

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

**RICHARD TULL, *Applicant***

**vs.**

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Legally  
Uninsured, Adjusted By STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ10228371, ADJ580886, ADJ2267886, ADJ8376625  
Van Nuys District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Joint (Amended) Findings and Orders issued on July 9, 2019 in case numbers ADJ10228371, ADJ2267886, ADJ8376625, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant is not entitled to a credit for alleged overpayment of permanent disability benefits in ADJ580886.<sup>1</sup> Defendant also seeks reconsideration of the Amended Findings and Orders issued on July 9, 2019 in case number ADJ580886, wherein the WCJ found that defendant failed to establish that it is entitled to a credit for its alleged overpayment of permanent disability benefits and that the parties stipulated that applicant sustained injury to his right knee, right ankle, and low back on January 29, 2004.

Defendant contends that the Joint (Amended) Findings and Orders erroneously fails to find defendant entitled to a credit for overpayment of permanent disability benefits in ADJ580886. Defendant also contends that the Amended Findings and Orders erroneously fails to find that defendant is entitled to a credit for overpayment of permanent disability benefits and incorrectly states applicant's date of injury.

We received an Answer from applicant.

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<sup>1</sup> Although the Joint (Amended) Findings and Orders sets forth findings apart from the issue of whether defendant is entitled to a credit for alleged overpayment of permanent disability benefits, we do not address those findings because the parties have raised no objection to them. (Lab. Code § 5904.)

The WCJ issued a Report and Recommendation on Second Joint Petition for Reconsideration (Report). The Report recommends that the Petition be denied, except that a clerical error as to the date of injury in ADJ580886 should be corrected.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will affirm the Joint (Amended) Findings and Orders and the Amended Findings and Orders, except that we will amend them to find that defendant overpaid applicant's permanent disability benefits in ADJ580886, that the amount overpaid shall serve as a credit against benefits payable in ADJ2267886, ADJ8376625, and ADJ10228371, that applicant's date of injury in ADJ580886 is August 9, 2001, and that the issue of the credit amount is deferred and to be adjusted by the parties, with jurisdiction reserved in the event of dispute, and we will return this matter to the trial level for further proceedings consistent with this decision.

#### **FACTUAL BACKGROUND**

Applicant filed four injury claims by way of case numbers ADJ580886, ADJ2267886, ADJ8376625 and ADJ10228371, and the WCJ ordered that the cases be consolidated for trial. (Minutes of Hearing (Reporter), November 7, 2018, p. 2:3-4.)

In ADJ580886, the parties stipulated that applicant sustained injury on August 9, 2001 to his right knee, right ankle and low back. (*Id.*, p. 2:12-14; Case No. ADJ580886, Findings and Orders, p. 2.)

In ADJ10228371, the parties stipulated that applicant sustained injury during the period August 8, 1999 through May 6, 2013, to his right knee. (Minutes of Hearing (Reporter), November 7, 2018, p. 5:16-18.)

The parties initially raised the following issue for trial as to all cases: Permanent disability, with defendant claiming an overpayment of \$23,011.62, with \$22,961.83 being an overpayment for the period 1/13/05 to 8/15/07, based on Dr. Ovadia's report from 7/13/09, which defendant advanced in good faith, and \$49.79 overpaid on the 7/7/13 stipulated award. (*Id.*, p. 6:9-13.)

The WCJ admitted defendant's benefits paid report dated February 22, 2018, defendant's letter to applicant dated May 23, 2013, Dr. Ovadia's report dated July 13, 2009, Dr. Ovadia's report dated June 15, 2015, and Dr. Ovadia's report dated November 29, 2016, into evidence. (*Id.*, pp. 6:18-24, 8:4-5, 7:21-22; Exhibit A, Benefits Paid Report dated February 22, 2018; Exhibit B, Letter Dated May 23, 2013; Exhibit Z, Medical Report of AME Dated July 13, 2009; Exhibit W,

Medical Report of AME Dated June 15, 2015; Exhibit V, Medical Report of AME Dated November 29, 2016.)

Defendant's benefits paid report reflects that defendant issued payments recorded under the heading "Permanent Disability" to applicant in the amount of \$47,800.71, including \$3,748.50 paid to applicant's attorney and \$44,052.21 to applicant. (Exhibit A, Benefits Paid Report dated February 22, 2018, p. 1.) The report further reflects that the payments were made with respect to applicant's injury of August 9, 2001. (*Id.*) The largest single recorded permanent disability payment was issued on August 28, 2009, in the amount of \$22,961.83. (*Id.*)

Defendant's letter to applicant dated May 23, 2013, asserts that applicant was paid \$47,800.71 in permanent disability indemnity for his August 9, 2001 injury, resulting in an overpayment of \$23,011.62. (Exhibit B, Letter Dated May 23, 2013, p. 1.)

Dr. Ovadia's July 13, 2009 report contains a date stamp: "SCIF Rec 08/15/2008." (Exhibit Z, Medical Report of AME Dated July 13, 2009, pp. 1-3.) The report also contains a summary of medical records, memorializing that on August 9, 2001, applicant sustained injury to his right knee and right ankle, causing him permanent disability, and noting that on July 14, 2005, applicant had filed a petition to reopen his claim to recover new and further disability benefits. (*Id.*, p. 1.)

Dr. Ovadia's June 15, 2015, report includes the following: "Regarding the right knee, I believe the current level of disability is directly related to the initial injury (08/09/01) for which the Applicant received a Stipulated Award. However, the increase in right knee disability (based on the chondromalacia patella), which I found at the time of my reevaluation (05/06/13), is thought to be related to [applicant's] ongoing employment . . ." (Exhibit W, Medical Report of AME Dated June 15, 2015, p. 1.)

Dr. Ovadia's November 29, 2016, report states: "[T]he additional 2% WPI noted in the second report (05/06/13) would be attributable to chondromalacia patella . . . the cause of his additional disability was his continued employment on a cumulative trauma basis, and not a natural progression of residuals . . ." (Exhibit V, Medical Report of AME Dated November 29, 2016, p. 1.)

The parties presented no witness testimony, and the matter was submitted for decision. (Minutes of Hearing (Reporter), November 7, 2018, pp. 1-8.)

On December 27, 2018, the WCJ issued the Joint Findings and Orders in case numbers ADJ10228371, ADJ2267886, ADJ8376625 and the Findings and Orders in case number ADJ580886. In his accompanying opinions on decision, the WCJ opines:

Defendant . . . failed to produce evidence that it was or is entitled to a “credit” for any “overpayment” of benefits as to this claim. For reasons unknown, defendant . . . issued payment to the applicant, a check in the sum of \$22,961.83, on 8/28/09 (see exhibit “A”, page 1, first entry) . . . There is no proffered reason or rationale for this claimed “overpayment . . .” (Opinion on Decision, Case No. ADJ580886, p. 2; Opinion on Decision, Case No. ADJ2267886, p. 3; Opinion on Decision, Case No. ADJ8376625, p. 3; Opinion on Decision, Case No. ADJ10228371, p. 3.)

On January 16, 2019, defendant sought reconsideration of the WCJ’s findings and orders, alleging that the evidence established its entitlement to a credit for overpayment of disability benefits and that the parties had stipulated that applicant had sustained injury to his right knee on August 9, 2001. (Petition for Reconsideration, January 16, 2019.)

On March 18, 2019, we granted defendant’s petition for reconsideration, ordered that the record be developed with respect to the issues of whether defendant overpaid applicant’s permanent disability benefits in ADJ580886 and whether the amount overpaid, if any, could be applied as a credit against benefits payable in ADJ2267886, ADJ8376625, and ADJ10228371, and amended the Findings and Orders to correct the date of injury in ADJ580886. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, March 18, 2019, pp. 2, 9-12.) In doing so, we reasoned as follows:

[W]e are unable to ascertain the reasons or grounds upon which the WCJ determined . . . that defendant failed to produce evidence that it was entitled to a credit for an overpayment. (Opinion on Decision, Case No. ADJ580886, p. 2; Opinion on Decision, Case No. ADJ2267886, p. 3; Opinion on Decision, Case No. ADJ8376625, p. 3; Opinion on Decision, Case No. ADJ10228371, p. 3.) In particular, the record does not disclose what weight, if any, the WCJ accorded the evidence that defendant issued \$47,800.71 in permanent disability payments, including a \$22,961.83 payment on August 28, 2009, that could have resulted in overpayment if applicant did not subsequently recover new and further benefits on his claim. (Exhibit A, Benefits Paid Report dated February 22, 2018, p. 1.) Moreover, the record does not disclose whether the WCJ evaluated defendant’s letter dated May 23, 2013 asserting that defendant paid \$47,800.71 in permanent disability indemnity, in the context of Dr. Ovadia’s June 15, 2015 and November 29, 2016 reports indicating that applicant’s knee injury identified in his July 13, 2009 report would not serve to reopen applicant’s August 9, 2001 claim, but rather as the

basis for a new, cumulative injury claim, and thus any permanent disability advances based on the July 13, 2009 report could overpay that claim. (Exhibit B, Letter Dated May 23, 2013, p. 1; Exhibit W, Medical Report of AME Dated June 15, 2015, p. 1; Exhibit V, Medical Report of AME Dated November 29, 2016, p. 1.)

Furthermore, we are unable to ascertain the reasons or grounds upon which the WCJ determined . . . that the evidence that defendant issued a \$22,961.83 payment did not show the payment was for permanent disability benefits. (Report, p. 4.) In particular, the record does not disclose what weight, if any, the WCJ accorded defendant's benefits paid report, wherein defendant's \$22,961.83 payment appears beneath the heading "Permanent Disability." (Exhibit A, Benefits Paid Report dated February 22, 2018, p. 1.) Moreover, the record does not disclose how the WCJ evaluated defendant's letter dated May 23, 2013, in which defendant asserts that it paid applicant \$47,800.71 in permanent disability benefits, the amount reflected by the collected entries of defendant's benefits paid report. (Exhibit B, Letter Dated May 23, 2013, p. 1; Exhibit A, Benefits Paid Report Dated February 22, 2018, pp. 1-2.) In addition, the record does not reflect whether or not the WCJ considered the close temporal connection between defendant's receipt of evidence that applicant was seeking new and further disability benefits and its issuance of the \$22,961.83 payment. Specifically, the date stamp on Dr. Ovadia's July 13, 2009 report disclosing applicant's petition for new and further benefits suggests that defendant received the report on August 15, 2009, and defendant's benefits paid report indicates that defendant issued the \$22,961.83 payment less than two weeks later, and thus apparently for purposes of advancing permanent disability benefits. (Exhibit Z, Medical Report of AME Dated July 13, 2009, pp. 1-3; Exhibit A, Benefits Paid Report dated February 22, 2018, p. 1.) Accordingly, we are unable to discern the bases on which the WCJ determined that no evidence suggests that defendant overpaid permanent disability benefits and could therefore be entitled to a credit. (*Id.*, pp. 6:13-7:21.)

On June 4, 2019, the matter again proceeded to trial. The parties framed the issue for trial as "Overpayment of benefits in the sum of \$22,961.83 . . . as to Case No. ADJ580886." (Further Minutes of Hearing (Reporter), June 4, 2019, p. 2:9-10.) At trial, the parties presented no new testimonial or documentary evidence. (*Id.*, p. 2:12-14.)

In the Report, the WCJ writes:

The parties stipulated that there was no good cause to reopen case numbered ADJ580886.  
(Report, p. 2.)

### **Clerical Error**

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The actual stipulated date of injury is 8/9/01. The record should again be corrected and amended to reflect this date of injury.

(*Id.*, pp. 3-4.)

The Court considered Exhibit “A” and its ledger of amounts. Other than a simple column header, no specific explanation, reason, medical report reference number, or similar information is given. . . .

The Court considered Exhibit “B” and its unexplained paragraph:

“Please note that we have paid PD in the amount of \$47,800.71. There is an overpayment of \$23,011.62. We will take credit for this overpayment against future compensation benefits.”

(*Id.*, p. 5.)

### **Review of Evidence/Exhibits**

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#### **Medical Reports**

The medical reports of Dr. Daniel Ovadia, (Joint Exhibits S-Z) dated: 7/13/09; 11/10/10; 5/6/13; 6/15/15; 11/29/16; 2/22/18; 12/12/17; 3/14/18;

The medical report of Dr. Greenspan, (Exhibit D) dated 9/4/02. . . . After careful review, none of the reports explained why the payment was issued on August 28, 2009.

#### **Letters from SCIF**

The letters from SCIF to applicant, dated 5/23/13, and 11/30/12 (Exhibits B & C). In review of the letter dated 5/23/2013, the content of the letter states that an overpayment was made. However it provides no explanation as to why.

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#### **Benefits Paid Report**

After careful review of the Benefits Paid Report, dated 02/22/18 (Exhibit A) the Court cannot determine . . . the rationale of any of the payments, or of any of the checks that were paid. . .

(*Id.*, p. 12.)

## **DISCUSSION**

Regarding the issues of whether defendant overpaid permanent disability benefits and should be allowed a credit therefor, we disagree with the WCJ’s reasoning, as stated in the Report, that the evidence fails to establish that the \$22,961.83 payment defendant issued to applicant was for permanent disability benefits which resulted in overpayment. (Report, pp. 5, 12.) Specifically, the record shows that (1) on August 15, 2009, defendant received Dr. Ovadia’s July 13, 2009 report

disclosing that applicant's August 9, 2001 knee injury warranted new and further benefits (Exhibit Z, Medical Report of AME Dated July 13, 2009, pp. 1-3); (2) on August 28, 2009, two weeks after receiving Dr. Ovadia's report, defendant issued a \$22,961.83 payment to applicant of permanent disability benefits for his August 9, 2001 knee injury (Exhibit A, Benefits Paid Report dated February 22, 2018, pp. 1-2); (3) applicant did not pursue new and further benefits for his August 9, 2001 knee injury (Report, p. 2); (4) on June 15, 2015 and November 29, 2016, Dr. Ovadia opined that the knee injury referenced by his July 13, 2009 report constituted grounds for a cumulative knee injury claim rather than for new and further benefits on the August 9, 2001 knee injury (Exhibit W, Medical Report of AME Dated June 15, 2015, p. 1; Exhibit V, Medical Report of AME Dated November 29, 2016, p. 1); (5) in ADJ10228371, the parties stipulated that applicant sustained injury to his right knee during the period August 8, 1999 through May 6, 2013 (Minutes of Hearing (Reporter), November 7, 2018, p. 5:16-18); and (6) defendant issued a total of \$47,800.71 in permanent disability benefits for applicant's August 9, 2001 knee injury (Exhibit A, Benefits Paid Report Dated February 22, 2018, pp. 1-2; see also Exhibit B, Letter Dated May 23, 2013, p. 1).

On this record, we are persuaded that defendant issued the \$22,961.83 payment to applicant as permanent disability benefits it expected would become due based upon Dr. Ovadia's July 13, 2009 report opining that applicant's August 9, 2001 knee injury claim warranted new and further benefits. Further, inasmuch as applicant did not pursue new and further benefits for his August 9, 2001 right knee injury but recovered benefits for his cumulative right knee injury instead, we are persuaded that the \$22,961.83 payment to applicant for his August 9, 2001 right knee injury resulted in an overpayment of permanent disability benefits in ADJ580886.

Accordingly, we will amend the Amended Findings and Orders to find that defendant is entitled to a credit for its overpayment of permanent disability benefits in ADJ580886.

Turning to the issue of whether defendant is entitled to apply the credit for its overpayment of disability benefits to applicant's claims in ADJ10228371, ADJ2267886 and ADJ8376625, we observe that 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 § 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.)

The intent of section 4909 is to encourage the employer to make voluntary payments to an injured worker by allowing it to later obtain credit and a reduction in the amount subsequently determined to be due the employee. (*Appleby v. Workers' Comp. Appeals Bd.* (1994) 27 Cal.App.4th 184 [59 Cal.Comp.Cases 520].)

Equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, 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 defendant's actions when the employee received benefits in good faith with no wrong-doing on his part. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) These equitable principles are particularly important where a defendant seeks a credit in one case for benefits paid in a different case, and such claims for credit should be scrutinized closely. (*City of Santa Clara v. Workers' Comp. Appeals Bd. (Henry)* (2004) 69 Cal.Comp.Cases 386 [writ den.] .)

For example, in *State Compensation Insurance Fund v. Worker' Comp. Appeals Bd. (Dunehew)* (2011) 76 Cal.Comp.Cases 1251, 1253–1254 (writ den.), the Appeals Board applied the equitable principles set forth in *Maples, supra*, to find that the employer was not entitled to credit for permanent disability advances paid to an employee for a specific industrial injury against permanent disability indemnity owed in connection with a cumulative trauma injury, when the employee's permanent disability was apportioned among three dates of injury. The Appeals Board reasoned that it would be inequitable for the employer to obtain the benefit of the separation of injuries for purposes of calculating permanent disability while allowing it to merge the cases for purposes of permanent disability advances.

While *Dunehew, supra*, disallowed a credit to an employer based upon the specific application of the equities to the evidence in that case, it does not stand for the proposition that a credit awarded in one case cannot legally be applied to benefits payable in a different case. Moreover, *Dunehew, supra*, does not suggest that where a payment is made as an advance on a new and further disability, it may not subsequently be applied to benefits payable on new claim that has overlapping symptomatology. In sum, where the evidence establishes that an employer overpaid an employee's worker's compensation benefits, the WCAB may award the employer a credit applicable against benefits payable in a separate claim filed by the employee as appropriate.

In this case, we are persuaded that the record of overlapping symptomatology and treatment therefor between applicant's August 9, 2001 right knee injury and his August 8, 1999 through May 6, 2013 cumulative right knee injury supports the allowance of credit against benefits payable in ADJ2267886, ADJ8376625, and ADJ10228371 based upon the overpayment in ADJ580886. Moreover, on this record, we are unable to discern how the allowance of a credit could cause significant interruption of benefits or disruption to applicant. However, we note that a discrepancy exists regarding the amount of credit: defendant has asserted that it is entitled to a credit based upon an overpayment of \$23,011.62, but the parties framed the issue for trial as a dispute over an alleged overpayment of \$22,961.83. (Exhibit B, Letter Dated May 23, 2013, p. 1; Further Minutes of Hearing (Reporter), June 4, 2019, p. 2:9-10.) Accordingly, we will amend the Joint (Amended) Findings and Orders and the Amended Findings and Orders to find that defendant is entitled to a credit for overpayment of permanent disability benefits in ADJ580886, with the parties to adjust the amount of the credit.

The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154–155].) The term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) If an error or omission is the result of inadvertence, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. An error resulting from the inadvertent omission of matter from a decision is generally considered to be a clerical error rather than a judicial error. (*Morgan v. Board of Equalization* (1949) 89 Cal.App.2d 674, 682.)

Here, as stated in the Report, the stipulated date of injury in case number ADJ580886 is August 9, 2001, and the record should again be corrected to reflect this date of injury. (Report, pp. 3-4.) Accordingly, we will amend the Amended Findings and Orders to correct this clerical error as recommended by the WCJ.

Accordingly, we will affirm the Joint (Amended) Findings and Orders and the Amended Findings and Orders, except that we will amend them to find that defendant overpaid applicant's permanent disability benefits in ADJ580886, that the amount overpaid shall serve as a credit

against benefits payable in ADJ2267886, ADJ8376625, and ADJ10228371, that applicant's date of injury in ADJ580886 is August 9, 2001, and that the issue of the credit amount is deferred and to be adjusted by the parties, with jurisdiction reserved in the event of dispute, and we will return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint (Amended) Findings and Orders issued on July 9, 2019, and the Amended Findings and Orders issued on July 9, 2019, are **AFFIRMED**, except that they are **AMENDED** as follows:

### **JOINT (AMENDED) FINDINGS AND ORDERS**

...

#### **FINDINGS OF FACT**

...

4. Defendant is entitled to a credit for overpayment of permanent disability benefits in ADJ580886.
5. The issue of the amount of the credit for overpayment of disability benefits in ADJ580886 to which defendant is entitled is deferred, with jurisdiction reserved in the event of dispute.

...

#### **ORDER**

- (a) The parties are ordered to adjust the amount of the credit for overpayment of disability benefits in ADJ580886 to which defendant is entitled, with jurisdiction reserved in the event of dispute.

## **AMENDED FINDINGS AND ORDERS**

...

### **STIPULATED FACTS**

1. Richard Tull, while employed on August 9, 2001, as a correctional officer, occupational group number 490, at Lancaster, California, by the California Department of Corrections and Rehabilitation, legally uninsured and adjusted by State Compensation Insurance Fund, sustained injury arising out of and in the course of his employment to his (right) knee, right ankle and low back.

...

### **FINDINGS OF FACT**

1. Defendant is entitled to a credit for overpayment of permanent disability benefits as to the claim herein.
2. The issue of the amount of the credit for overpayment of disability benefits to which defendant is entitled is deferred, with jurisdiction reserved in the event of dispute.
3. Defendant is entitled to apply the amount of the credit for overpayment to which it is entitled to the far end of the award in ADJ10228371, ADJ2267886 and ADJ8376625.

### **ORDERS**

- (a) The parties are ordered to adjust the amount of the credit for overpayment of disability benefits in ADJ580886 to which defendant is entitled, with jurisdiction reserved in the event of dispute.

**IT IS FURTHER ORDERED THAT** this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

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



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

**March 2, 2021**

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

**RICHARD TULL  
STATE COMPENSATION INSURANCE FUND  
LAW OFFICES OF WARREN GREENE**

**SRO/ara**

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