

# INTER-OFFICE MEMORANDUM

**TO:** ALL ATTORNEYS/ALL OFFICES/CLIENTS  
**FROM:** JOE TRUCE  
**DATE:** January 29, 2002  
**RE:** IMPORTANT WCAB DECISION RE EARNINGS

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Labor Code §4453(c)(1) is the Labor Code Section which is applicable to a majority of our cases on the issue of earnings and provides in relevant part as follows:

**"Where the employment is for 30 or more hours a week and for 5 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 injury."**

However, Labor Code §4453(4) provides an exception with respect to determining the earnings as follows:

**"Where the employment is for less than 30 hour 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% 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 . . . "**

In the case of Susan Cundy v. WCAB, Kemper Insurance Company, 3 WCAB Rptr. 10,360, both the Workers' Compensation judge and the applicant's attorney computed the applicant's earnings pursuant to Labor Code §4453(c)(1) on the assumption that the applicant qualified as working 30 or more hours per week and for 5 or more working hours per week.

However, on reconsideration the Board rejected this assumption stating in relevant part as follows:

**"Applicant argues that she should have her earnings calculated on an average of a 36 hour week. However, the defendant's compensation records show that applicant did not regularly work 72 hours in a two-week period. Rather, they show applicant regularly had time off for illness, vacation, personal reasons, and her employer's regular day off each month. There is nothing in the record to**

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**establish that the pattern of applicant's hours were unusual and were likely to have changed. . ."**

Therefore the Board, after examining the applicant's wage history, determined that the applicant did not qualify as a full-time employee pursuant to Labor Code §4453(c)(1).

WJT:wf

Enclosure- 3 WCAB Rptr. 10,360