

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

EVELYNE GARCIA, *Applicant*

vs.

**DRAPER'S AND DAMON'S INC.;;
ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ2436963 (SAC0305016)
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Findings issued on March 10, 2026. The workers' compensation administrative law judge (WCJ) found that defendant failed to meet its burden of proof to establish the right to credit.

Defendant contends that it met its burden of proof to support a credit in the amount of the recovery received by applicant in her third party case against its liability for payment of future benefits; and that to the extent that the WCJ relied on the application of laches in her Opinion on Decision, applicant did not prove the elements of laches to bar application of a credit.

Applicant filed an Answer. The WCJ issued a Report recommending denial of the Petition.

We have considered the allegations in the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny reconsideration.

FACTS

Applicant sustained an injury while employed by defendant to her bilateral knees, lumbar spine, and left hip as the result of a cumulative injury through July 25, 2001.¹

On October 20, 2011, applicant, along with a co-plaintiff, filed a civil complaint for negligence, strict products liability, failure to warn, breach of express warranty, and breach of

¹ The matter may have previously resolved by way of stipulation, but there are no stipulations in the record before us.

implied warranty of fitness and merchantability against OtisMed Corporation² and Stryker Corporation. (Defendant's Exhibit F, at p. 399.) The complaint alleges that following applicant's total knee replacement surgery on June 26, 2007, the hardware failure and abnormal loosening of the knee hardware resulted in a revision surgery in October 2007. (*Id.* at p. 403.) It also alleges that applicant had a left knee replacement with the same unfortunate hardware failure which resulted in the need for five left knee revisions surgeries occurring between February 2009 and January 2011.

On April 18, 2014, defendant Zenith filed a Notice of Lien Claim in the civil action which stated:

...under the provisions of Labor Code section 3852, 3856(b), and 3862 a first lien in the sum of \$20,925, to date, upon any settlement or judgment rendered herein in favor of the Plaintiff, for amounts it has paid, and for further amounts it may become obligated to pay, for Plaintiff's benefit under a contract of workers' compensation insurance on account of the workers' compensation liability of Draper's and Damon's Inc. by reason of injuries sustained by Plaintiff on or about July 25, 2011.

(*Id.* at p. 26.)

It appears that the civil matter was settled on September 9, 2015, and was dismissed on October 19, 2015. (*Id.* at p. 3 and p. 5.)

On July 9, 2025, defendant filed a Petition for Credit seeking a credit in the amount of \$32,000.00. According to a copy of a check made out to applicant that was attached to the Petition for Credit, the check was by applicant's civil counsel, dated October 16, 2015, and states, "Garcia v. Stryker-net settlement."³

On February 26, 2026, the matter was set for trial on the following issues:

1. Defendant's Petition for Credit, dated July 9, 2025. Defendant seeks credit in the amount of \$32,000.00 to be applied against any and all benefits due or may become due. Defendant relies on Labor Code sections 3858 and 3861. Applicant raises laches and estoppel as defenses. Applicant contends defendant was aware of the faulty knee that resulted in surgery. Applicant claims the credit would result in unjust enrichment.

(Minutes of Hearing/Summary of Evidence (MOH/SOE) at 2:10-14.)

² OtisMed was dismissed from the suit prior to settlement.

³ The parties and the WCJ are reminded that each exhibit must be clearly and separately marked. It is improper to designate a pleading, here the Petition for Credit, as an exhibit.

At trial, applicant testified that she is receiving medical treatment through Zenith Insurance Company for her injury that she sustained while working for defendant. (*Id.* at 3:18-19.) She recalled filing a lawsuit against Stryker and settling the matter, but did not recall the amount of the settlement. She never received settlement paperwork. (*Id.* at 3:21-24.) On cross examination, she recalled that her net recovery was \$32,000.00 and that she signed an agreement. She could not recall any of the terms of the settlement. (*Id.* at 4:2-5.)

Applicant's husband, Frank Garcia, also testified. He testified that Zenith also received a check from the settlement. He recalled that their attorney at the time called Zenith, who agreed to take part in the settlement, then the attorney would take fees, and they would get the remainder. (*Id.* at 4:18-20.) He understood that the settlement was a "done deal." (*Id.* at 5:5-6.) The settlement was payment for the failing knee prosthesis for which applicant had 12 surgeries. (*Id.* at 5:14.) He also testified that applicant is still receiving treatment through Zenith, but that most of the requests are denied after review. He was unable to reach his civil attorney as the phone number was not valid anymore. (*Id.* at 6:1-2.)

The claims examiner, Yvette Alatiz, testified on behalf of defendant. She testified that she inherited the file in 2023 at which time she noticed that Zenith had a lien in the lawsuit. (*Id.* at 6:13 and 17.) Her supervisor advised her to follow up with the subrogation department to determine status and if there was further recovery. (*Id.* at 6:18-20.) She subpoenaed the civil records at that point, but they did not include copies of any settlement documents. The claims notes did include discussion of attending a mediation in 2015 and that they received \$10,000 from the mediation. (*Id.* at 7:4-8.) There are additional notes from 2017 that questioned whether a settlement had occurred. (*Id.*) She attempted to subpoena the records from applicant's civil counsel, but the subpoena was returned noting the records had been destroyed. (*Id.* at 7:14-16.) She was not aware whether the agreement for \$10,000.00 resolved all future claims for credit. (*Id.* at 7:25.) She did not know how much Zenith's lien was worth at the time of the settlement. (*Id.* at 8:2-4.)

On March 10, 2026, the WCJ issued her Findings, ruling that defendant had failed to meet its burden to establish a right to credit, thereby denying defendant's Petition for Credit. In her Opinion, the WCJ explained that without any documentation, including the settlement agreement itself, she could not determine the breakdown or the allocations of the funds. She could not tell if

defendant settled only the lien or the right to credit as well. She likewise opined that the credit could be barred by laches.

DISCUSSION

I.

Former Labor Code section 5909⁴ provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on April 7, 2026 and 60 days from the date of transmission is Saturday, June 6, 2026. The next business day that is 60 days from the date of transmission is Monday, June 8, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)⁵ This decision issued by or on Monday, June 8, 2026 so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides

⁴ All further statutory references will be to the Labor Code unless otherwise indicated.

⁵ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 7, 2026 and the case was transmitted to the Appeals Board on April 7, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 7, 2026.

II.

Section 3852 states, in pertinent part:

The claim of an employee. . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation. . . may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit. . . the total amount of compensation. . . paid to the employee or to his or her dependents . . .

(Lab. Code, § 3852.)

Section 3861 states:

The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.

(Lab. Code, § 3861.)

Thus, section 3852 allows an employer to pursue recovery for benefits already paid to an injured worker from a civil defendant in a civil lawsuit. Under section 3861, when workers' compensation benefits are owed to an injured worker after resolution of the civil case, credit is the underlying mechanism. "An employer is entitled to a credit against its obligation to pay further compensation benefits in the amount of the worker's net recovery against the third party. (Lab.

Code, § 3858, 3861.)” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Borges)* (1997) 53 Cal.App.4th 579, 583 [62 Cal.Comp.Cases 300]); *Herr v. Workers’ Comp. Appeals Bd.* (1979) 98 Cal.App.3d 321, 327-328 [44 Cal.Comp.Cases 1059] (“The right to credit in the appeals board proceedings and the right to a lien in the third party action are separate and distinct” [Citations omitted]); *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Brown)* (1982) 130 Cal.App.3d 933, 939, fn 2 [47 Cal.Comp.Cases 358] (“The lien allows the employer to be reimbursed for money already paid, while the credit is taken against sums which may become due in the future”).) Thus, even though an employer may have resolved its lien in the civil case, it could still be entitled to assert a credit.

Defendant bears the burden of proving entitlement to a credit as outlined in *Martinez v. Associated Engineering & Construction Co.* (1979) 44 Cal.Comp.Cases 1012, 1021 (Appeals Board en banc), wherein we explained:

[D]efendant has the burden of proof to establish its right to claim a credit. It must show that there was a third party settlement and that it has paid out compensation benefits or will likely have to pay such benefits in the future.

(*Id.* at p. 1021; see also Lab. Code, § 5705.)⁶

Defendant contends here that evidence of a net recovery by way of a check is enough to satisfy its burden of proving entitlement to a credit.

First, WCAB Rule 10555(b) (Cal. Code Regs., tit. 8, § 10555) requires a petition for credit to include (1) a copy of the settlement or judgment, if available; and (2) an itemization of any credit applied to expenses and attorney’s fees pursuant to sections 3856, 3858, and 3860. Here, it has been established that neither party has been able to recover a copy of the settlement documents or any other supporting documents explaining how the proceeds were allocated. The purpose of this rule is well founded as the settlement or judgment provides pertinent information for establishing the propriety of a credit, particularly as to amount, bases for damages⁷, allocation of liability, and whether certain rights were reserved or waived in the course of settlement.

⁶ “The burden of proof rests upon the party or lien claimant holding the affirmative of the issue.” (Lab. Code, § 5705.)

⁷ We note that a credit right will be applied to all damages without segregation for non-economic damages such as pain and suffering. (*Pacific Gas & Electric Co. v. IAC (Johnson)* (1935) 8 Cal. App. 2d 499. However, damages paid to another would not be recoverable in the credit, such as loss of consortium damages.

Adjudication of a credit without any of the documents that explain the basis for the settlement is nearly impossible.

Likewise, without such documentation, there is no basis to explain under what circumstances applicant received \$32,000.00 and defendant received \$10,000 because the settlement documents may contain information as to the cause(s) of action being settled. At first blush, these appear to be claims for product liability and negligence, but there is at least some indication that the civil case could involve a medical malpractice component wherein the workers' compensation insurance carrier would not be reimbursed by the third party, and the applicant instead takes a reduction in settlement. (See Civil Code §3333.1 and 3333.2; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal. App. 3d 499 [54 Cal. Comp. Cases 160].)⁸ Further, there could have also been a stipulation as to comparative negligence amongst all the parties which would also effectively reduce the amount of credit defendant would be entitled to claim. (See *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829.) Without the documents, and in the absence of any specific recollection on the part of applicant or her spouse, and/or the lack of any first hand knowledge by defendant, we are left to speculate as to the amount of the credit, which in turn supports the conclusion that defendant did not meet its burden.

Additionally, where the third-party tort is not contemporaneous with the precipitating industrial injury, defendant carries an additional burden to prove that the later third party negligence caused an exacerbation of the injury. (*Hodge v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 501 [46 Cal.Comp.Cases 1034]; *Kaiser Foundation Hospital v. Workers' Comp. Appeals Bd. (Tawney)* (1984) 161 Cal.App.3d 1071 [49 Cal.Comp.Cases 724]; *Rhode v. National Medical Hosp.* (1979) 93 Cal.App.3d 528 [44 Cal.Comp.Cases 706].) As held in *Hodge*, defendant is then "entitled to a credit only to that portion of future compensation benefits representing the third party's responsibility for exacerbating the employee's condition, since only that portion of future benefits poses a potential for double recovery." (*Hodge, supra*, at p. 515.) As explained in *Tawney*:

Such additional compensation arises by virtue of the well-established rule that temporary disability benefits and medical benefits cannot be apportioned. Where

⁸ Notably, defendant submitted evidence of a separate claim in Santa Clara Superior Court against Stanford Hospital alleging medical negligence which was dismissed for reasons unknown in 2017. It is unclear the relevance of this evidence in this matter, so we do not address it here.

the need for either or both of them is caused partly by industrial and partly by nonindustrial factors, the employer is liable for all of such costs, including those related to the nonindustrial incident if needed to cure the industrial condition. (citations omitted.) The existence of this rule furnishes a compelling practical reason to recognize that the availability of subrogation rights must turn upon whether the tort injury **was compensable** in some respect, not whether it was "industrial." The policy underlying the subrogation statutes is avoidance of double recovery by the employee. (citations omitted.) This policy could not be properly effectuated unless subrogation were allowed in *all* instances where increased compensation is one effect of the tort injury.

(*Id.* at pp. 1071), emphasis added.)

Here, defendant did not provide any evidence that there was increased disability or compensation owed as a result of the tort. While it may be inferred from the pleadings and testimony, no medical evidence was provided and no benefit printout was offered that would show that defendant paid for additional surgeries as a result of the third party's negligence. Apart from the original lien filing, there is no evidence as to what the final amount of the lien was at the time of the settlement and no evidence of payment of continuing benefits as the result of an exacerbation by the third party tortfeasor. As explained above, a credit only applies against future workers' compensation benefits that defendant becomes obligated pay *after* the time of the civil action settlement. (*Herr, supra*, 98 Cal.App.3d at p. 329.) The parties testified that medical treatment continued to be provided, but without any evidence of a connection, it is possible that the potential damages owed to defendant were already satisfied by the amounts sought in the lien. It is also worth noting, that because the issues of workers' compensation indemnity had resolved years prior to the civil lawsuit, defendant's right to credit could also arguably be reduced for any amount considered as a replacement for earning losses that arose as a result of the third party acts as applicant would not be entitled to further compensation for those losses in her workers' compensation case.

Ultimately, defendant failed to meet its burden that it is entitled to a credit.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 8, 2026

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

**EVELYNE GARCIA
METZINGER & ASSOCIATES
CHERNOW PINE**

TF/kl

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