $445.03.

Here, the WCJ properly arrived at applicant's average weekly earning capacity by looking to "all the surrounding circumstances and conditions disclosed by the evidence." (*Goytia*, *supra*, page 896.) This amount reasonably represents the average weekly earning capacity of the injured employee at the time of her injury, due consideration being given to her actual earnings from all sources and employments. (Lab. Code, § 4453(c)(4).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 27, 2025

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

OLGA MAGANA
LAW OFFICES OF VICTOR SARGAZY
GOLDBERG SEGALLA

PS/oo

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