

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

TERESA MINOGUE, *Applicant*

vs.

SANTA CRUZ REGIONAL 9-1-1, permissibly self-insured, *Defendants*

**Adjudication Number: ADJ12680875
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the June 1, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Dispatcher, Occupational Group 212, during the period April 5, 1990 through March 2, 2019 sustained an industrial injury to her neck, wrists, hands, shoulders, and elbows. The WCJ found that the injury caused permanent disability of 21% and that defendant is not entitled to take a credit against permanent disability indemnity for its overpayment of temporary disability indemnity.

Defendant contends that the WCJ should have assigned applicant to occupational group 111, arguing that applicant's job duties did not involve arduous duties impacting her back. Defendant also contends that the WCJ should have exercised his discretion to allow a credit for the overpayment of temporary disability that occurred between applicant's appointment with the panel qualified medical evaluator (PQME) and the PQME issuing a report.

Applicant filed an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the Report and for the reasons discussed below, we will deny reconsideration.

Permanent disability and temporary disability are separate and distinct benefits, designed to compensate for different losses. (See Lab. Code, § 4661; *Sea-Land Service, Inc. v. Workers' Comp. Appeals Bd.* (Lopez) (1996) 14 Cal. 4th 76, 88 [61 Cal.Comp.Cases 1360]; *Granado v.*

Workmen's Comp. Appeals Bd. (1968) 69 Cal. 2d 399, 405 [33 Cal.Comp.Cases 647].) “Temporary disability is an impairment reasonably expected to be cured or improved with proper medical treatment.” (*Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (Ochoa) (2006) 142 Cal. App. 4th 790, 801 [71 Cal.Comp.Cases 1044] .)

In contrast, permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313, 1320 [72 Cal.Comp.Cases. 565].)

Pursuant to Labor Code section 4909, the WCJ has discretion to award a credit against permanent disability for an overpayment of temporary disability. In fixing the amount of compensation to be paid, the WCAB “may take into account” any payment, allowance, or benefit that the employer has provided to the injured employee that was not then due and payable. (Lab. Code, § 4909; see *Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254 [34 Cal.Comp.Cases 382]; *Mercury Aviation Co. v. Industrial Accident Com.* (1921) 186 Cal. 375.) The intent of section 4909 is to encourage the employer to make voluntary payments to an injured worker by allowing it to later obtain credit and a reduction in the amount subsequently determined to be due the employee. (*Appleby v. Workers' Comp. Appeals Bd.* (1994) 27 Cal.App.4th 184 [59 Cal.Comp.Cases 520].)

However, the allowance of a credit for overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) In those circumstances, the WCJ has discretion to award permanent disability without “taking into account” the payment of another benefit and reducing the amount.

Here, as in *Maples*, applicant was not at fault for causing the overpayment of temporary disability, but instead the overpayment was caused by the PQME’s retroactive opinion that applicant had reached maximum medical improvement. Because the credit is a large percentage of the permanent disability award, it would be disruptive to the purpose of permanent disability indemnity. Accordingly, the WCJ properly exercised discretion when denying the credit.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the June 1, 2021 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 12, 2021

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

**TERESA MINOGUE
WILSON & WISLER
MACINTYRE & WHITE**

MWH/oo

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