

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

**MICHAEL RAMRAKHA, *Applicant***

**vs.**

**STATE OF CALIFORNIA, RICHARD J. DONOVAN CORRECTIONAL FACILITY,  
legally uninsured; STATE COMPENSATION INSURANCE FUND, STATE CONTRACT  
SERVICES SAN DIEGO adjusting agency only, *Defendants***

**Adjudication Numbers: ADJ8919366 (MF); ADJ4508242 (AHM 0121305);  
ADJ1415534 (AHM 0121299)  
San Diego District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues.<sup>1</sup> This is our Decision After Reconsideration.

In the Joint Findings and Award of March 10, 2020, the workers' compensation judge ("WCJ") issued decisions in three case numbers. In ADJ1415534, the WCJ found, in relevant part, that on September 16, 2001, applicant, while employed as a correctional officer by the California Department of Corrections and Rehabilitation ("CDCR"), sustained industrial injury in the form of coronary heart disease, hypertensive cardiovascular disease, and hematopoietic impairment, that applicant's earnings at the time of injury were \$1,156.62 per week, warranting an indemnity rate of \$170.00 for permanent disability, that the injury caused permanent disability of 25% with compensation payable by 95.75 weeks of indemnity benefits at a rate of \$170.00 per a week for a total \$16,277.50, that applicant's attorney is allowed a fee of 15% of said indemnity for a total of \$2,441.63, and that defendant is not entitled to take credit for this permanent disability from ADJ4508242.

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<sup>1</sup> Commissioners Sweeney and Lowe, who were on the panel that issued the Opinion and Order Granting Petition for Reconsideration of May 18, 2020, no longer serve on the Appeals Board. Other panelists have been substituted in their place.

In ADJ4508242, the WCJ found that on March 16, 2003, applicant, while employed as a correctional officer by the CDCR, sustained industrial injury in the form of coronary heart disease, hypertensive cardiovascular disease, and hematopoietic impairment, that applicant's earnings at the time of injury were \$1,659.44 per week, warranting an indemnity rate of \$185.00 for permanent disability, that the injury caused permanent disability of 4% with compensation payable by 12 weeks of indemnity benefits at a rate of \$185.00 per week for a total of \$2,220.00, that applicant's attorney is allowed a fee of \$333.00, and that "[t]he employer/carrier has paid compensation pursuant to the benefits paid report."

In ADJ8919366, the WCJ found that applicant, while employed by the CDCR as a correctional officer during the period March 17, 2003 to February 3, 2013, sustained industrial injury in the form of coronary heart disease, hypertensive cardiovascular disease, and hematopoietic impairment, that applicant's earnings at the time of injury were \$2,608.48 per week, warranting an indemnity rate of \$230.00 for permanent disability, that the injury caused permanent disability of 53% with compensation payable by 295.25 weeks of indemnity at a rate of \$230.00 per week totaling \$67,907.50, that applicant's attorney is allowed a fee of \$10,186.13, that "[t]he employer/carrier has paid compensation pursuant to the benefits paid report[.]" and that defendant is not entitled to take credit for permanent disability for this case from ADJ4508242.

Defendant filed a timely Petition for Reconsideration of the WCJ's decisions. Defendant contends that the WCJ erred in denying credit for overpayment based on defendant's failure to file a petition for credit, because defendant filed a petition for credit on February 7, 2020. Defendant further contends that applicant was not prejudiced by defendant's alleged failure to file a petition for credit, that the WCJ erred in concluding defendant submitted no evidence showing the reasons how and why benefits were paid, and that the WCJ abused her discretion in disallowing credit.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). We adopt and incorporate the Introduction and Facts of the Report, to the extent indicated in the attachment to this decision. We do not adopt or incorporate the remainder of the Report.

Based on our review of the record and applicable law, we conclude that in ADJ1415534, defendant is entitled to credit for permanent disability indemnity paid in ADJ4508242, but the WCJ correctly denied credit in ADJ8919366. As our Decision After Reconsideration, we will affirm the WCJ's decisions in part and amend them in part consistent with the above conclusion.

Preliminarily, we note that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers’ compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers’ Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).<sup>2</sup> In light of the district offices’ closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.<sup>3</sup> Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices’ closure was tolled until April 13, 2020.

Turning to the merits of the credit issue, we begin by noting that in her Opinion on Decision and in her Report, the WCJ faults defendant for failing to file a petition for credit pursuant WCAB Rule 10555(a). (Cal. Code Regs., tit. 8, § 10555(a).) Subdivision (a) of the rule states: “When a dispute arises as to a credit for any payments or overpayments of benefits pursuant to Labor Code section 4909, any petition for credit shall include: (1) A description of the payments made by the employer; (2) A description of the benefits against which the employer seeks a credit; and (3) The amount of the claimed credit.”

Defendant points out in its petition for reconsideration that it did provide to applicant’s attorney a petition for credit that complied with Rule 10555(a), albeit not until the day of trial on January 15, 2020. Of course, the better practice is to submit a petition for credit “when [as soon as] a dispute arises as to a credit for any payments or overpayments of benefits pursuant to Labor Code section 4909.” However, the rule includes nothing that authorizes or requires disallowance of credit for failure to comply with the rule’s requirements regarding the content of “any petition for credit.” We also note that applicant’s answer does not complain that he had insufficient notice of the specifics of defendant’s claim for credit. For these reasons, we conclude that defendant’s

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<sup>2</sup> The March 16, 2020 DWC Newline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

<sup>3</sup> The April 3, 2020 DWC Newline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

alleged failure to timely comply with WCAB Rule 10555(a) is not a basis for disallowing its claim for credit.

We also observe that in her Opinion on Decision and Report, the WCJ apparently considered whether or not defendant's administration of benefits in the three cases may have warranted the imposition of penalties under Labor Code section 5814. However, the sole issues raised at trial on January 15, 2020 were attorney's fees and "whether or not defendant can take credit of a permanent disability overpayment in a total amount of \$27,833.25 from ADJ4508242, with \$13,835.88 to ADJ1415534 and \$13,997.37 to ADJ8919366." Since the issue of penalties was not raised at trial, it is not a significant factor in determining whether defendant is entitled to credit.

The remaining grounds supporting the WCJ's denial of credit are set forth on pages six and seven of her Report, as follows:

In the case at hand, there is no doubt that the benefits on all three cases have not been administered correctly. One glaring example is the fact that the parties stipulated to a 25% PD for date of injury of September 16, 2001, yet no permanent disability at all has been paid on this case. (Defendant Exhibit A) This is despite the fact that Dr. Bressler found the applicant permanent and stationary with some permanent disability as far back as May 31, 2018. (Joint Exhibit 3) Allowing the credit of \$13,835.88 would eliminate all benefits on this claim for the applicant, which is exactly the result Labor Code §4909 exists to avoid. Furthermore, the cases supporting an allowable credit point to equity principles wherein the equity favors allowances of credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of credit of overpayment of one benefit against a second benefit is not 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 with faith with no wrong-doing on his part. Again, here, this would eliminate all benefits on a 25% permanent disability award. Defendant failed to show what wrongdoing applicant has done to allow the credit. Defendant failed to provide any benefits notices or letters sent to applicant. Defendant failed to produce any witnesses to testify on their behalf with regards to how applicant's benefits have been administered to date on these claims.[<sup>4</sup>]

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<sup>4</sup> It appears the WCJ did not offer a specific explanation why she denied credit in ADJ8919366, the cumulative trauma case.

The WCJ is correct that the determination of whether to allow defendant credit for benefits voluntarily paid in error, pursuant to Labor Code section 4909, is within the WCAB's discretionary authority.<sup>5</sup> The Board may consider a weighing of the equities between the parties, as well as whether the applicant's compensation award will be seriously impaired if credit is allowed. (*J.C. Penny Co. v. Workers' Comp. Appeals Bd. (Edwards)* (2009) 175 Cal.App.4th 818 [74 Cal.Comp.Cases 826]; *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106]; *City and County of San Francisco v. Workmen's Comp. Appeals Bd. (Quinn)* (1970) 2 Cal.3d 1001, 1016 [35 Cal.Comp.Cases 390, 395]; *Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382, 384].)

In this case, there is no evidence that applicant improperly collected undue compensation without notifying defendant of the possibility that excess payments were being made. On the other hand, defendant was in control of the manner in which it paid permanent disability indemnity benefits, so the extent to which defendant's actions resulted in significant overpayment of permanent disability indemnity is defendant's responsibility.

Nevertheless, the balance of equities between the parties is not the only factor to be considered. The purpose of Labor Code section 4909 must be considered as well. The statute was intended to encourage employers to make voluntary payments to injured employees and, in appropriate circumstances, to obtain a subsequent reduction in the amount of workers' compensation benefits determined to be due the employee. (*Appleby v. Workers' Comp. Appeals Bd.* (1994) 27 Cal.App.4th 184, 191 [59 Cal.Comp.Cases 520].)

In this case, we are persuaded the WCJ erred in disallowing credit for permanent disability indemnity payments due in ADJ1415534 for those paid by defendant in ADJ4508242.

Defendant alleges that in paying advances on permanent disability indemnity starting February 15, 2005 and continuing through March 4, 2008, it relied on the Qualified Medical Evaluator ("QME") report of Dr. Bressler dated October 29, 2005. In that report, Dr. Bressler evaluated both of the specific injuries at issue herein, i.e., the September 16, 2001 injury in

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<sup>5</sup> Section 4909 states: "Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid. The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer."

ADJ1415534 and the March 16, 2003 injury in ADJ4508242. (Joint exhibit 2.) Dr. Bressler opined that applicant had restrictions of no exposure to extreme stressors and no very heavy lifting, which refers to the 1997 Schedule for Rating Permanent Disabilities (“PDRS”). Dr. Bressler also found applicant’s cardiovascular conditions to be 100% industrial, but the doctor did not apportion permanent disability between the two specific injuries.

Defendant states that it rated Dr. Bressler’s restrictions at 24% permanent disability but paid permanent disability indemnity based on a 32.5% rating, the latter rating being a split between Dr. Bressler’s report and a subsequent report from Dr. Lineback, dated June 10, 2005, which supported a rating of 58%. Payment of permanent disability indemnity following the two specific injuries totaled \$29,270.25, after attorney’s fees, according to defendant. (Petition for Reconsideration, p. 6.)

As the September 16, 2001 injury in ADJ1415534 ultimately resulted in a stipulated rating of 25% permanent disability (\$16,277.50, per the WCJ’s finding) and the March 16, 2003 injury in ADJ4508242 ultimately resulted in a stipulated rating of only 4% permanent disability (\$2,220.00), it appears that defendant’s administration of the two claims resulted in an overpayment of permanent disability indemnity exceeding \$10,000.00. In retrospect, defendant’s apparent assignment of permanent disability indemnity payments to the March 16, 2003 date of injury in ADJ4508242 was imprudent, but this error did not result in impairment of applicant’s ultimate award of 25% permanent disability for the September 16, 2001 injury. This is because applicant had long since been paid all the compensation he was owed, when considering the two specific injuries taken together. Whether by happenstance or not, defendant’s payment of permanent disability indemnity for the two specific injuries was consistent with the intent of section 4909: to encourage employers to voluntarily pay compensation and, where appropriate, to obtain a subsequent reduction of compensation ultimately determined to be due the employee. Accordingly, we will amend the WCJ’s decisions to allow defendant credit in ADJ1415534 for permanent disability indemnity paid in ADJ4508242.

However, we will affirm the WCJ’s denial of credit for permanent disability indemnity owed by defendant on the cumulative trauma in ADJ8919366 (date of injury March 17, 2003 to February 3, 2013). Defendant states that it began paying permanent disability advances on February 17, 2016 based on the report of the same date authored by the Agreed Medical Evaluator (AME) at the time, Dr. Bruff. Defendant asserts “apportionment [was not] done correctly” by the

doctor, but defendant kept paying advances until October 9, 2019. According to defendant, between February 17, 2016 and October 9, 2019, when advances were being paid, the parties returned to Dr. Bressler, this time to act as their AME, with the doctor issuing two reports and undergoing deposition once during that period. (Petition for Reconsideration, pp. 6-7.) However, defendant's chronology does not show why defendant continued advancing permanent disability payments for three and one-half years, in a situation where defendant says it had doubts about Dr. Bruff's apportionment opinion from the beginning, i.e., from the time of the doctor's report dated February 17, 2016. More importantly, defendant's administration of benefits in the cumulative trauma case has resulted in defendant claiming a credit of almost \$14,000.00 on a permanent disability award of \$67,907.50, which represents an approximately 20 percent curtailment of applicant's permanent disability indemnity benefits. Although defendant voluntarily paid benefits on the cumulative trauma claim and eventually claimed credit as envisioned by section 4909, defendant did so in a manner and under circumstances that resulted in a material impairment of applicant's permanent disability award in ADJ8919366. (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Dunehew)* (2011) 76 Cal.Comp.Cases 1251 (writ den.) [allowing defendant credit for compensation paid for 2003 injury would be destructive of purpose of permanent disability award for 2007 injury].) In this case, we therefore conclude that the WCJ correctly disallowed credit in ADJ8919366.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Award of March 10, 2020 is **AFFIRMED**, except that Finding 7 in ADJ1415534 is **RESCINDED AND REPLACED** by the following new Finding 7 in ADJ1415534:

**FINDINGS OF FACT**

**ADJ1415534**

...

7. Defendant is entitled to take credit for this permanent disability from ADJ4508242, after accounting for the attorney's fee in ADJ1415534. The exact amount of the credit shall be adjusted by the parties or determined by the WCJ absent adjustment, jurisdiction reserved.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



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

**March 29, 2023**

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

**MICHAEL RAMRAKHA  
LAW OFFICES OF EDWARD SINGER  
STATE COMPENSATION INSURANCE FUND**

**JTL/ara**

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



**REPORT AND RECOMMENDATION ON PETITION FOR  
RECONSIDERATION**

**INTRODUCTION**

Defendant, RJ Donovan Correctional Facility, legally uninsured, by and through its adjusting agency State Compensation Insurance Fund, has filed a timely, verified, petition for reconsideration, on the standard statutory grounds, from the trial court's March 10, 2020 Findings and Order, pleading that

- (1) The Board acted without or in excess of its powers,
- (2) The evidence does not justify the Findings of Fact and Order, which determined that applicant is to take nothing further for the alleged industrial injury.
- (3) The finding of fact do not support the order, decision, or award,
- (4) Specifically, defendant contends this WCJ erred in not allowing credit to be taken from one case/claim to another due to significant overpayment made by defendant.

**FACTS**

The main issue for this WCJ to decide in this matter was whether or not defendant was entitled to take credit for overpayments from one industrial injury claim for permanent disability in another claim for permanent disability.

Here, the evidence presented established the following:

For the date of injury 9/16/01, ADJ1415534, parties stipulated to a 25% PD and defendant has paid no permanent disability to date on this claim. (Defendant Exhibit A)

For the date of injury 3/16/03, ADJ4508242, parties stipulated to a 4% PD and defendant has paid \$29,720.25 from 2/15/05 through 3/04/08, with the first check issuing on 7/19/05 for the period of 2/15/05 through 7/19/05 in the amount of \$4,096.43. (Defendant Exhibit B)

For the date of injury 3/17/03-2/3/13, ADJ8919366, parties stipulated to a 53% PD and defendant has paid \$43,724.01 for the period of 2/17/16 - 10/08/19, with the first check issuing on 5/24/16 in the amount of \$3,220.00. (Defendant Exhibit C)

Defendant requested to take credit for \$13,835.88 from ADJ4508242 to ADJ1415534 and \$13,997.37 from ADJ4508242 to ADJ8919366.<sup>1</sup> [...]

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<sup>1</sup> It should be noted that for ADJ4508242, at 4%, the proper PD amount for the date of injury of 3/16/03 is a total of \$2,220.00, making a potential overpayment of \$27,500.25. (29,720.25-2,220.00 = 27,500.25) However, defendant is asking for a total of \$27,833.25, more than what would be "left over" after taking out the proper PD amount, if allowable. This point is made to show that after trying to decipher exactly how defendant administered the claim, the amounts are still not correct to date.