

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

**MICHAEL CROUGH, *Applicant***

**vs.**

**MCDONNELL DOUGLAS/BOEING; CALIFORNIA INSURANCE GUARANTEE  
ASSOCIATION for FREMONT INSURANCE COMPANY, in liquidation, *Defendants***

**Adjudication Number: ADJ2403735 (LBO 0207587)  
Long Beach District Office**

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

Defendant seeks reconsideration of the Findings of Fact issued on November 27, 2024, wherein the workers' compensation administrative law judge (WCJ) found that defendant is not entitled to assert a credit for permanent disability advances of \$34,738.40 because the advances were not included in the Stipulation with Request for Award dated September 26, 2023.

Defendant contends that the Findings of Fact constitutes an ultra vires modification of the Award because the Stipulation on which the Award is based provides that defendant is entitled to take credit for all permanent disability advances.

We did not receive an Answer.

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

We have considered the allegations of the Petition 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 Findings of Fact, except that we will amend to find that defendant's petition for credit of overpayment of permanent disability benefits is denied.

**FACTUAL BACKGROUND**

On September 26, 2023, the parties filed a Stipulation with Request for Award, providing that applicant was to receive an award of permanent disability benefits in the amount of \$24,045.00, that defendant was "entitled to take credit for any and all permanent disability advances paid up to the date of the award," and that defendant's liability for future medical treatment commences upon written demand by applicant and authorization by defendant.

(Stipulation with Request for Award, September 26, 2023, pp. 10, 12.) The WCJ issued an Award based upon the Stipulation with Request for Award. (Award, September 26, 2023.)

On October 17, 2023, defendant filed a Petition for Credit for Overpayment of Permanent Disability, alleging that it advanced permanent disability payments between July 18, 1992 and March 15, 2005, amounting to \$34,738.40, that applicant was entitled to only \$24,045.00 of permanent disability benefits under the Stipulation and Award, and that it was entitled to a credit for overpayment of permanent disability benefits in the amount of \$10,693.40. (Petition for Credit for Overpayment of Permanent Disability, October 17, 2023, pp. 1-2.)

On October 8, 2024, the matter proceeded to trial of the following issue:

Whether Defendants are entitled to assert permanent disability advances of \$34,738.40 when this amount was not included in the Stipulation with Request for Award dated 9/26/2023.

(Minutes of Hearing, October 8, 2024, p. 2:23-24.)

The parties stipulated that (1) while employed during the period of January 15, 1987 to January 15, 1989 as a utility maintenance person, applicant sustained injury in the form asthma, hypertension, bronchitis, and sinusitis; (2) this case was resolved by Stipulation with Request for Award approved on September 26, 2023; and (3) defendant would be entitled to a permanent disability credit of \$34,738.40 should it prevail at trial. (*Id.*, p. 2:12-20.)

The parties did not proffer any documentary or testimonial evidence. (*Id.*, p. 3:1-3.)

In the Opinion on Decision, the WCJ states:

WHETHER DEFENDANTS ARE ENTITLED TO ASSERT PERMANENT DISABILITY ADVANCES OF \$34,738.40 WHEN THIS AMOUNT WAS NOT INCLUDED IN THE STIPULATION WITH REQUEST FOR AWARD DATED 09/26/2023

This matter had been set for trial on 09/26/2023.<sup>1</sup> At one point during the day, the parties had indicated that a settlement had been reached and the parties presented the undersigned with two Stipulation with Request for Awards. The undersigned reviewed the settlement documents along with the medical reports and based on this review, the undersigned approved the two Stipulation with Request for Awards. On 10/17/2023, defendant filed a Petition for Credit for Permanent Disability Overpayment for ADJ2403735 contending that the defendant should receive credit for permanent disability advances that were not included in the Stipulation with Request for Award.

...

It should be noted that the Stipulation with Request for Award on ADJ4645734 contains a provision that the defendant is entitled to credit for permanent disability advances totaling \$13,370.00; thus the defendant was fully aware of its ability to include any credits into the settlement document. Unlike ADJ4645734, the defendant chose not to include any permanent disability advances on the case at hand in the Stipulation with Request for Award.

...

1 It should be noted that the applicant had three cases set for trial on 09/26/2023; ADJ2403735 (this case), ADJ4645734 (06/02/1987) and ADJ1415156 (04/15/1988 to 12/15/1988)  
(Opinion on Decision, pp. 1-2.)

## **DISCUSSION**

### **I.**

Former Labor Code section 5909 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, Labor Code section 5909 was amended to state in relevant part:

(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 Labor Code 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 December 30, 2024, and 60 days from the date of transmission is February 28, 2025. This decision is issued by or on February 28, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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 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. Labor Code 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 January 3, 2025, and the case was transmitted to the Appeals Board on December 30, 2025. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on January 3, 2025.

However, a notice of transmission was served by the district office on December 30, 2024, which is the same day as the transmission of the case to the Appeals Board on December 30, 2024. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on December 30, 2024.

## II.

Labor Code section 4909 provides:

Any payment, allowance, or benefit received by the injured employee during the period of his incapacity ... which by the terms of this division was not then due and payable ... 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.  
(Lab. Code, § 4909 [italics added].)

Because Labor Code section 4909 uses the term "may," which is not mandatory language, the Appeals Board has the discretion whether to grant or deny credit for overpayments thereunder. (Lab. Code, § 15; *City and County of San Francisco v. Workmen's Comp. Appeals Bd. (Quinn)* (1970) 2 Cal.3d 1001, 1016 [35 Cal.Comp.Cases 390]; *Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].)

In determining whether to allow Labor Code section 4909 credit, the Appeals Board must apply equitable principles. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 837-838 [45 Cal.Comp.Cases 1106].)

Equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits. (*Id.*)

Equity does not favor allowance of a credit of overpayment of one benefit against a second benefit that would be destructive of the purpose of the second benefit or where the applicant may be prejudiced by the defendant's actions after receiving an overpayment of benefits in good faith and through no wrongdoing on his or her part. (*Id.*)

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.)

The burden of proof is on the defendant to establish its entitlement to credit. (*Ott v. Workers' Comp. Appeals Bd.* (1981) 118 Cal.App.3d. 912, 922 [46 Cal.Comp.Cases 545]; *Quintana v. Contra Costa County* (1982) 47 Cal.Comp.Cases 512 (Appeals Board en banc).)

In this case, defendant argues that the Findings of Fact constitutes an ultra vires modification of the Award because the Stipulation on which the Award is based provides that defendant is entitled to take credit for all permanent disability advances.

But this argument disregards the law governing the WCJ's authority to allow a credit for overpayment of permanent disability benefits. Under the foregoing authorities, the WCJ's discretion to allow a credit for overpayment of permanent disability benefits depends upon whether equity favors the credit. Yet defendant proffered no evidence at all, let alone evidence to suggest that allowance of a credit would not (1) cause a significant interruption of benefits to which applicant is otherwise entitled; (2) be destructive of the purpose of another benefit if the credit is applied to the other benefit; or (3) prejudice applicant after he received an overpayment in good faith and through no wrongdoing on his part. (Minutes of Hearing, October 8, 2024, p. 3:1-3.)

Defendant also failed to describe the benefits against which defendant would apply the credit as required by WCAB Rule 10555(2), leaving the record not only without proof that the

equities favor allowance of a credit but also without a pleadings posture on which such an allowance could be granted.

Hence, we conclude that defendant failed to meet its burden of proving that the Petition for Credit of Overpayment of Permanent Disability should be granted.

Accordingly, we will amend the Findings of Fact to find that the Petition for Credit of Overpayment of Permanent Disability is denied.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the Findings of Fact, except that we will amend to find that defendant's petition for credit of overpayment of permanent disability benefits is denied.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact issued on November 27, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on November 27, 2024 is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

1. Defendant's Petition for Credit of Overpayment of Permanent Disability is denied.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

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



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

**FEBRUARY 27, 2025**

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

**MICHAEL CROUGH  
EMPLOYMENT DEVELOPMENT DEPARTMENT  
FLOYD SKEREN MANUKIAN LANGEVIN  
REAL & HERNANDEZ**

**SRO/cs**

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