



New Case Brief  
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September 5, 2006

**Signature Fruit Company, et al. v. WCAB and Eva Ochoa**  
Court of Appeal, 5 th District, # F 048255; WCAB # STK 186410  
<http://www.courtinfo.ca.gov/opinions/>  
(8/31/06)  
Certified for Publication

An employee is not owed any temporary disability payments during the off-season when the employee does not have any earnings and does not compete in the open labor market during that portion of the year.

Eva Ochoa, a seasonal sanitation worker for Signature Fruit Company, was injured on September 1, 2003. Ochoa sought TTD indemnity for the period of time during her “off-season” that she was certified as TTD. At an Expedited Hearing, the parties stipulated that Ochoa’s “in-season” ran from July 29 to September 9 and that Ochoa did not have any earnings or engage in any employment during her “off-season” throughout the remainder of the year. The WCJ agreed with Ochoa, relying on the 1/1/03 amendment to L.C. Section 4453 that established a minimum average weekly earnings rate of \$189, and awarded \$126 per week. Signature petitioned for reconsideration claiming (1) that the medical evidence did not demonstrate that Ochoa was TTD beyond her “in season” and (2) that regardless she would not be entitled to TTD after her seasonal employment ended. Reconsideration was granted and the decision was upheld. Signature, represented by Paula White of Mullen & Filippi’s Stockton Office, sought a Writ of Review that was granted by the 5<sup>th</sup> District Court of Appeals. The Court of Appeals annulled the WCAB’s Opinion and Decision after Reconsideration and remanded the case back to recalculate the TTD award.

The Appellate Court acknowledged the decision in *Jimenez v. San Joaquin Valley Labor* (2002) 67 CCC 74, en banc, holding that under L.C. 4453 seasonal workers (distinct from intermittent workers) would receive TTD at an in-season rate based on in-season earning capacity and an off-season rate based on off-season earning capacity. The calculation of average earnings for seasonal workers falls under Section 4453 (c)(4) that directs the use of estimated earning capacity and Section 4453 (a)(5) that directs the use of the lesser of \$189 or 1.5 times the average weekly earnings. Under *Jimenez*, a seasonal worker without off-season average weekly earnings would receive no TTD during the period of regular unemployment. AB 749, effective 1/1/03, amended L.C. Section 4453 to establish a minimum weekly earnings of \$189 for dates of injury after 1/1/03 but without the alternate method of multiplying actual earnings by 1.5.

The Appellate Court accepted the result in *Jimenez* and reached a similar result in the present case, but for a different reason. Section 4453 (c), as amended, sets a minimum

average weekly earnings of \$189, but does not establish or calculate the TTD rate. Section 4653 provides that “If the injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of such disability *consideration being given to the ability of the injured employee to compete in an open labor market*” (italics added). Ochoa stipulated that she did not compete in the open labor market during her off-season. Since Ochoa voluntarily or by necessity made herself unavailable for employment during part of the year, she is not entitled to TTD for that part of the year. The court states that its reading of Section 4653 comports with the long-standing policy of providing TTD for an injured worker’s lost wages.

The court expressly reserved the question regarding a worker who has a history or potential for some off-season earnings but below the average weekly earnings rate set forth in Section 4453 (\$189/week).