

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

MARIA HERNANDEZ, *Applicant*

vs.

**COSTCO WHOLESALE CORPORATION,
permissibly self-insured, administered by HELMSMAN MANAGEMENT,
*Defendants***

**Adjudication Number: ADJ16426069
Santa Rosa District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued on June 15, 2023, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that (1) while employed by defendant as a bakery wrapper on February 16, 2019, applicant sustained injury arising out of and in the course of employment to her neck and right shoulder; (2) defendant is entitled to a credit for payment of temporary disability indemnity paid beyond the 104-week statutory cap, to be applied against the permanent disability rate of \$290.00 per week, with the exact amount to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute; (3) applicant's injury caused permanent disability of 21 percent, entitling applicant to 80.50 weeks of disability indemnity payable at the rate of \$290.00 per week in the total sum of \$23,345.00; (4) applicant will require further medical treatment to cure or relieve her from the effects of injury; and (5) the Employment Development Department (EDD) has paid applicant Unemployment Compensation Disability Benefits from March 5, 2022 through November 22, 2022 at the weekly rate of \$758.00, and its lien shall be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute.

The WCJ awarded applicant (1) permanent disability of 21 percent, entitling applicant to 80.50 weeks of disability indemnity at the rate of \$290.00 per week, in the

total sum of \$23,345.00, less credit to defendant, and less \$3,501.75 payable to applicant's attorney; and (2) future medical treatment.

Applicant contends that defendant is barred from receiving a credit for overpayment of temporary disability benefits because it failed to file a petition for credit. Applicant further contends that the evidence fails to establish that the equities favor the award of a credit in defendant's favor.

We received an Answer from defendant.

The WCJ filed a Report and Recommendation on Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record and as discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that defendant overpaid applicant's temporary disability benefits, that the issue of the amount of overpayment of temporary disability benefits is deferred, and that the issue of whether the equities favor an award of credit for the overpayment is deferred; and we will return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On May 22, 2023, the matter proceeded to trial of the following issues:

1. Permanent disability.
 - ...
 3. Need for further medical treatment.
 4. The lien of EDD for state disability insurance for periods paid from March 5, 2022 through November 22, 2022, in the total amount of \$25,827.68, paid at a weekly rate of \$758.
 - ...
 6. Temporary disability overpayment (over 104 weeks) in the total amount of \$6,094.47.
- (Minutes of Hearing and Summary of Evidence, May 22, 2023, pp. 2:38-3:5.)

The parties stipulated that (1) defendant paid temporary disability benefits at the weekly rate of \$804.95 from January 14, 2020 through March 18, 2022, and permanent disability benefits at the weekly rate of \$290 from March 5, 2022 through May 7, 2022;

and (2) applicant became permanent and stationary on December 16, 2022. (*Id.*, p. 2:18-34.)

The WCJ admitted one exhibit into evidence: the QME Report Dr. Avagyan dated January 11, 2023. (*Id.*, p. 3:11-12.) The report includes the following:

DISABILITY STATUS

The applicant has reached maximal medical improvement since December 16, 2022. She is permanent and stationary. The applicant has had several sessions of physical therapy. She has been taking pain medications, including anti-inflammatory pain medications and neuropathic pain medications. She underwent right shoulder surgery with postoperative physical therapy. She has been evaluated by multiple pain management specialists, and she received cervical epidural injections.

...

FUTURE MEDICAL CARE

Provisions should be made for future medical care for this patient as indicated by continuation or exacerbation of pain and consequent progression of disability. That care may include, but is not restricted to, the following:

1. Physical therapy as needed, including but not limited to such modalities as hot packs, massage, ultrasound, TENS unit, strengthening and conditioning exercises, and when indicated, adjunctive chiropractic manipulations.
 2. Medications such as NSAID's, muscle relaxants, neuropathic pain medications and injectable corticosteroids.
 3. Future re-evaluations, consultations and diagnostic studies.
 4. The use, maintenance, and replacement of such orthotic devices and durable medical goods as may be needed, such as rigid, semi-rigid, and elastic braces, and a TENS unit.
 5. Surgery and appropriate hospital and post-operative rehabilitative care in event of deterioration of this patient's current clinical status relative to the underlying right shoulder and cervical spine pathology.
- (Ex. 1, QME Report Dr. Avagyan, January 11, 2023 pp. 65-66.)

Applicant was the only witness at trial and testified as to the duties of her work as a bakery wrapper for Costco for 23 years. (Minutes of Hearing and Summary of Evidence, May 22, 2023, pp. 3:16-4:23.)

In the Report, the WCJ writes:

Applicant suffered an industrial injury to her neck and right shoulder on February 16, 2019 as a bakery wrapper for the employer Costco Wholesale Corporation. The injury occurred when she was cleaning tables and experienced pain in her right shoulder. She was age 63 on the date of injury.

...

Hripsime Avagyan, D.O. was utilized as the Panel Qualified Medical Evaluator (QME). In his sole report dated January 11, 2023, Dr. Avagyan opined that the applicant had reached maximum medical improvement since December 16, 2022. (Jt. Exh. 1, Dr. Avagyan, 1/11/23.)

Temporary disability was paid from January 14, 2020 through March 18, 2022 at the weekly rate of \$804.95. The defendant asserted a temporary disability overpayment . credit in the amount of \$6,094.47, representing the temporary disability indemnity paid beyond the statutory cap of 104 weeks. The parties stipulated that the permanent and stationary date is December 16, 2022.

This matter was tried on the issues of credit for temporary disability overpayment, permanent disability, occupation and group number, need for further medical treatment, EDD lien and attorney's fees.

...

Turning to the merits of the issue, Labor Code §4909 authorizes the Appeals Board to allow a defendant credit for payments it made to the injured worker during a time period when it did not have a legal obligation to do so. Whether a credit is to be allowed is a matter directed to the discretionary authority of the WCAB to be weighted in the light of the circumstances of a particular case and should not be subjected to a harsh dictate that avoids the equities presented, (*Cordes v. General Dynamics-Astronautics* (1966) 31 Cal. Comp. Cases 429 (Appeals Bd. panel).

In determining whether to award a credit in such cases:

It must be remembered that temporary disability indemnity and permanent disability indemnity were intended by the Legislature to serve entirely different functions. Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. . . In contrast, permanent disability indemnity compensates for the residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained . . . Permanent disability services to assist the injured worker in his adjustment in returning to the labor markets . . . Thus, in many instances the allowance of credit for a temporary disability overpayment against permanent disability indemnity can be disruptive

and in some instances totally destructive of the purpose of permanent disability indemnity.

(*Maples v. Workers' Comp. Appeals Bd* (1980) 111 Cal. App. 3d 827, 836-837)

A credit may be awarded when the amount sought is small and would not result in any significant interruption of benefits. (*Id. at* 111 Cal. App. 3d 827, 834.)

Here, in weighing the relative equities, the court awarded a temporary disability overpayment credit only at the permanent disability indemnity rate. As stated in the Opinion on Decision,

"Here, for reasons unclear to the court, defendant continued to pay temporary disability benefits beyond their legal obligation. No evidence was presented to explain why defendant continued to pay temporary disability beyond the statutory 104 week cap pursuant to Labor Code §4656(c)(2). However, there is public policy against an applicant's double recovery. Balancing the equities in this case, including the amount of permanent disability awarded and the continuation of benefits, the defendant is entitled to a credit at the permanent disability weekly rate of \$290 from the temporary disability overpayment paid beyond the 104 weeks."

(Opinion on Decision, 6/15/23.)

In this case, the overpayment spans over a period of almost eight weeks totaling \$6,094.47. The permanent disability award is \$23,345.00. The credit sought by the defendant is not so substantial as to deprive the applicant the majority of her permanent award. Also, there does not appear to be an interruption in applicant's benefits.

At the same time, there is no evidence that the applicant acted in bad faith in accepting temporary disability benefits beyond the 104-week statutory cap.

(Report, pp. 1-5.)

DISCUSSION

We first evaluate applicant's contention that defendant is barred from receiving a credit for overpayment of temporary disability benefits because it failed to file a petition for credit.

WCAB Rule 10555 provides:

(a) 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.
(Cal. Code Regs., tit. 8, § 10555.)

In *Ramrakha v. State*, 2023 Cal.Wrk.Comp. P.D. LEXIS 82,¹ an Appeals Board panel declined to disallow a claim for credit based upon the defendant's failure to file a petition for credit on the grounds that Rule 10555 "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.'" (*Id.*)

We are persuaded by the reasoning in *Ramrakha*, and conclude that here the failure to file or serve a petition for credit cannot serve as a basis to disallow a claim for credit. Accordingly, we are unable to discern error in the WCJ's award of a credit based upon the lack of a petition for credit.

However, before we turn to applicant's argument that the evidence fails to prove that the equities favor the award of a credit, we note that the parties framed the issue of whether defendant overpaid applicant's temporary disability benefits in the amount of \$6,094.47 for trial without identifying the issue of whether a credit should be awarded in the event that defendant overpaid temporary disability benefits. (Minutes of Hearing and Summary of Evidence, May 22, 2023, pp. 2:38-3:5.) Notwithstanding the specificity with which the parties framed the issues, the WCJ did not issue a finding as to whether defendant overpaid temporary disability benefits in the amount of \$6,094.47 or any other amount. Rather, the WCJ found that defendant is entitled to a credit for payment of temporary disability indemnity paid beyond the 104-week statutory cap in an amount to be adjusted by the parties. As we will explain, we are unable to discern the WCJ's reasons or grounds for this finding.

¹ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of statutory or regulatory construction. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

In our view, a determination of the amount of overpayment of temporary disability benefits is a necessary prerequisite to the determination of whether the equities favor an award of credit based upon the overpayment amount. (See, e.g., Cal. Code Regs., tit. 8, § 10555(a)(3) (requiring that any petition for credit specifically set forth the amount of credit claimed); *Maples, supra*, at pp. 834, 836-837 (finding that credit may be awarded when the amount sought is small, would not cause significant interruption of benefits, and would not nullify the purpose of permanent disability indemnity.) Not only is there no determination of the actual overpayment amount here, but the record lacks evidence from which we can make such a determination.

Specifically, on one hand, defendant claims to have overpaid applicant in the amount of amount of \$6,094.47. (Minutes of Hearing and Summary of Evidence, May 22, 2023, pp. 2:38-3:5.) On the other hand, the parties stipulated that (1) defendant paid temporary disability benefits to applicant at the weekly rate of \$804.95 from January 14, 2020 through March 18, 2022, and permanent disability at the weekly rate of \$290 from March 5, 2022 through May 7, 2022; and (2) applicant became permanent and stationary on December 16, 2022. (*Id.*, pp. 2:18-34.) The juxtaposition of defendant's claimed amount versus the parties' stipulations leaves the record unclear regarding the grounds on which (1) defendant sought a credit of \$6,094.47 when the stipulation suggests that defendant paid temporary disability benefits 9 weeks and 4 days beyond the 104 week statutory period, amounting to an overpayment of \$7,703.37; and (2) defendant issued both temporary and permanent disability benefits for the period from March 5 through March 18, 2022, a date approximately nine months before the date applicant became permanent and stationary.

The WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award, there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Labor Code § 5313; see also *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the

right of seeking reconsideration more meaningful." (*Hamilton, supra*, at p. 476, (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351]).)

Given that the record is insufficient to determine the amount of the temporary disability benefits overpayment, and given that the evaluation of the issue of whether the equities favor an award of credit requires that the actual amount of overpayment be determined, we conclude that the record should be developed as to the issue of the amount of temporary disability benefits defendant overpaid. Accordingly, we will amend the F&A to find that defendant overpaid temporary disability benefits to applicant and that the issue of the amount of overpayment is deferred.

Having determined that the record should be developed as to the issue of the amount of overpayment, we nevertheless examine the record regarding the issue of whether the equities favor the allowance of a credit.

Labor Code section 4909 authorizes the WCAB to allow a credit for any payment, allowance, or benefit that the employer has provided to the injured employee that was not then due and payable or for which a dispute or question concerning the right to compensation has arisen. (See Labor Code § 4909; see also *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.)

As explained above, equity favors allowance of a credit if the credit is small and would not cause a significant interruption of benefits. In analyzing the equities, the law recognizes 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 an employer's actions when the employee received benefits in good faith with no wrong-doing on his or her part. (See *Maples, supra*; see also *J.C. Penny Co. v. Workers' Comp. Appeals Bd. (Edwards)* (2009) 175 Cal.App.4th 818 [74 Cal.Comp.Cases 826]; *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 [78 Cal. Rptr. 497, 455 P.2d 425, 34 Cal.Comp.Cases 382, 384].)

In this case, although the WCJ determined that applicant received the overpayment

of temporary disability benefits in good faith, it is unclear as to whether the undetermined, actual amount of overpayment may be considered small or large when viewed in the context of the permanent disability award of \$23,345.00 against which a credit for the overpayment would be applicable.

Additionally, the record is unclear as to whether an award of credit would disrupt applicant's receipt of benefits or nullify the purpose of the permanent disability benefit. Notably, the record does not address whether or not an award of credit might significantly interrupt applicant's potential future treatment, including among other things, physical therapy, surgery and post-operative rehabilitative care, if such treatment were to constrain applicant's ability to work and earn income. (See Ex. 1, QME Report Dr. Avagyan, January 11, 2023 p. 66.) Nor does the record address whether an award of credit could be destructive to the purpose of applicant's permanent disability benefits in the event that defendant was awarded a credit for overpayment of temporary disability benefits in excess of the 104 week-cap and then sought to recover an additional credit based upon its obligations to reimburse the EDD. We therefore conclude that the record should be developed as to the issue of whether the equities favor awarding defendant a credit for overpayment of temporary disability benefits.

Accordingly, we will amend the F&A to find that the issue of whether the equities favor the award of a credit for the overpayment of temporary disability benefits is deferred.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that defendant overpaid applicant's temporary disability benefits, that the issue of the amount of overpayment of temporary disability benefits is deferred, and that the issue of whether the equities favor an award of credit for the overpayment is deferred; and we will return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on June 15, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on June 15, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

3. It is found that defendant overpaid applicant's temporary disability benefits, and that the issues of the amount of overpayment and whether the equities favor an award of credit for the overpayment are deferred.

AWARD

AWARD IS MADE in favor of **MARIA HERNANDEZ** against **COSTCO WHOLESALE CORPORATION**, permissibly self-insured, administered by **HELMSMAN MANAGEMENT**; of:

- a. Permanent disability of 21%, entitling applicant to 80.50 weeks of disability indemnity at the rate of \$290, in the total sum of \$23,345.00, less credit, if any, to defendant for sums paid in excess of temporary disability benefits to which applicant was entitled, and less \$3,501.75 payable to Wyman & Hegwer as attorney fees to be commuted from the far end of the award; and
- b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

IT IS FURTHER ORDERED that this matter is **RETURNED** for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 31, 2023

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

**MARIA HERNANDEZ
WYMAN & HEGWER
GILSON DAUB**

SRO/cs

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