

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

**MICHAEL NEWKIRK, *Applicant***

**vs.**

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA Permissibly Self-Insured,  
*Defendant***

**Adjudication Numbers: ADJ12483095, ADJ1400193, ADJ16237990  
Fresno District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Award of April 11, 2023, wherein it was found that, while employed as a police officer on October 29, 2017 in cases ADJ11400193 and ADJ12483095, applicant sustained industrial injury to his low back, causing permanent disability of 34%. It was also found that while employed as a police officer on April 24, 2017 in case ADJ16237990, applicant also sustained industrial injury to the low back causing permanent disability of 34%. Thus, it was found that the applicant was entitled to two separate awards of 34% permanent disability. It was found that defendant was entitled to a credit in the amount of a \$6,587.79 overpayment of temporary disability indemnity towards its permanent disability indemnity liability.

Applicant contends that the WCJ erred in finding that defendant was entitled to a credit in the amount of its overpayment of temporary disability indemnity. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will deny the applicant's Petition.

Applicant was evaluated by qualified medical evaluator chiropractor M. Nathan Oehlschlaeger, D.C. on May 27, 2021, and his condition was found to be permanent and stationary on that date. (May 27, 2021 report at p. 18.) However, the May 27, 2021 report was signed by Dr. Oehlschlaeger on June 26, 2021, served on June 26, 2021, and not received by the parties until June 29-30, 2021. Temporary disability ceases when either the injured worker returns to work or when his condition becomes permanent and stationary. (*Bethlehem Steel Co. v. Industrial Acc.*

*Com. (Lemons)* (1942) 54 Cal.App.2d 585 [76 Cal.Comp.Cases 250].) However, because defendant had not yet received the QME report, it continued to pay temporary disability indemnity until June 29, 2021, resulting in an overpayment of \$6,587.79.

Under Labor Code section 4909, the WCAB is allowed to “take[] into account,” i.e. to allow a credit, for any payment, allowance, or benefit paid by the defendant to the injured employee when it was not then due and payable or when there was a dispute or question concerning the right to compensation.

In *State Comp. Ins. Fund v. Industrial Acc. Comm. (Verden)* (1955) 30 Cal.Comp.Cases 132 (writ den.), the defendant overpaid temporary disability indemnity through its own inadvertence. Its subsequent request for credit against the applicant’s permanent disability indemnity was denied because the credit would have totally exhausted the applicant’s permanent disability indemnity and therefore would have frustrated the Legislature’s purpose in providing for permanent disability indemnity. Our Supreme Court has stated that the allowance of credit is within the WCAB’s discretion. (*Herrera v. Workers’ Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].) As we said in *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Bd. panel), “Whether a credit is to be allowed is a matter directed to the discretionary authority of the [WCAB] to be weighed in the light of the circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities presented.”

In *Maples v. Workers’ Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 836-838 [45 Cal.Comp.Cases 1106], the Court of Appeal, citing *Verden* and *Cordes*, among other authorities, stated that equitable principles are frequently applied to workers’ compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant’s actions when the employee received benefits in good faith with no wrong-doing on her part.

“An employer or carrier may be estopped from obtaining a credit for overpayment of temporary disability benefits where the employer or carrier fails to properly and timely challenge the worker’s entitlement to benefits.” (*Kemper National Ins. Co. v. Workers’ Comp. Appeals Bd. (Spangler)* (1999) 65 Cal.Comp.Cases 78, 80 [writ den.].) At the same time, courts have

recognized a “strong public policy against double recovery in ... tort and workers’ compensation actions.” (*Abdala v. Aziz* (1992) 3 Cal.App.4th 369, 378 [57 Cal.Comp.Cases 94].)

Here, the WCJ did not abuse his discretion in allowing the credit. A credit is ordinarily allowed in cases of overpayment of temporary disability when the defendant was not negligent or otherwise at fault, and there are no special factors present militating against the issuance of a credit. Here, applicant has not presented any reliance or special factors, and the denial of a credit would discourage the prompt payment of benefits and would contravene the strong public policy against double recovery. We therefore deny the applicant’s Petition.

For the foregoing reasons,

**IT IS ORDERED** that Applicant's Petition for Reconsideration of the Findings of Fact and Award of April 11, 2023 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ NATALIE PALUGYAL, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**June 26, 2023**

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

**MICHAEL NEWKIRK  
GROVE LAW FIRM  
LAUGHLIN, FALBO, LEVY & MORESI**

**DW/oo**

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