WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GABRIEL RIVERA LEON, ***Applicant***

vs.

ACES; REDWOOD FIRE & CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ13667342
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued on March 27, 2026, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that while employed by defendant on April 22, 2020, applicant sustained injury arising out of and in the course of employment (AOE/COE) to multiple body parts; that applicant's earning potential increased twice during the time period April 2020 thru April 2022; that applicant is entitled to the differential between the rate paid by the defendant and the rate calculated based on his earning potential; that applicant is entitled to unpaid temporary total disability and that applicant's attorney is entitled to a fee of 15% thereon. The WCJ also made a finding as to applicant's 'post injury, long term earnings potential.'

Defendant contends that the WCJ erred in finding that applicant's earning potential and temporary disability rates increased over time; that the earning potential calculation for the purposes of permanent disability was incorrect; that applicant is not entitled to unpaid temporary total disability; and that his attorney is not entitled to a 15% fee. Defendant argues that the evidence presented does not support these findings because applicant did not provide specific, demonstrable evidence of his intention to pursue higher education in order to work as a supervisor; he has not provided substantial evidence that the employer had scheduled annual raises at the time of the injury; and the reporting of applicant's vocational consultant did not provide substantial evidence of applicant's potential earnings.

We have received an Answer from applicant.

The WCJ prepared a Report and Recommendation (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. We have also reviewed the trial transcript from January 5, 2026, the second day of trial. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the March 27, 2026 F&A, and return this matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant sustained injury to his head, brain, face, eyes, ribs, psyche, upper extremities, bladder, hypertension, teeth, liver, pulmonary, spleen, and right lower extremity as the result of a motor vehicle accident on April 22, 2020, while employed by defendant as an Applied Behavioral Analysis (ABA) therapist. (9/30/20 Application, at pp. 1-9.)

The January 19, 2022 report from Qualified Medical Evaluator (QME) in Neurology, Kenneth H. Geiger, M.D., indicated that applicant began working for defendant on October 2018, as a therapist for individuals with mental disabilities. (Applicant's Exh. 13, Dr. Geiger PQME Report, at p. 3.) He was injured in a car accident on April 22, 2020, when he was driving between worksites. (*Ibid*.) His initial diagnoses included traumatic brain injury, multiple facial fractures, C-spine fractures, pulmonary contusions, pneumomediastinum, rib fractures, blunt abdominal trauma, liver injury, splenic injury and adrenal gland hemorrhage; he was in a coma for a month after the accident; and he went through multiple surgeries. (*Id*. at pp. 3-6.) On August 19, 2020, clinical neuropsychologist Elizabeth Cisneros, Ph.D., diagnosed applicant with diffuse traumatic brain injury with loss of consciousness greater than 24 hours with return to pre-existing consciousness; cognitive deficits due to cognitive brain injury; memory impairment; attention and concentration deficits; cognitive communication deficit; psychomotor deficit; and frontal lobe executive function deficit. (*Id*. at pp. 14-15.) Applicant received intensive treatment at Casa Colina Hospital for the first five months after the accident, including 5-day per week physical therapy, occupational therapy and speech therapy, G-tube feeding, and pain management. (*Id*. at pp. 17-20.) In September 2020, he was transferred to Casa Colina's Transitional Living Center, where his initial evaluation indicated that he had " progressed well and …would benefit from a post-acute brain injury program to continue with rehabilitation and community reintegration prior to returning home." (*Id*. at pp. 20-22.) Dr. Geiger wrote that applicant's present status, in 2022, includes cognitive difficulties, short-term memory reduction, seizure disorder, weakness on his right side, causing a right foot drop when fatigued, and an abnormal gait. (*Id*. at pp. 31-44.) Dr. Geiger indicated that applicant "has probably reached a level of Maximum Medical Improvement for a neurological perspective" but highlighted that he was not provided with most of the medical records from the "initial, acute hospitalization." (*Id*. at 38.)

On January 12, 2022, applicant was discharged from Casa Colina Transitional Living Center. (Applicant's Exh. 7, Casa Colina Discharge Summary, 1/17/22.)

In his supplemental report of September 30, 2022, after reviewing the remaining medical records, Dr. Geiger concluded that "this patient has probably reached a level of Maximum Medical Improvement form a neurological perspective…" and that, based on Dr. Robert Tomaszewski's evaluation, further improvements in applicant's neuropsychological status were likely over the next 6-12 months. (Applicant's Exh. 18, Dr. Geiger 9/30/22 supplemental report, at p. 52.)

Robert Tomaszewski, Ph.D., conducted an initial neuropsychological examination of applicant on July 7, 2022 and a follow up on December 12, 2022. (Applicant's Exh. 19, Dr. Tomaszewski 12/12/22 report, at p. 1.) In the latter report, Dr. Tomaszewski listed applicant's diagnoses as: mild neurocognitive disorder due to traumatic brain injury; diffuse traumatic brain injury, with loss of consciousness of >24 hours without return to preexisting conscious level with patient surviving; Pseudobulbar Affect Disorder; adjustment disorder with mixed anxiety and depressed mood, persistent and Insomnia Disorder. (*Id*. at p 11.) Dr. Tomaszewski concluded that applicant's "neuropsychological disability status is most likely permanent and stationary and has reached maximum medical improvement" and that his impairments are 100% apportioned to the April 22, 2020 industrial injury. (*Id*. at pp. 12-13.)

An expedited hearing on the issue of further medical treatment was held on December 16, 2024. (12/16/24 Minutes of Hearing, at pp. 1-2.) The parties stipulated to employment, to applicant's injuries AOE/COE, and that employer had furnished some medical treatment. (*Id*. at p. 2.) On February 11, 2025, the WCJ issued a Findings and Award, in which he found, in pertinent part, that applicant, while employed by defendant on April 22, 2020, sustained injury AOE/COE to his head, brain, face, eyes, ribs, psyche, upper extremities, bladder, hypertension, teeth, liver, pulmonary, spleen, and right lower extremity; that his need for home health aide services was found reasonable and necessary on August 29, 2024; that applicant's condition and need for home health aide services have remained unchanged since that time; that defendant failed to make the required showing of changed circumstances that would permit it to terminate the home health aide services; and that applicant is entitled to further medical treatment in the form of home health aide services; and ordered that such services are awarded. (2/11/25 F&A.)

The matter proceeded to a second expedited hearing on December 11, 2025, and January 5, 2026. (12/11/25 Minutes of Hearing and Order to Appear; 1/5/26 Minutes of Hearing (further) and Summary of Evidence.) The parties stipulated to employment; to injury AOE/COE as previously determined; that defendant paid temporary total disability at the weekly rate of $287.26 from April 23, 2020 to April 20, 2022, and permanent disability at the rate of $287.26 from April 21, 2022 to the present; that employer has furnished some medical treatment and that applicant's primary treating physician is Dr. Sangnil. (12/11/25 Minutes of Hearing, at p. 2) The issues for trial were listed as:

1. Earnings: Employee claiming $1,630.85 per week, based on earning capacity and Ray Largo; Employer claiming $430.89, based on wage records and Kelly Winn.

2. Temporary disability, employee claiming the differential from the period of 4-23-2020 to 4-20-2022.

3. Attorney fees.

(*Ibid*.)

Applicant's testimony, as well as that of three other witnesses, was heard on the second day of trial on January 5, 2026. (1/5/26 Minutes of Hearing and (further) and Summary of Evidence; 1/5/26 Reporter's transcript.)

Applicant testified in pertinent part as follows. He is 29 years old, he graduated from UC Irvine in 2018, and he graduated in four years with a double major in Criminology and Psychology. (1/5/26 Reporter's Transcript, at pp. 28-31.) He explained that he "wanted to help society" without being a police officer, "so I wanted to find other jobs within those fields to help out" and make a difference in the world. (*Id*. at pp. 31, 42.) He had a plan to get a master's degree, but had not yet applied, although it was his intention to work in the field of ABA therapy, and then at some point to apply to get his master's. (*Id*. at pp. 32, 39.) If he hadn't been in the car accident, he would have gone ahead and obtained a master's degree. (*Id.* at pp. 33, 47.) He paid off his student loans, and he had always worked since high school. (*Id*. at pp. 33-35.) He was 22 when he graduated from college and 24 at the time of the accident. (*Id*. at pp. 35-36.) He started working at ACES within a few months of his graduation, and he accepted a part-time position there because he was "getting my foot in the door." (*Id*. at pp. 38-39.) It was his intention to work at ACES and then continue to earn income so he could help pay for his master's degree eventually. (*Id*. at p. 40.) He would not have been satisfied making $16.50 per hour for the rest of his life. (*Ibid*.) His goals were to oversee a larger program and help more children, and to work full time at ACES. (*Id*. at pp. 43, 45.) He worked as a coach at Soccer Shots to supplement his income while he was working at ACES. (*Id*. at pp. 43-44.) He believed that if the accident hadn't happened, he would have worked as a supervisor at ACES, after getting his master's. (*Id*. at p. 47.) On cross-examination, applicant stated that he doesn't recall what subject he would get his master's degree in. (*Id*. at p. 49.) He never looked into financial aid, since his family members told him he wouldn't be eligible. (*Id*. at pp. 49-50.)

Fatima Danishwar testified that she was a board certified behavior analyst (BCBA) clinical supervisor at ACES from November 2019 to October 2021, that she worked with applicant for a one year period, when he was a part-time registered behavior technician (RBT), that she observed him to be an "excellent" employee because he was open to feedback, creative in his work with autistic clients, very communicative, very good to supervise, and showed passion, drive and willingness to work. (*Id*. at pp. 5-10.) She testified further that based on her observations, but not on availability of positions, applicant had the potential to work full-time in this field. (*Id*. at p. 11.) She herself had discussions with her manager about being promoted, but she never saw any RBTs be promoted to full-time work, and she did not observe any job openings with ACES in 2020, but there was high demand for RBTs at that time. (*Id*. at pp. 12-14.) She stated that she would hire applicant for full time work, if she had the opportunity, including as an RBT or a supervisor. (*Id*. at p. 15.) She believed that applicant "had what it took to be a supervisor." (*Id*. at p. 16.) She indicated that a lot of employees at ACES started part-time and then became full-time. (*Ibid*.) She herself had annual performance reviews and pay increases while at ACES. (*Id*. at p. 17.) Applicant had a number of very positive "employee praise" notes in his file. (*Id*. at pp. 17-19.) She testified that she believed applicant would make more than $16.50 per hour in this field, and that he would be “moving up.” (*Id*. at pp.19-20.) On cross-examination, she stated that applicant would have needed additional qualifications to become a supervisor and was not eligible to be a BCBA without being in a master’s program, but ACES had a program where an employee can be in school getting a master’s degree while working in a BCBA-in-training capacity. (*Id*. at pp. 21-22.) She doesn’t know anyone at ACES who was part-time and became full-time. (*Id*. at p. 22.)

Khanh Le testified that she was applicant’s co-worker at ACES, she worked there as a supervisor, she has a master’s degree in applied behavioral therapy, and that her role when she started at ACES was 30 hours per week, which was considered full-time. (*Id*. at pp. 53-57.) There is a high demand in the field of behavioral therapists, as evidenced by the client waiting list. (*Id*. at p. 59.) When asked about starting salaries for supervisors at ACES, in 2023 or 2024, she indicated that a salary of $77,000 to $82,000 was “high” for someone with a master’s degree and was “appropriate” for someone who was in a BCBA position. (*Id*. at pp. 59-60.) The BCBA position requires a bachelor’s degree, a master’s degree, a certain number of field hours, and passing an exam. (*Id*. at pp. 60-61.) Applicant had passed the exam to be an RBT. (*Id*. at p. 61.) Ms. Le’s experience with applicant was that he was punctual, willing to learn, accepted feedback, was motivated to make a difference for his clients and was qualified to work in this field. (*Id*. at pp. 61-62.) Before the accident, he had the desire to continue to work in this field. (*Id*. at p. 62.) In his work with the one client that applicant shared with Ms. Le, applicant implemented recommended procedures and was receptive to learning and applying what he learned. (*Id*. at p. 64.) She indicated that she could not answer the question of whether applicant “had a career in this field” because she didn’t supervise him enough to know, nor could she answer how well he would have done in his job after a master’s degree. (*Id*. at pp. 67-69.) She stated there was “potential” for him to have earned $70,000. (*Id*. at p. 69.) She indicated that in 2024, the starting pay at ACES was $21 to $25 per hour. (*Id*. at p. 70.) She admitted on cross-examination that she worked with applicant for only one year, saw him three to four times during that year, and never talked to him about his career path. (*Id*. at p. 72.)

Defendant called Dika Karakashian Mazmanian, the associate director of human resources (HR) for ACES, who testified that in 2020 she was the HR manager. (*Id*. at pp. 75-76.) Applicant’s job was generally a part time position, and its “very rare” for behavioral interventionists to become full time. (*Id*. at pp. 77-78.) To move up to a BCBA position, “you would need to have completed your master's, completed your practicum, and then sat and passed your BCBA exam." (*Id*. at pp. 79-80.) The master's takes about two years, the practicum is typically one year, but it depends on the employee, and some people start but don't finish the program, or take but don't pass the test. (*Id*. at p. 80.) ACES does not guarantee employment as a BCBA for someone who completes the training. (*Ibid*.) From 2018 to 2020, there were no scheduled wage increases, other than those based on minimum wage; other wage increases were discretionary. (*Id*. at p. 83.) Behavioral interventionists make rate 1 when working with clients, and rates 2 or 3 when doing training, administrative or other work. (*Ibid*.) The $16.50 that applicant was hired at was rate 1, the other rates were $13 per hour, in 2020. (*Id*. at pp. 83-84) When asked if applicant would be entitled to raises based on her review of his employee file, Ms. Le answered that she does not know, because it's not her role to make those decisions. (*Id*. at pp. 89-90.) She has no opinion about what applicant could have made if he continued to work at ACES, nor how many hours he would have worked. (*Id*. at p. 90.) She has never met applicant and is not aware of his qualifications, goals, nor whether he wanted to get a master's degree. (*Id*. at pp. 90-91.)

The matter was submitted on January 5, 2026. The WCJ issued the Findings of Fact and Award (F&O) on March 27, 2026, as described above.

Defendant's Petition followed.

DISCUSSION

I.

Former Labor Code section 5909[1] 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.) Effective July 2, 2024, section 5909 was amended to state 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.
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> (b)
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> (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.

[1] All section references are to the Labor Code, unless otherwise indicated.

> (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), 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 May 5, 2026 and 60 days from the date of transmission is Saturday, July 4, 2026**.** The next business day that is 60 days from the date of transmission is Monday, July 6, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, July 6, 2026, 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 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 May 5, 2026, and the case was transmitted to the Appeals Board on May 5, 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) 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 May 5, 2026.

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[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

The Workers' Compensation Act provides for temporary and permanent disability indemnity. (Lab. Code, § 4650 et seq.) We first address the findings and award regarding temporary disability indemnity. 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].) The calculation of an award of temporary disability requires (1) a determination of the employee's average weekly earnings (which may be based on various calculations, including actual earnings or on earnings capacity), (2) the application of the minimum and maximum disability rates, and (3) a determination of the period the employee was temporarily totally disabled.

Section 4453, subdivision (c), provides four methods to calculate average weekly earnings. (Lab. Code, § 4453(c)(1)-(4).) As relevant here, section 4453(c) provides:

> (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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> …
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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).)

Subdivision (c)(1) thus provides for temporary disability calculations where the applicant is regularly employed on a full-time basis, and the subdivision uses the applicant's regular earnings at the time of injury as the metric for temporary disability calculation. Subdivision (c)(4) on the other hand provides an alternative calculation where the work at the time of injury is part-time, irregular, or the applicant's earnings at the time of injury "cannot reasonably and fairly be applied."

In *Goytia v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 889 [35 Cal.Comp.Cases 27] (*Goytia*), the California Supreme Court distinguished between the various approaches to calculating average earnings as follows:

> The language of the statute leads to two conclusions: first, average weekly earnings under subdivision [(c)(4)][3] differs from average weekly earnings under the other three subdivisions; subdivision [(c)(4)] applies "where the employment is for less than 30 hours per week, or where for any reason the foregoing methods … cannot reasonably and fairly be applied." Since the prior three subdivisions calculate average weekly earnings solely on the basis of prior earnings, the statute apparently contemplated that prior earnings are not the sole basis for the determination of earning capacity or average weekly earnings under subdivision [(c)(4)].
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> Secondly, subdivision [(c)(4)] states that in determining average weekly earning capacity the appeals board should give "due consideration" to actual earnings "from all sources and employments." Pre-injury earnings constitute one factor, but not the exclusive factor, in determining such earnings. The subdivision in alluding to earning "capacity" must necessarily refer to earning potential which may not, and probably will not, be reflected by prior part-time earnings.

(*Id.* at p. 895.)

Thus, our inquiry in this matter is necessarily factual in nature and must give due consideration to applicant's past earnings in predicting earning capacity. However, a determination of what an employee's earnings would have been had he not been injured also requires consideration of additional factors, including applicant's age and health, willingness to work, skill and education, and the general condition of the labor market. (*Goytia, supra*, 1 Cal.3d at p. 895; *Argonaut Ins. Co. v. I.A.C.* (*Montana*) (1962) 57 Cal.2d 589, 594 [371 P.2d 281].)

In *Grossmont Hosp. v. Workers' Comp. Appeals Bd.* (*Kyllonen*) (1997) 59 Cal.App.4th 1348, 1362 [62 Cal.Comp.Cases 1649], the Court held that in calculating total temporary disability benefits, "application of the section 4453, subdivision (c)(4) earning capacity method is appropriate where for any reason the application of the actual earnings methods is not reasonable and fair." The Court explained that:

> Where 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).

(*Ibid.*)

In determining the temporary disability benefits that are due,

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[3] The original text in *Goytia* refers to former Labor Code section 4453, subdivision (d), which has since been redesignated as subdivision (c)(4).

> …[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 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.* Once the Board makes an award for temporary disability, the third sentence of section 4453, subdivision (d) mandates it remain constant unless changed pursuant to section 4661.5.

(*Id*. at p. 1363, emphasis added.)

Here, the WCJ noted in the Opinion on Decision that applicant worked fewer than 30 hours per week and concluded that section "4453(c)(4) is the appropriate method for calculating the applicant's average weekly earnings." (3/27/26 Opinion on Decision, at p. 8.) In applying that subdivision to determine temporary disability benefits, the WCJ considered evidence of applicant's wages at the time of his accident (from his employment with defendant, and his additional employment with Soccer Kids), as well as the evidence of an average $1.40 per hour wage increase each year at ACES. (*Id*. at pp. 8-9.) Based on this evidence, and the evidence that "applicant was an exceptional employee" the WCJ calculated that applicant's earning potential was $430.89 per week for the period of April 23, 2020 to August 31, 2020; $459.13 per week for the period of September 1, 2020 to August 13, 2021; and $487.37 per week for the period of September 1, 2021 to April 20, 2022. (F&A, findings 3, 4 and 5; Opinion on Decision, at pp. 8-9.)

We agree with the WCJ that an earning capacity analysis, pursuant to section 4453, subdivision (c)(4), is the correct approach to determine earning potential or average weekly wage for temporary disability purposes in this matter. (Lab. Code, § 4453(c)(4); *Goytia, supra,* 1 Cal.3d at p. 895.) Only section 4453, subdivision (c)(4), provides a fair and reasonable way to calculate applicant's average weekly wage, when he was employed by multiple employers, part-time, at the time of injury.

We conclude, however, that there is no adequate legal basis for the WCJ's reliance on an escalating scale of wages for the applicable time period. The Court in *Grossmont* addressed a situation, such as the one here, where, it would be "unreasonable or unfair to use actual wages to calculate temporary disability benefits" and required that when "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" those factors must be considered "to calculate *one sum* that represents a fair and reasonable estimate of average weekly earning capacity for the anticipated duration of the disability." (*Grossmont Hosp.*, *supra*, 59 Cal.App.4th at p. 1363, emphasis added.) Citing section 4453, subdivision (d), the Court in *Grossmont* also indicated that an award of temporary disability must "remain constant" unless changed pursuant to section 4661.5. (*Ibid*, citing §§ 4453(d) and 4661.5.)

Thus, instead of relying on the three distinct, escalating wage amounts for the temporary disability time period, as the WCJ did here, the law requires that "one sum" be calculated, that fairly and reasonably estimates applicant's average weekly earning capacity. As the WCJ pointed out, the evidence here "showed that ACES had an annual review policy that served as the basis for wage increases for employees in good standing" and "demonstrated that the applicant was an excellent employee, and, as such, it is reasonably anticipated that, at the time the applicant was injured, he would have received an annual increase under the annual review policy." (Report, at p. 8.) The evidence also indicates that applicant was working three part-time jobs at the time he became disabled: at ACES, at Soccer Shots, and as a delivery driver for Door Dash. (Applicant's Exh. 51, at p. 12.) Between the three positions, he worked seven days per week. (*Id*. at pp. 12-14.) Thus, the evidence supports an award at the highest of the three rates, for the entire period of temporary total disability. We will return this matter below for the WCJ to find a single, short-term average weekly wage and award all temporary disability indemnity at that rate.

III.

Turning to permanent disability, we note that 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(a).) 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).) For permanent disability, similar to temporary disability, the method of computation of the average weekly wage 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].)

As the WCJ correctly noted, "In calculating the applicant's earning capacity" for the temporary disability and permanent disability time periods, "the calculations reached are not necessarily the same." (Opinion on Decision, at p. 8; *Argonaut*, *supra*, 57 Cal.2d at p. 594 ["Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award….In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time."].)

The Supreme Court in *Argonaut*, *supra*, observed that in arriving at a realistic appraisal of earnings:

> An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured … 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 … [All] facts relevant and helpful to making the estimate must be considered [citations].
>
> The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant."

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

In *Rubalcava*, the Court of Appeal considered a situation similar to the present case, in which a 19-year-old student and part-time pizza shop employee suffered an industrial finger amputation, and the case turned on the question of her future earning capacity after graduation. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901 [55 Cal.Comp.Cases 196].) The Court held that in determining long-term earning capacity "basing the disability compensation rate on the employee's actual earnings at the time of injury is unfair and unreasonable where there is specific demonstrable evidence the employee's long-term earning capacity would likely have increased." (*Id*. at p. 909, citations omitted.)

Any finding as to long-term earning capacity must be based on substantial evidence. As explained in *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), a decision "must be based on admitted evidence in the record" (*Id*. at p. 478) 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]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) The Appeals Board has the discretionary authority to develop the record when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Here, the WCJ found that applicant's long-term earning potential was $1,480.77 per week. The WCJ explained that this finding was based, in part, on the evidence that "applicant was working towards full-time employment and to obtain a supervisory position…However, the applicant still needed to complete his master's degree, which takes approximately 2 years….[H]e would not have been eligible for the supervisory position from 2020 to 2022." (Opinion on Decision, at p. 8.) The finding was also based on evidence that "applicants' prior supervisors found him to be an above-average employee who was expected to have an extended and successful career…" and that "applicant was actively pursuing advancement [and] was highly motivated and had pursued his career goals." (*Id*. at p. 9.) The WCJ wrote, "The Court is persuaded by the applicant's, Ms. Danishwar's, and Ms. Le's testimony that the applicant would have met the requirements to obtain a supervisorial position and would have obtained such a position with ACES or another provider but for his industrial injury" and "[b]ased on the testimony given and the records submitted, the Court finds that the applicant would have become a BCBA/supervisor but for his industrial injury." (*Id*. at pp. 9-10.) The WCJ cited the testimony of Ms. Le that applicant "could have ultimately earned $72,000 per year" and the earnings analysis by applicant's Vocational Consultant, Ray C. Largo, which estimated that "if applicant were promoted to a supervisor position, his potential earnings would range from $77,000.00 to $82,000.00 per year." (*Id*. at pp. 6-7.) The WCJ concluded, "the Court finds that the annual earnings for a BCBA/supervisor are reasonably calculated at $77,000.00. This equates to a weekly average of $1,480.77." and "[t]his increased earning capacity was reasonably anticipated at the time of injury and would have occurred during the anticipated duration of the disability." (*Id*. at pp. 7 and 10.)

We agree with the WCJ that the record as a whole suggests that applicant was a motivated employee and would likely have had significantly higher earnings in the future, but for his injury. However, the WCJ's finding that applicant's long-term earning potential was $1,480.77 per week, was premature and not supported by the current evidentiary record.

First, applicant's long-term earning potential for the purposes of calculating permanent disability was not listed as an issue for trial. Rather, the December 11, 2025 Minutes simply listed the trial issue as "earnings," followed by the weekly amounts claimed by each party. (12/11/25 Minutes of Hearing, at p. 2.) The November 17, 2025 Declaration of Readiness (DOR) filed by applicant's attorney, as well as the Pre-Trial Conference Statement (PTCS) as amended at trial, each indicate that the permanent disability rate was not at issue for the December 2025 trial. The DOR indicated that the trial was needed based on a "dispute as to TTD underpayment based on earning capacity." (11/17/25 DOR, at p. 7.) The PTCS listed temporary disability, but not permanent disability, nor the permanent and stationary date, as issues for trial. (12/11/25 PTCS, at p. 3.) Thus, at the time of trial, the parties were not on notice that the issues of permanent disability and long-term earning potential for determining potential permanent disability indemnity would be decided, and as a result, they have not yet had a full opportunity to put on relevant evidence on this question. (See, Cal. Code Regs., tit. 8, § 10787(a) and (c)(3).) The finding regarding applicant's long-term earning potential was thus premature.

Second, we agree with defendant that the available evidence in this current record does not constitute "specific demonstrable evidence" that applicant's long-term earning capacity would have increased to $1,480.77 per week, as required by *Rubalcava* and *Grossmont*. (Petition, at pp. 4-11; *Rubalcava*, *supra*, 220 Cal.App.3d at 909; *Grossmont Hosp.*, *supra*, 59 Cal.App.4th at p. 1363.) The evidence that applicant would have become a supervisor at ACES or a similar agency, and that he would have earned an annual salary of $77,000 ($1,480.77 per week), is simply too speculative, based on the current record, to constitute "specific demonstrable evidence" of applicant's future earning capacity. Unlike the employee in *Rubalcava*, applicant here was not in school working toward his degree. Rather, applicant testified that he planned to get a master's degree at some unspecified date in the future, but he had not yet applied, nor had he looked into financial aid, at the time of the accident. (1/5/26 Reporter's Transcript, at pp. 32-33, 39-40, 47, 49-50.) He was not able to recall which field of study he had previously hoped to get his master's in. (*Id*. at p. 49.) The testimony of his coworkers Ms. Danishwar and Ms. Le praised his work as an RBT but did not provide anything beyond speculation regarding whether applicant's role would become full-time, nor whether he would be promoted to a supervisory role at ACES. (*Id*. at pp. 5-22, 61-72.) The testimony of Ms. Le and Ms. Mazmanian indicated that to obtain a supervisory role at ACES as a BCBA requires not just a two-year master's degree, but also an additional year of practicum or field hours, the passing of an exam, and being hired into that position, none of which occurred automatically. (*Id*. at pp. 60-61, 79-80.) There is no evidence that applicant had started any of these steps, at the time of his accident. There can be no doubt that applicant's excellent work was demonstrated, as was his desire to help people and to move up in the ranks to a higher paying position. This evidence, however, did not rise to the level of specific, demonstrable evidence that but for the industrial injury, applicant would have completed all of the necessary steps to become a supervisor in a BCBA role.

In addition, the vocational reports by applicant's vocational expert, Ray C. Largo, cannot be relied upon as to long-term earning capacity, because his conclusions are not based on evidence in the record. Most of Mr. Largo's reports addressed applicant's "residual employability," and concluded that applicant "is presently unable to benefit from vocational rehabilitation and is unable to return to the open labor market;" these reports did not address the question of applicant's future earning capacity. (Applicant's Exh. 41, at pp. 29, 32-33; see also, applicant's Exhs. 42, 43, 44, 45, 47, 48 and 50.) In his February 13, 2024 report, Mr. Largo addressed applicant's earning capacity at ACES, providing estimates for applicant's wages through 2029, if he continued to work part-time, and annual raises were provided, yielding a salary of $26,052 per year in 2029. (Applicant's Exh. 46, at p. 18.) If applicant increased his hours to 40 hours per week, with annual raises, Mr. Largo found that applicant's salary would increase to $52,000 per year, in 2029. (*Id*. at p. 19.) Mr. Largo then wrote that "it is noted during the deposition [of Ms. Le, on October 6, 2023]…" that applicant's attorney, Mr. Keith More,

> …indicated that according to the employer's records Mr. Rivera-Leon was undergoing supervision training on April 16, 2020. Mr. More indicated per the ACES website the entry salary for Clinical Supervisors/Board-Certified Behavioral Analysists is between $77,000.00 and $82,000.00 per year. If Mr. Rivera-Leon continued on track to become a supervisor this salary range would be applicable to his future earning capacity.

(*Id*. at 19, citing Applicant's Exh. 40, Deposition of Khanh Le, marked for Identification Only.) In short, Mr. Largo's estimates for supervisory salaries are based on Ms. Le's deposition, which is not in evidence, and in which the only information about those salaries apparently came from applicant's attorney, not from Ms. Le. Therefore, Mr. Largo's conclusions about applicant's potential future salary range have no evidentiary value at this juncture.

In a subsequent report dated May 28, 2025, Mr. Largo repeated the statement from his earlier report, that if applicant was promoted to supervisor "his potential earnings range from $77,000 to $82,000 per year," but Mr. Largo failed to indicate that the sole source of this information was the statement by applicant's attorney, during Ms. Le's deposition. (Applicant's Exh. 49, at pp. 6, 8.) Mr. Largo then provided what he described as "potential occupational titles compatible with Mr. Rivera-Leon's education and employment history." (*Id*. at p. 10.) Each of the three occupations he identified (probation/parole officer, child/family/school social worker, and paralegal) required "2-4 years of vocational preparation." (*Ibid*.) Given these additional educational requirements, as well as the fact that there is no evidence in the record that applicant ever indicated that he was interested in pursuing any of these fields, these jobs, and the associated salary ranges and lifetime earnings potential for each job provided by Mr. Largo, provide no relevant evidence to support the finding of long-term earning capacity here. (*Id*. at pp. 10-14.)

Ms. Le was again asked by Mr. More, during her January 5, 2026 testimony, about starting salaries for supervisors at ACES in 2023 or 2024. (1/5/26 Reporter's transcript, at pp. 59-60.) Mr. More asked her if she remembered looking "at parts of the ACES website where it indicated that starting salaries for the supervisors would be between $77,000 to $82,000." (*Ibid*.) Ms. Le responded, "I can't confirm that information…" (*Id*. at p. 60.) Counsel then asked her, "Does that sound about right to you as far as the salaries were concerned for supervisors at ACES?" (*Ibid*.) Ms. Le responded, "I would say that's high for just starting off at a master's level" but for a BCBA "I would say that that amount was appropriate given the year and with that position." (*Ibid*.) When counsel asked her if applicant had stuck with his job and completed the supervisory requirements "then there's no question he could have earned $70,000," Ms. Le responded, "Yeah, the potential." (*Id*. at p. 69.) The HR representative, Ms. Mazmanian, testified that she could not express any opinion about what applicant could have made if he continued to work at ACES, nor how many hours he would have worked. (*Id*. at p. 90.)

After reviewing all of the evidence, we conclude that the existing evidence in this record is not sufficient to support the finding that "applicant's post-injury, long-term earnings potential would be $1,480.77 per week." We make no determination here as to what applicant's average weekly wage for the purposes of permanent disability would be; our review is limited to the current evidentiary record, which is not sufficient.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter below for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the decision of March 27, 2026 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued by the WCJ on March 27, 2026 is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 6, 2026

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

GABRIEL RIVERA LEON
BENTLEY & MORE LLP
HALLETT, EMERICK, WELLS & SAREEN

MB/*ara*

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