

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

**TERESA GONZALEZ, *Applicant***

**vs.**

**ARCONIC FASTENING SYSTEMS;  
ACE AMERICAN INSURANCE COMPANY, administered by  
HELSMAN MANAGEMENT ROCKLIN, *Defendants***

**Adjudication Numbers: ADJ12859017, ADJ12859018  
Marina del Rey District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the September 24, 2021 Findings of Fact and Award in Case No. ADJ12859018.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the September 24, 2021 Findings of Fact and Award in Case No. ADJ12859018 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 24, 2021 Findings of Fact and Award in Case No. ADJ12859018 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**  
**Case No. ADJ12859018**

\* \* \*

8. It is found that defendant is not entitled to credit for overpayment of temporary disability for the period from December 8, 2020 through February 15, 2021. It is found that defendant is entitled to credit for overpayment of temporary disability for the period February 16, 2021 through March 1, 2021.

\* \* \*

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**December 6, 2021**

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

**TERESA GONZALEZ  
PENNINGTON & TRODDEN  
PURINTON LAW**

**PAG/abs**

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

**JOINT REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION**

**I**

**INTRODUCTION**

- |     |  |   |
|-----|--|---|
| 1.  | Applicant's Occupation:                    | Tech #2   |
| 2.  | Applicant's Age:                           | 53  |
| 3.  | Date of injury:                            | 4/3/14; CT 12/31/95 to 11/13/19   |
| 4.  | Parts of Body Injured:                     | Lumbar Spine, Right Shoulder, Bilateral Wrists  |
| 5.  | Manner in which injuries<br>have Occurred: | Cumulative Trauma   |
| 6.  | Identity of Petitioner:                    | Applicant, Teresa Gonzalez  |
| 7.  | Timeliness:                                | The petition was timely filed.  |
| 8.  | Verification:                              | A verification is attached.   |
| 9.  | Date of Findings and Award:                | 9/22/2021   |
| 10. | Petitioner's contentions:                  | 1. The WCJ erred in allowing credit for<br>Permanent disability advances paid in<br>ADJ12859017 from ADJ12859018.<br>2. The WCJ erred in allowing defendant<br>a credit for temporary disability paid<br>from 12/8/2020 through 3/1/21. |

**II**

**JURISDICTIONAL FACTS**

Applicant, Teresa Gonzalez, born [], while employed on April 4, 2014 as a Tech #2, case number ADJ12859017, by Arconic Fastening Systems, sustained injury arising out of and in the course of her employment to her lumbar spine and right shoulder. Additionally, while employed during the period December 31, 1995 to November 13, 2019 as a Tech #2, case number ADJ12859018, by Arconic Fastening Systems, applicant sustained injury arising out of and in the course of her employment to her lumber spine, right shoulder and bilateral wrists.

The matter proceeded to trial on July 21, 2021. No witness testimony was proffered by either party. Applicant offered the medical reports of her treating physician, Dr. Michael Luciano. The parties jointly offered AME reports of Dr. Steven Silbart into evidence. Formal Rating

Instructions and Ratings were served on the parties on August 10, 2021. No Objection or Request for Cross-Examination of the Rater was received in response thereto. Two separate Findings issued on September 22, 2021 (a Findings of Facts in ADJ12859017 and a Findings of Facts and Award in ADJ12859018). Applicant filed a timely verified Petition for Reconsideration in both cases on October 5, 2021. Defendant filed a timely Answer to Petition for Reconsideration in both cases on October 12, 2021.

For the following reasons, the Petition for Reconsideration should be granted in part and denied in part.

### **III** **DISCUSSION**

The Petition for Reconsideration takes issue with the following findings: that defendant is entitled to a credit for overpayment of temporary disability in ADJ12859018 paid from 12/8/20 through 3/1/21 and that defendant is allowed a credit for permanent disability advances paid in ADJ12859017 against permanent disability benefits due in ADJ12859018. These arguments will be addressed in order.

#### **THE WCJ ERRED IN ALLOWING DEFENDANT A CREDIT FOR TEMPORARY DISABILITY PAID FROM DECEMBER 8, 2020 THROUGH MARCH 1, 2021 IN CASE ADJ12859018**

Petitioner is correct in asserting that the Findings and Award in ADJ12859018 should be changed to reflect that defendant should not be granted a credit for overpayment of temporary disability for the period December 8, 2020 through February 15, 2021 pursuant to the standard of *J.C. Penney v. Workers' Compensation Appeals Board (Edwards)* (2009) 175 Cal. App. 4th 818, 74 Cal. Comp. Cases 826. However, under the rationale of that same case, Petitioner's argument that there should be no credit for overpayment of temporary disability from February 16, 2021 through March 1, 2021 should fail.

Although the medical record in this matter is at times less than precise, the reports of treating physician Dr. Michael Luciano and the reports of AME Steven Silbart do provide adequate opinions upon which to resolve the issues presented. Contrary to Petitioner's assertion, treating physician Dr. Michael Luciano never stated in any of his three reports submitted into evidence that applicant was totally temporarily disabled during the time frame from December 8, 2020 through February 15, 2021. Rather, in each of his reports, dated December 10, 2020, January 29, 2021 and March 18, 2021 (Applicant's exhibits 1, 2 and 3), Dr. Luciano indicated only that applicant was released to modified duties. Thus, applicant was partially temporarily disabled during the time span in dispute from December 8, 2020 to March 1, 2021. Although there was no direct evidence submitted regarding whether the employer could accommodate these work restrictions, it can be reasonably inferred that such accommodations were not possible since the parties stipulated that defendant initiated temporary disability benefits in case ADJ12859018 as of June 9, 2020 and continued paying those benefits up through March 1, 2021 (Minutes of Hearing dated July 21, 2021 p.3, lines 22-23).

The only medical report indicating that applicant was actually totally temporarily disabled during the time frame in question from December 8, 2020 through March 1, 2021 is Dr. Silbart's record review report dated December 17, 2021 (Joint Exhibit BB at p. 3), wherein the doctor stated that as of that date applicant "remains validly Temporarily Totally Disabled." This was a somewhat curious assertion since Dr. Silbart's initial report dated December 7, 2020 (the same date as the examination) did not comment on applicant's disability status (Joint Exhibit AA). Thereafter, in his final report dated February 15, 2021, Dr. Silbart indicated that it was his opinion that applicant became permanent and stationary as of the date of his examination on December 7, 2020 (Joint Exhibit DD at p. 1).

Petitioner correctly points out that Dr. Silbart did not explain the apparent contradiction between finding that applicant was "validly Temporarily Totally Disabled" in his December 17, 2021 report with his later opinion in his February 15, 2021 that applicant had reached a permanent and stationary plateau as of December 7, 2020. However, this contradiction does not interfere with an analysis of whether an overpayment credit is valid here in light of the standard of Edwards.

The decision in Edwards regarding issues of credit for overpayment of benefits stands on the "spirit of Labor Code Section 4062." The relevant portion of that statute indicates that if a party fails to timely object to a treating physicians report, that party cannot later validly assert a claim for a retrospective determination of a permanent and stationary date. In Edwards the applicant received temporary disability benefits from the time of his injury on July 23, 2003 up through March 14, 2007. The last treating doctor report indicating that applicant was TTD was dated May 24, 2006, and stated that applicant remained "Temporarily totally disabled through June 2006." Thereafter, the parties used Dr. Mandell as an AME who evaluated applicant on February 5, 2007 and found applicant was permanent and stationary. In his report, AME Mandell found that applicant was retroactively permanent and stationary as of approximately August 9, 2005.

The defendant in Edwards asserted a credit for overpayment of TTD going back to the date of August 9, 2005. However, the Edwards court noted that defendant in that case failed to object to medical reports issued through May 26, 2006 that found applicant totally temporarily disabled until "June 2006". The court's decision allowed only a credit going back to June 2006 as there were no later treating doctor reports for any party to object to.

In this case the treating doctor reports of Dr. Luciano, upon which it reasonably appears defendant premised its payments of temporary disability benefits assuming work restrictions could not be accommodated, essentially find applicant temporarily disabled for the period from the AME exam on December 7, 2020 through the AME permanent and stationary report of February 15, 2021. There being no evidence that defendant ever objected to these reports from Dr. Luciano during this time frame pursuant to LC 4062, the application of Edwards to these facts leads to the conclusion that defendant should not be allowed a credit for temporary disability benefits for the period December 8, 2020 through February 15, 2021. As noted in Edwards, where defendant fails to object to treating doctors reports regarding applicant's temporary disability status within the time limit provided in Labor Code Section 4062, defendant loses the right to object to that determination in the future.

However, the principles of *Edwards* do not mandate that there be no credit allowed for TD overpayment for the period from February 16, 2021 through March 1, 2021 in the case of [ADJ12859018]. Dr. Silbart's opinions should be afforded great weight as the parties clearly respected his expertise in utilizing him as an AME. Although there were some inconsistencies in Dr. Silbart's reporting, particularly regarding Petitioner's disability status, the opinions expressed in Dr. Silbart's February 15, 2021 report were definitive and premised upon the cumulative results of a physical exam of applicant as well as diagnostic studies consisting of an MRI scan and EMG/NCV testing along with a review of relevant medical records. It was not until that date that Dr. Silbart opined that applicant had reached a permanent and stationary plateau and assessed and outlined factors of permanent impairment. Although there is conflict within Dr. Silbart's reports as to whether applicant was permanent and stationary at an earlier date, there can be no question that as of February 15, 2021 applicant was permanent and stationary. As such, since defendant continued to pay temporary disability benefits through March 1, 2021, defendant should be permitted credit for overpayment of temporary disability for the period February 16, 2021 through March 1, 2021.

**THE WCJ ERRED IN ALLOWING DEFENDANT A CREDIT FOR PERMANENT DISABILITY PAID IN CASE ADJ12859017 FROM BENEFITS DUE IN CASE ADJ12859018**

Petitioner cites the case of *Dunehew v. Don Keith Transportation, et. al.*, 2010 Cal. Wrk. Comp. P. D. LEXIS 407 (Panel Decision – Reconsideration Granted), for the proposition that credit for permanent disability advances paid in one case should not be allowed against the permanent disability owed in another case. Petitioner further cites to portions of *Benson v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 113 and *Maples v. Worker's Comp. Appeals Bd.* (1980) 45 Cal. Comp. Cases 1106 as further supporting her position. As shall be discussed below, the facts of this matter are distinguishable from those in *Dunehew*, *Benson* and *Maples*.

In *Dunehew*, defendant utilized *Benson* to apportion the applicant's permanent disability among three separate injuries which reduced applicant's overall amount of permanent disability, yet defendant wanted full credit for advances without any concomitant or corresponding reduction, in effect, allowing defendant to benefit from the separation of injuries for purposes of permanent disability while allowing defendant to merge the cases together for purposes of taking credit for permanent disability advances. The *Dunehew* court found such a scenario to be inequitable.

In the instant matter there are no such equity concerns as there is no apportionment under *Benson*. Applicant's PD Award herein has not been reduced due to the existence of multiple dates of injury because in the case at bar there are no separate and distinct dates of injury. Not only does AME Silbart essentially dismiss the occurrence of a specific date of injury in 2014, he apportions all of applicant's disability to a single date of injury – the cumulative trauma from December 31, 1995 to November 13, 2019 (Joint Exhibit DD – page 2).

Additionally, the *Dunehew* court also premised their decision to disallow a permanent disability credit among separate and distinct injuries upon the fact that allowing such a credit in that case would completely wipe out any monetary recovery by applicant for permanent disability

from the second case, resulting in applicant not receiving any “new money” at all for the second case. Such a scenario does not exist here. The total permanent disability indemnity Awarded herein is \$34,437.50 while the credit for prior permanent disability payments from ADJ12859017 is, according to defendant’s Answer, \$8,700 (Answer, p.6). By no stretch does allowing such a credit come close to extinguishing Applicant’s monetary recovery for the second case.

*Maples* is similarly inapposite to the facts of this case. In *Maples*, the defendant was found to have deliberately withheld a medical report for a substantial amount of time. The *Maples* court found that applicant should not be prejudiced by defendant’s wrongful behavior particularly when applicant has received benefits in good faith and through no wrongdoing on applicant’s part. Unlike *Maples*, here there has been no finding or even an allegation of wrongdoing or wrongful behavior on behalf of defendant. Here both parties have acted in good faith. Therefore, the rationale underlying *Maples* is inapplicable here.

In the instant matter, although the parties stipulated that applicant sustained an injury on April 3, 2014, there is no lay or expert medical evidence indicating that any specific injury actually occurred on that date. Even AME Dr. Silbart stated in his February 15, 2021 final report that Applicant “does not really describe a specific injury April 13, 2014[sic]” (Joint Exhibit DD at p.2). Instead, Dr. Silbart found only that applicant suffered a cumulative trauma from December 31, 1995 to November 13, 2019.

Prior to the end date of the cumulative trauma on November 13, 2019, Applicant received treatment to her right shoulder and lumbar spine, culminating in right shoulder surgery on September 9, 2017. As noted in the Minutes of Hearing dated July 21, 2021 at page 2, lines 16 to 18, defendant paid temporary disability benefits from September 9, 2017 through April 3, 2019 and then permanent disability advances for the period covering April 18, 2019 to November 13, 2019. Since there was no permanent and stationary reporting in 2019 as part of the evidentiary record, this WCJ can only surmise that these PD payments represented a reasonable estimate of applicant’s permanent disability for the right shoulder and lumbar spine which defendant was statutorily obligated to pay pursuant to Labor Code Section 4650.

As outlined above, multiple factors support the discretionary decision in this matter, pursuant to Labor Code Section 4909, to allow a credit for permanent disability benefits paid in case ADJ12859017 to be credited against similar benefits in ADJ12859018 as follows: the medical evidence in this matter supports only the finding of a cumulative trauma injury; there are no *Benson* apportionment issues; this matter does not involve bad faith actions by either party; allowing credit for permanent disability payments made in 2019 will not deprive applicant of receiving any “new money” for the ADJ12859018 cumulative trauma injury. Thus, the rationales underpinning the decisions in *Dunehew* and *Maples* are inapplicable to this case. Rather, it is appropriate and equitable, as well as avoiding any potential double recovery by applicant, that credit be allowed for permanent disability benefits paid under ADJ12859017 against permanent disability benefits still owed on ADJ12859018.

### **RECOMMENDATION**

As the Petition for Reconsideration sets forth good cause regarding the finding of overpayment of temporary disability in case ADJ12859018, it is respectfully recommended that it be granted in part and the finding regarding the temporary disability overpayment in case ADJ12859018 should be AMENDED to read as follows:

1. It is found that defendant is not entitled to credit for overpayment of temporary disability for the period from December 8, 2020 through February 15, 2021;
2. It is found that defendant is entitled to credit for overpayment of temporary disability for the period February 16, 2021 through March 1, 2021.

Regarding the remainder of the Petition, as it fails to demonstrate good cause upon which to base the setting aside of the Findings and Award dated September 22, 2021, it is respectfully recommended that the Petition for Reconsideration be denied for lack of good cause as set forth above.

Respectfully submitted,

Date: 10/19/2021

**DANIEL L. TER VEER**  
Workers' Compensation Judge