

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

**MARIA AVOLA, *Applicant***

**vs.**

**SOUTHERN CALIFORNIA EDISON, permissibly self-insured, *Defendant***

**Adjudication Number: ADJ9313967  
Los Angeles District Office**

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

Applicant seeks reconsideration of the “Findings and Award II” of February 20, 2024, in which the Workers’ Compensation Administrative Law Judge (“WCJ”) found that applicant, while employed as an IT specialist by Southern California Edison during the period February 10, 2009 to February 10, 2010, sustained industrial injury to her psyche and internal systems, causing temporary disability from February 10, 2010 through October 3, 2017. The WCJ also found that applicant is entitled to 104 weeks of temporary disability indemnity at the weekly rate of \$986.69, and that against this compensation defendant is entitled to credit for long term disability (“LTD”) payments made to applicant.

Applicant contends that the evidence does not justify the WCJ’s finding that defendant is entitled to credit for LTD payments, that the WCJ erred in not following the Appeals Board’s prior decision of March 13, 2023, that the decision required defendant to produce the LTD policy, that the WCJ erred in admitting improperly authenticated evidence, and that applicant is entitled to an increased weekly rate of temporary disability indemnity pursuant to Labor Code section 4661.5.

Defendant filed an answer.

Applicant submitted a request to file a supplemental petition for reconsideration and the proposed supplemental petition. Defendant submitted a request to file a supplemental answer and

the proposed supplemental answer. We have exercised our discretion to accept and consider these supplemental pleadings. (WCAB Rule 10964, Cal. Code Regs., tit. 8, § 10964.)

Based on our review of the record and applicable law, we conclude that defendant has not met its burden of proving that it is entitled to credit for LTD benefits against its liability for temporary disability indemnity. We will grant reconsideration, rescind the WCJ's decision, and replace it with a decision denying credit. We also include a finding that applicant must be paid temporary disability indemnity at the weekly rate required by Labor Code section 4661.5. To provide applicant with notice, we will defer the issue of attorney's fees.

### **BACKGROUND**

As noted above, the WCJ found that applicant sustained industrial injury to her psyche and internal systems during the period February 10, 2009 to February 10, 2010, that the injury caused temporary disability from February 10, 2010 through October 3, 2017, and that applicant is entitled to 104 weeks of temporary disability indemnity. These findings are not disputed upon reconsideration. We further note that according to the printout of benefits in defense exhibit C, it appears that STD/LTD benefits were paid during a period entirely overlapping applicant's entitlement to 104 weeks of temporary disability indemnity. For instance, it appears STD/LTD benefits were paid from January 2010 to October 19, 2014, in the total amount of \$289,635.21.<sup>1</sup> In any case, and although defendant belatedly submitted a lien for the STD/LTD benefits that were paid, the issue before us is one of credit. We explain this below.

In our prior decision of March 13, 2023, we stated:

[...] [W]e agree that defendant's actual LTD benefits policy, not just the "disability program overview" dated July 21, 2010 (defense exhibit B), must be admitted into evidence and considered by the WCJ in issuing a new decision. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings as directed in this opinion, and for a new decision by the WCJ.

The Board previously issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration in this matter on January 3, 2020. In that decision, the Board rescinded the Findings and Award issued by the WCJ on October 30, 2019 and returned the matter to the trial level "to allow the WCJ to enter the LTD policy into the record and to determine whether the benefits paid pursuant to the LTD policy were intended to replace workers' compensation

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<sup>1</sup> In its answer herein, defendant offers various figures of the total amounts of STD/LTD paid to applicant during various time periods. As we are denying defendant's claim of credit in its entirety, we need not make a specific finding of the amount of credit that otherwise may have been applicable.

benefits, pursuant to Labor Code section 4903.1(a)(3)(A).” (Board decision dated January 3, 2020, at 2:26-3:2.) However, the next entry in the EAMS record following the Board’s decision - the Minutes of Hearing of February 5, 2020 - show only that the WCJ granted the parties’ joint request for an order taking the matter off calendar (“OTOC”) and then submitted the matter for decision. Even though the matter had already been submitted for decision on February 5, 2020, the WCJ admitted into evidence defense exhibit B (a 29-page “disability program overview”) and defense exhibit C (printout of benefits) later, when the WCJ issued his Findings and Award and Opinion on Decision on March 11, 2020.

In addition to violating applicant’s right to due process by admitting additional evidence (defense exhibits B and C) after the matter had already been submitted, and without providing applicant an opportunity to object, it appears the WCJ overlooked the essence of the Board’s decision of January 3, 2020. To reiterate, in said decision the Board returned this case to the WCJ “to enter the LTD policy into the record and to determine whether the benefits paid pursuant to the LTD policy were intended to replace workers’ compensation benefits, pursuant to Labor Code section 4903.1(a)(3)(A).” (*Italics added.*...]

In his Report on applicant’s petition for reconsideration herein, the WCJ does not ignore the fact that in our March 13, 2023 decision, we remanded the case to the WCJ with a directive to obtain the actual LTD insurance policy from defendant. However, the WCJ acknowledges that this was not done. Instead, the WCJ states in his Report that defendant “did provide the [WCJ] with clarification per the benefit handbook provided to all employees inclusive of the applicant.”

In fact, the WCJ stated in his Opinion on Decision that he relied upon the benefit handbook (exhibit AA, pp. 194-197) to allow defendant credit for LTD benefits paid to applicant: “Per the direct language in the Employee Benefit Handbook, the applicant cannot obtain [LTD] and temporary disability payments at the same time without a requirement of reimbursement to the [LTD] Policy. In this case, applicant has collected the [LTD] payments for which, should the applicant collect temporary disability, she would be required, per the Benefit Handbook, to reimburse these payments; conversely, credit for payments under this policy fall into this same category.”

We disagree. As explained below, we are not persuaded that defendant’s presentation of the Employee Benefit Handbook is enough to meet defendant’s burden of proving that it is entitled to credit for LTD payments.

## DISCUSSION

We begin by noting that Labor Code section 4903.1(a)(3)(A) provides:

(a) The appeals board or arbitrator, before issuing an award or approval of any compromise of claim, shall determine, on the basis of liens filed with it pursuant to Section 4903.05, whether any benefits have been paid or services provided by a health care provider, a health care service plan, a group disability policy, including a loss-of-income policy or a self-insured employee welfare benefit plan, and its award or approval shall provide for reimbursement for benefits paid or services provided under these plans as follows:

[...]

(3)(A) If the appeals board issues an award finding that an injury or illness arises out of and in the course of employment and makes an award for temporary disability indemnity, the appeals board shall allow a lien as living expense under Section 4903, for benefits paid by a group disability policy providing loss-of-time benefits and for loss-of-time benefits paid by a self-insured employee welfare benefit plan. The lien shall be allowed to the extent that benefits have been paid for the same day or days for which temporary disability indemnity is awarded and shall not exceed the award for temporary disability indemnity. A lien shall not be allowed hereunder unless the group disability policy or self-insured employee welfare benefit plan provides for reduction, exclusion, or coordination of loss-of-time benefits on account of workers' compensation benefits.

Here, although defendant submitted a lien for LTD benefits at the eleventh hour - the second trial date of December 6, 2023 (exhibit BB) – it was only the issue of credit that expressly was raised at the original trial date of September 4, 2019. Those trial minutes specifically reflect that defendant raised the issue of “*credit* for long-term disability payments against TTD.” (Minutes of Hearing, 9/4/19, p. 3, italics added.) Accordingly, the issue before us is appropriately defined as the question whether defendant is entitled to credit for LTD payments against its liability for indemnity due for the period of temporary disability indemnity found by the WCJ. (See *Connolly v. S. Cal. Edison* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 612 [distinguishing defendant’s claim for credit and a lien].)

Concerning that issue, the Board panel made it clear in *Butelo v. Leighton & Assocs.* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 523 [slip op. at 14-17] that the burden is on defendant to establish entitlement to credit:

[...] Labor Code section 4909 authorizes the Appeals Board to award a defendant credit for payments made during a time period that there was not a legal obligation to do so. [] (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827

[168 Cal. Rptr. 884, 45 Cal.Comp.Cases 1106].) An employer may be entitled to credit for payments made under an employer-provided private disability plan. (*Appleby v. Workers' Comp. Appeals Bd.* (1994) 27 Cal.App.4th 184 [32 Cal. Rptr. 2d 375, 59 Cal.Comp.Cases 520] (*Appleby*).) However, in order to obtain credit, the payments must have been, "clearly intended by both employer and employee as an advance on compensation to become due." (*Ott v. Workers' Comp. Appeals Bd.* (1981) 118 Cal.App.3d 912 [173 Cal. Rptr. 648, 46 Cal.Comp.Cases 545] (*Ott*); *Sea-Land Serv. v. Workers' Comp. Appeals Bd. (Lopez)* (1996) 14 Cal.4th 76 [58 Cal. Rptr. 2d 190, 925 P.2d 1309, 61 Cal.Comp.Cases 1360].)

Here, defendant presented no evidence regarding either the employer or employee's intent with regard to the long-term disability payments applicant received. Indeed, the only evidence concerning that issue was applicant's testimony at trial that the way he remembered it, he paid for the policy. Although the force of that testimony was diminished by applicant's further statement that he did not remember "exactly how it worked," the resulting ambiguity does not support defendant's claim for credit. This is because defendant was asserting the claim of credit for LTD payments and it had the affirmative burden of proof on that issue. (Lab. Code, § 5705; *Appleby, supra*.) Presenting ambiguous and uncertain testimony did not carry that burden.

As noted by the WCJ in her Report, an employer is not entitled to credit for money received by an injured worker because of a long term disability policy that the employee alone purchased because in that situation the employer has made no "payment, allowance or benefit" as required by Labor Code section 4909, and because it is self-evident that in such a situation payments made under the policy were not intended by either the employee or the employer to be "an advance on [worker's] compensation [benefits] to become due." (Lab. Code, § 4909; *Ott, supra*; *Appleby, supra*.) Here, defendant did not prove that it is entitled to credit for the long-term disability payments applicant received because it did not prove that it paid for the policy, and did not prove that the parties intended that payments under the policy be considered an advance on workers' compensation benefits. (*Id.*)

As in *Butelo*, here defendant presented no evidence regarding the employer or employee's intent with regard to the long-term disability payments applicant received. Applicant testified on direct examination, without rebuttal, that "she was not aware that the long-term disability would be used to offset TTD benefits or work-comp benefits. Her claim [was] denied and has not been accepted." (Summary of Evidence, 9/4/19, p. 4:14-17.)

Defendant claims in its answer (pp. 3-4) that an LTD policy did not exist at the time STD and LTD benefits were paid, and that in truth the "LTD Plan" had consisted of the "LTD Plan's Summary Plan Description," as contained in "Your Benefits Handbook." We note that the "Your Benefits Handbook" (exhibit AA) states that it is effective as of "January 1, 2011," almost a year

after applicant became temporarily disabled. In addition, we note the Handbook begins with a statement that “[t]his handbook contains Summary Plan Descriptions (SPDs) of the benefit plans offered by the company. The official plan documents are on file with the Edison International Employee Benefits Committee or the Southern California Edison Company Benefits Committee, as applicable. If there are any conflicts between the SPDs and the official plan documents, the plan documents will govern.” (Italics added.) Defendant’s assertion that a LTD policy did not exist at the time STD and LTD benefits were paid is contradicted by the Handbook’s reference to official plan documents that are supposed to be controlling in case of conflict. Further, although the Handbook addresses the issue of credit at pp. 196-197, the Handbook fails to clarify that LTD benefits will be reduced by workers’ compensation benefits in the form of temporary disability.

We further note that at trial on December 6, 2023, the WCJ rejected as untimely defendant’s attempt to offer a witness named Ms. Carol Woods to explain the allegedly non-existent policy or how the Handbook was supposed to deal with coordination of LTD and workers’ compensation benefits. (See, e.g., *Padron v. Frito Lay* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 69.) To the extent defendant’s suggestion to call Ms. Woods amounted to an offer of proof, it is contradicted by applicant’s testimony on cross-examination (at the original trial date) that she “does not recall if she received an employee handbook. This handbook discussed long-term disability and short-term disability. She does not know how much money she made on long-term/short-term disability.” (Summary of Evidence, 9/4/19, p. 5:18-21.)

In summary, defendant had multiple opportunities to come forward with the actual LTD policy pursuant to which it seeks credit, but defendant did not heed those opportunities. Although defendant introduced the Benefits Handbook, applicant testified that she did not recall whether she received it, and otherwise defendant failed to establish that applicant did receive it and knew that temporary disability benefits could be swallowed by STD/LTD benefits. Here, as in the *Butelo* case, defendant did not prove that it is entitled to credit for the LTD payments applicant received because defendant did not prove that the parties intended that payments under the policy would be considered an advance on workers’ compensation benefits. We therefore conclude that the WCJ erred in granting defendant’s claim for credit based on the Benefits Handbook.

We also find merit in applicant’s contention that because defendant never paid temporary disability indemnity and the benefit will be paid well past two years from the date of injury, she is entitled to have the indemnity paid at the rate required by Labor Code section 4661.5. (See

*Bufalino v. Countrywide Home Loans* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 323.) In its answer (pp. 13-14), defendant alleges that applicant is bound by a pretrial stipulation to the temporary disability indemnity rate of \$986.69 per week. We reject the allegation. At trial on September 4, 2019, applicant stipulated to weekly earnings of \$1,971.52 and a weekly *permanent* disability indemnity rate of \$230.00, but there was no stipulation to the weekly *temporary* disability indemnity rate. Rather, it was stipulated that “there is an issue in regard to the appropriate TTD rate.” (Minutes of Hearing, 9/4/19, p. 3.) In fact, applicant has consistently maintained that she is entitled to a weekly temporary disability indemnity rate of \$1,314.35, per Labor Code section 4661.5. She is correct. In order to provide notice to the applicant herself, however, we will defer the issue of her attorney’s fees for recovery of temporary disability benefits. Accordingly, we will order defendant to withhold 15% of said benefits pending further proceedings and determination by the WCJ.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the “Findings and Award II” of February 20, 2024 is **GRANTED**, and that as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, said decision is **RESCINDED**, and the following Findings and Award is **SUBSTITUTED** in its place:

#### **FINDINGS**

1. Maria Avola, while employed during the period February 10, 2009 through February 10, 2010 as an IT specialist at Rosemead, California by Southern California Edison, who was self-insured through Southern California Edison, sustained injury arising out of and occurring in the course of employment to her psyche and internal systems.
2. Applicant’s injury caused temporary disability from February 10, 2010 to October 3, 2017 for which she is entitled to 104 weeks at the rate of \$1,314.35 per week.
3. Defendant’s claim of credit for Long Term Disability payments made is denied.
4. The issue of attorney’s fees is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved at the trial level.

**AWARD**

**AWARD IS MADE** in favor Maria Avola against Southern California Edison of:

a. Temporary disability indemnity at the rate of \$1,314.35 per week beginning February 10, 2010 for 104 weeks. Defendant is ordered to withhold 15% of the total temporary disability indemnity amount, pending further proceedings and determination of attorney’s fees by the WCJ, with jurisdiction reserved at the trial level.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on all outstanding issues, consistent with this opinion.

**WORKERS’ COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

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



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

**May 14, 2024**

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

**MARIA AVOLA  
GRAIWER & KAPLAN  
MICHAEL SULLIVAN & ASSOCIATES LLP**

**JTL/ara**

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