WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JERMAINE PRITCHETT, *Applicant*

vs.

WESTERN EXPRESS, INC.; SUNZ INSURANCE COMPANY, administered by NEXT LEVEL ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ20695668
Redding District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact, Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on March 3, 2026, wherein the WCJ found in pertinent part that while employed on November 20, 2024 by defendant as a trainee driver by Western Express, Inc., applicant sustained injury arising out of and in the course of employment to the low back, left shoulder and neck; that the payroll records support a temporary disability indemnity rate of $309.08 a week; and that applicant is currently temporarily partially disabled, and entitled to continuing temporary disability. The WCJ then awarded applicant temporary disability payments at the rate of $309.08 per week, from the last day of payment of temporary disability on February 13, 2025 to the present and continuing, with credit to defendant for four days of modified work.

Applicant contends that the temporary disability rate of $309.08 per week is not supported by substantial evidence; and that he offered an additional exhibit at trial to substantiate his future earnings.

We received an Answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, and as discussed below, we will

grant applicant's Petition for Reconsideration, and we will affirm the WCJ's decision, except that we will amend it to defer the issue of the temporary disability indemnity rate pending further development of the evidentiary record (Finding of Fact 4, Award).

BACKGROUND

The WCJ provided the relevant facts as follows.

> The petitioner injured his low back, neck and left shoulder on 11/20/24 while attempting to put heavy tire chains on the truck he and his trainer were driving. At the time, he was working as a driver trainee for defendant employer. The parties agree that the wage information contained in the payroll records, in evidence as Defendant's Exhibit A, would justify a temporary disability rate of 309.08. However, petitioner contends that the short period of his employment does not properly or fairly represent his earning capacity, and his potential earnings as a truck driver should be used to calculate the proper temporary disability rate.
>
> The issues of injury AOE/COE, earnings and period of temporary disability were tried on 1/27/26, and the Findings of Fact, Award and Opinion on Decision issued on 3/3/26. Petitioner disagrees with the findings that the applicant's average weekly wages would justify a temporary disability rate of 309.08, arguing that although this was calculated using the payroll records, the more fair and accurate method would be to establish an earning capacity and use that to calculate his average weekly earnings. This is the only issue appealed by the petitioner.

(Report, at p. 2)

DISCUSSION

I.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California, and 30 days when one of the parties is out of state. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 979,

984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. I.A.C.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

The decision is this matter issued on March 3, 2026, and applicant was served at a home address in Richmond, Virginia, an out of state address. Thus, the last day to file a timely petition was on April 2, 2026, and the Petition in this matter was filed on April 2, 2026. Therefore, the Petition is timely filed.

Former Labor Code section[1] 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. (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.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), 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 April 13, 2026, and 60 days from the date of transmission is June 12, 2026. This decision is issued by or on June 12, 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

[1] All statutory references are to the Labor Code unless otherwise stated.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on April 13, 2026, and the case was transmitted to the Appeals Board on April 13, 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 April 13, 2026.

II.

Turning to the merits, in order to compute a worker's temporary indemnity rate, 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. I.A.C. (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 pp. 594-595; *Pham*, *supra*, at pp. 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:
>
> (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).)

At trial, to support his claim that he earned $1,730.00 per week, applicant offered the following testimony about his employment and earnings:

> Applicant testified that he is not currently employed and last worked for Western Express. He was hired on 11/14/2024 as a truck driver. He was injured on 11/20/2024.
> …
> There was an offer of modified duty, which he accepted. He did four days of modified duty at Habitat for Humanity, which required him to move furniture and clean windows and floors and mix paint. He felt this work was hard physically to do because of his work injury. In fact, it was hard enough that he asked his treating physician to rearrange his restrictions, but the doctor refused. He felt he needed to see a doctor for another opinion and felt that the treating physician at that time was not taking his injuries seriously.
> …
> Since leaving his job at Western, he has had no other employment other than the four days of modified duty. He is not currently employed by the defendant Western. His employment there ended on April 8th of 2025. He was told that his employment was over because he refused to return to work or abandoned his job.
> …
> He testified that he applied to be a truck driver with the defendant because he likes to travel and that he thought the pay as a truck driver would be pretty good. He says he has traveled to multiple countries. He thought he would make 80 to 90 thousand a year when he started his job and that eventually earning income of over $130,000 a year was at least possible.
>
> He did have a commercial driver's license at the time he applied for this job with Western.
>
> He was told by his employer he had completed his training at Western. He was told this by Tedrick Warner. He was asked whether he was ready for his own truck. The applicant testified that he felt he was, in fact, ready for his own truck after he had received a few more practice hours and felt that decision was ultimately up to him.

> He originally got his salary information from the defendant's own website.
> …
> Tedrick Warner, from the employer, reported to the applicant that he had graduated and passed his driving test. Applicant testified that he felt these remarks meant that he had had good grades from his trainer. The defendant did offer him his own truck at an unknown salary, and eventually the defendants told him that he would get about .40 per mile. He indicated he was offered any truck he wanted and said if he had [] taken the job, he would have taken any route they wanted him to drive. The pay structures the employer discussed were at the time of orientation. The offer of a truck was done over the phone, although they did not discuss pay, the route, or what kind of truck it would be. He did not accept the first offer. After orientation was the point at which he was matched with his trainer. He was paid between $70 to $77 per day during the training period.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), January 27, 2026, at pp. 3:25-4:2; 5:6-11; 5:16-19; 5:24-6:9; 6:20-7:3.)

To support their contention that applicant earned $463.62 per week, defendant introduced payroll records: pay period beginning November 10, 2024 thorough pay period ending April 12, 2025. (Exhibit A.) It appears applicant was paid a "Per Diem" and separate "Trainee Pay." (*Id*.) The Per Diem rate listed is as "107.14" and the Trainee Pay rate is listed as "35.7143." For his employment with defendant employer, from November 14, 2024 through November 20, 2024, before deductions, applicant earned $928.56. (*Id*. at p. 3.) For his four days of modified work, applicant was paid $15.00 per hour. (Exhibit C.)

Regarding this evidentiary record, the WCJ stated:

> The only objective piece of evidence admitted into evidence by the parties was the earnings records in Defendant's Exhibit A, showing what the applicant was earning while employed as a driver trainee for defendant. In his testimony at trial, the petitioner stated that it was his impression that once he became an experienced driver, he could earn 80 to 90 thousand dollars a year as a starting driver, and that that could go up to as high as 130,000 dollars a year with experience. He stated that when he started with the defendant employer, he possessed a commercial driver's license (Summary of Testimony, page 6: 1-3). He testified that he got this information on potential pay from the employer's own website (Summary of Testimony, page 6: 8-9), but neither party entered any confirming information into evidence. … Petitioner further testified that Western offered him a truck to drive, but he turned that offer down conditional on some further training (Summary of Testimony, page 6:5-7; 14-16; 22-25; page 7:1-2). Pay was not discussed.

(Report, at pp. 2-3.)

In the Amended Petition, applicant alleges that:

> . . . discussions occurred between WCJ Swanson, Applicant's counsel, and defense counsel concerning Applicant's Exhibit 13 ("Western Express Job Salary Listing," see fully executed Pretrial Conference Statement). During those discussions, Applicant's counsel advised that a staff member who had recently been hired -and shortly thereafter resigned- failed to upload Exhibit 13. Upon discovery, Applicant's counsel immediately uploaded Exhibit 13 into EAMS (EAMS Doc ID 62261742) and served it on all parties on January 27, 2026.

(Amended Petition for Reconsideration, p. 2, lines 17-23.)

The MOH do not document that applicant submitted "Exhibit 13" into evidence or that it was marked as evidence, and the WCJ's Opinion on Decision does not discuss it. The "Western Express Job Salary Listing" is identified on the pre-trial conference statement. Although applicant raised the issue in the Petition, the WCJ did not address it in his Report. To the extent that the "Western Express Job Salary Listing" is relevant, the WCJ should consider it.

In addition to agreeing with the WCJ that both parties failed to enter internet advertised salaries into the record, we also observe that defendant failed to offer any rebuttal evidence including witness testimony to applicant's assertions about potential earnings and his willingness to work after a few more hours of training. In fact, applicant asked for "a few more practice hours … To work on a few more driving skills with a coach. These included turning properly and backing up the truck." (MOH/SOE, January 27, 2026, at p. 6:6-7, 14-16.) Considering how the industrial event occurred, that neither applicant nor his trainer "felt they could put the [snow] chains on properly" (*Id*. at p. 4:2-12), applicant's request for a few more hours of training should not be conflated with an unwillingness to work. Accordingly, if the WCJ had found the applicant's testimony about potential earnings to be credible and substantial on that issue, that would have supported a finding of the same.

On this record, it is unclear how many days per week the applicant worked for defendant employer or how many hours per day applicant worked for defendant employer. Accordingly, it is not possible to compute his average weekly wage. On this record, it is unclear what, if any, applicant's earnings were during the 52 weeks preceding the industrial event. We note that applicant had his commercial driver's license before he started working for defendant employer. As applicant relies on section 4453(c), on this record, the sum which "reasonably represents the average weekly earning capacity of applicant at the time of his injury, due consideration being

given to his actual earnings from all sources and employments," is unclear to make a reasonable and fair finding of average weekly wage.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].)

In accordance with that mandate, we will grant the Petition for Reconsideration, and amend the WCJ's decision to defer the issue of temporary disability indemnity rate (Finding of Fact 4, Award), and otherwise affirm the decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Award of March 3, 2026, is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award issued by the WCJ on March 3, 2026 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

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4. The issue of the rate of applicant's average weekly wage is deferred with jurisdiction deferred to the WCJ in the event of a dispute.

***

AWARD

The issue of an award of temporary disability indemnity is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 12, 2026

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

JERMAINE PRITCHETT
THE BRIDGEFORD LAW OFFICE
ME LAW

SL/abs

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