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

Case No. **ADJ182746 (SAC 0335247)**

**ERIC MOREHOUSE,**

*Applicant,*

vs.

**ANTHONY INDRIERI, d/b/a ORLANDO  
ELECTRIC AND AIR; HARBOR  
SPECIALTY INSURANCE, administered by  
EMPLOYERS COMPENSATION  
INSURANCE COMPANY,**

*Defendants.*

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

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 19, 2018, wherein the WCJ found in pertinent part that defendant could not claim a credit for overpayment of temporary disability payments against either permanent disability or temporary disability payments it has not yet paid applicant.<sup>1</sup> Defendant asserts it should have been given a credit for the \$13,311.93 it paid in temporary disability between July 25, 2016 and December 28, 2016, and a credit for \$4,681.03 in vocational rehabilitation maintenance allowances (VRMA) and vocational rehabilitation temporary disability (VRTD) paid during the period of temporary total disability.

We did not receive an Answer. We did receive a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending we deny the petition. We have considered the allegations of the Petition for Reconsideration, and the contents of Report. Based upon our review of the record, and for the reasons explained below, we will grant reconsideration and amend the F&O to find

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<sup>1</sup> Deputy Commissioner Gondak, who was on the panel that issued a prior Opinion and Decision After Reconsideration in this matter, is no longer with the Appeals Board. Another panel member was assigned to take her place.

1 defendant may subtract from its total balance of temporary disability benefits still owed to applicant the  
2 \$13,311.93 it paid in temporary disability between July 25, 2016 and December 28, 2016, and the  
3 \$4,681.03 paid in vocational rehabilitation benefits. In all other respects, we affirm the F&O.

#### 4 **FACTUAL BACKGROUND**

5 The factual background of this matter is essentially uncontested. On January 5, 2017, the WCJ  
6 issued his Amended Findings, Award and Orders, finding applicant temporarily totally disabled from  
7 July 31, 2003 to July 25, 2016, and sixty-six percent (66%) permanently disabled. The parties agree that  
8 this amounted to an award of \$404,392.41 in temporary disability, and \$72,936.25 in permanent  
9 disability, less any payments already made. Defendant did not seek reconsideration.

10 During the pendency of applicant's claim, defendant paid applicant temporary disability benefits.  
11 These benefits included \$13,311.93 paid from July 25, 2016 to December 28, 2016; in other words,  
12 temporary disability paid after the date applicant was ultimately found to be permanent and stationary,  
13 but before the adjudication of permanent and stationary status was actually made. Defendant also paid  
14 applicant a total of \$4,683.03 in VRMA and/or VRTD.<sup>2</sup>

15 By defendant's own admission, the amount of temporary disability paid during the pendency of  
16 the case amounts to substantially less than the total amount of temporary disability, \$404,392.41,  
17 awarded by the WCJ. With the parties unable to agree as to how much more defendant owed applicant,  
18 the matter was set for hearing in front of the WCJ. The parties appeared for trial on January 4, 2018,  
19 submitting evidence and argument. Defendant acknowledged the underpayments, but argued that the  
20 \$13,311.93 it paid in temporary disability from July 25, 2016 to December 28, 2016 and the \$4,683.03 in  
21 VRMA/VRTD should both be credited against any outstanding balance.

22 On January 19, 2018, the WCJ issued his Findings and Orders (F&O), finding that defendant had  
23 underpaid applicant temporary total disability benefits by \$61,509.19, and underpaid permanent  
24 disability by \$16,297.44. The WCJ found that defendant could not claim a credit for either the  
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26 <sup>2</sup> Defendant provided no breakdown as to how much of the money was provided as VRMA and how much was provided as  
27 VRTD. However, review of Exhibit J. suggests that, based upon the rate of payment, defendant intended the benefits as  
VRMA.

1 \$13,311.93 in temporary disability overpayments or the \$4,683.03 in VRMA/VRTD. The Opinion on  
2 Decision explains that the WCJ determined that allowing a credit against permanent disability would be  
3 unfair because it would wipe out the remaining permanent disability balance owed to applicant. (See  
4 Opinion on Decision, at p. 1.) The WCJ also found that it would be similarly unfair to credit defendant  
5 against temporary disability benefits owed. (*Ibid.*) The WCJ also noted that the "failure to pay applicant  
6 over \$60,000 in awarded benefits obviously raises additional issues," but that those issues were deferred  
7 for future decision because they had not been raised at the trial. (*Id.* at pp. 1-2.)

8 This Petition for Reconsideration followed. Defendant does not appear to contest the WCJ's  
9 determination of the amounts defendant has yet to pay applicant. However, defendant does contest the  
10 WCJ's conclusion that no credit was owed for temporary disability overpayments or for payments of  
11 VRMA/VRTD. Defendant argues that a credit should be provided against either its remaining balance of  
12 temporary disability benefits, or against its remaining balance of permanent disability benefits.

### 13 DISCUSSION

14 Under Labor Code section 4909, the Appeals Board is allowed to "take[] into account," (i.e., to  
15 allow a credit) for any payment, allowance, or benefit paid by the defendant to the injured employee  
16 when it was not then due and payable or when there was a dispute or question concerning the right to  
17 compensation. (Lab. Code, § 4909.) The Supreme Court has stated that the allowance of credit is within  
18 the Appeals Board's discretion. (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258  
19 [34 Cal.Comp.Cases 382].) An Appeals Board panel stated that "[w]hether a credit is to be allowed is a  
20 matter directed to the discretionary authority of the trier of fact to be weighed in the light of the  
21 circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities  
22 presented." (*Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Board  
23 panel decision).) Thus, the allowance of a credit is a matter of discretion and not a legal entitlement.

24 In *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases  
25 1106], the Court of Appeal stated that equitable principles are frequently applied to workers'  
26 compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a  
27 significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a

1 second benefit can be disruptive and in some cases totally destructive of the purpose of the second  
2 benefit, and that the injured employee should not be prejudiced by defendant's actions when the  
3 employee received benefits in good faith with no wrong-doing on his part. (*Maples, supra*, 111  
4 Cal.App.3d at pp. 837-38.)

5 Here, we agree with the WCJ that it would not be equitable to allow a credit for the temporary  
6 disability overpayments or VRTD/VRMA payments against applicant's *permanent* disability benefit  
7 award. Like in *Maples*, allowing such a credit would significantly diminish applicant's permanent  
8 disability award, which serves a separate and distinct purpose from the award of temporary disability  
9 benefits.

10 However, we cannot agree that defendant should not be entitled to count the temporary disability  
11 payments it paid from July 25, 2016 to December 28, 2016 against the temporary disability benefit  
12 award. The Labor Code section 4909 credit applies when a benefit is paid which "was not then due and  
13 payable or when there is any a dispute or question concerning the right to compensation." (Lab. Code,  
14 § 4909.) Here, based upon the WCJ's prior Order, applicant was temporarily totally disabled from  
15 July 31, 2003 to July 25, 2016. Therefore, when defendant made temporary total disability payments to  
16 applicant from July 25, 2016 to December 28, 2016, it was paying benefits that were already due to  
17 applicant - not benefits which were not due. That the temporary disability benefits were apparently  
18 characterized as being for the period from July 25, 2016 to December 28, 2016, rather than for prior  
19 periods when benefits were owed but not paid, does not change the fact that defendant paid applicant  
20 temporary total disability payments which he was owed, and that those payments should therefore be  
21 considered in determining defendant's outstanding balance of benefits due. We cannot find any legal  
22 basis to hold that a defendant cannot count temporary total disability payments made to an applicant  
23 against an award of temporary total disability benefits for the same injury.

24 Labor Code section 4909 does govern defendant's request for a credit for VRMA/VRTD  
25 payments, because vocational rehabilitation benefits were separate from either temporary disability or  
26 permanent disability benefits.<sup>3</sup> (See generally *Kopitske v. Workers' Comp. Appeals Bd.* (1999) 74  
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<sup>3</sup> VRMA and VRTD no longer exist as benefit categories due to changes in the Labor Code.

1 Cal.App.4th 623, 630–33.) However, we do not agree with the WCJ that it would be inequitable to allow  
2 the credit. As stated in *Maples*, equity favors the allowance of a credit when the credit is small and does  
3 not cause a significant interruption of benefits, and where the credit for overpayment of one category of  
4 benefits is not disruptive. (*Maples, supra*, 111 Cal.App.3d at pp. 837–38.) Here, defendant paid  
5 applicant vocational rehabilitation benefits during a period when applicant was ultimately determined to  
6 have been temporarily totally disabled. In no circumstances would applicant have been entitled to  
7 receive both temporary total disability and vocational rehabilitation benefits for the same period of time  
8 for the same injury. (See *Kopitske, supra*, 74 Cal.App.4th at 631.) Although the label may have been  
9 different, in effect there was no significant distinction between the temporary total disability payments  
10 made by defendant during the period of applicant’s temporary total disability, and the vocational  
11 rehabilitation benefits paid during that same period. Therefore, equity favors allowing a credit for those  
12 payments.

13 Accordingly, we will grant reconsideration, and amend the WCJ’s F&O to find that defendant  
14 must pay applicant any outstanding benefits due, but that defendant is entitled to subtract from the  
15 amount of temporary total disability due the \$13,311.93 paid from July 25, 2016 to December 28, 2016  
16 in temporary totally disability payments, and the \$4,683.03 it paid in vocational rehabilitation benefits.  
17 We emphasize that the WCJ specifically deferred consideration of certain issues, including the possibility  
18 of penalties, stemming from defendant’s failure to pay applicant amounts of temporary total disability  
19 well in excess of the amounts defendant seeks an offset or credit for via this Petition for Reconsideration.  
20 These issues may be pursued at the trial level as appropriate.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Order (F&O)  
3 issued by the workers' compensation administrative law judge on January 19, 2018 is **GRANTED**.

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1 **IT IS FURTHER ORDERED**, as the Decision after Reconsideration of the Workers'  
2 Compensation Appeals Board, that Findings and Order (F&O) issued by the workers' compensation  
3 administrative law judge on January 19, 2018 is **AFFIRMED**, except that it is **AMENDED** as follows:

4 **ORDERS**

- 5 3. Defendant may count the \$13,311.93 it paid as temporary total disability  
6 from July 25, 2016 to December 28, 2016 against its outstanding balance  
7 of temporary total disability benefits. In addition, defendant shall be  
8 entitled to a credit against its outstanding temporary total disability benefits  
9 balance in the amount of \$4,683.03 for vocational rehabilitation benefits  
10 paid during applicant's period of temporary total disability.

11 **WORKERS' COMPENSATION APPEALS BOARD**

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14 DEIDRA E. LOWE

15 **I CONCUR,**

16  **CHAIR**  
17 \_\_\_\_\_  
18 KATHERINE ZALEWSKI

19 **I DISSENT (see attached dissenting opinion),**

20  **DEPUTY**  
21 \_\_\_\_\_  
22 ANNE SCHMITZ



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

24 **APR 16 2018**

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

27 **ERIC MOREHOUSE**  
**ADELSON, TESTAN, BRUNDO, NOVELL & JIMENEZ**

AW/mm

MOREHOUSE, Eric

1 **DISSENTING OPINION OF DEPUTY COMMISSIONER SCHMITZ**

2 I respectfully dissent, for the reasons set forth in the workers' compensation administrative law  
3 judge's (WCJ's) Report and Recommendation on Petition for Reconsideration, which I adopt and  
4 incorporate. Based upon the Amended Findings, Award and Orders, applicant was owed permanent  
5 disability during the period from July 25, 2016 to December 28, 2016. Any credit for temporary  
6 disability benefits paid during that period should therefore be against permanent disability benefits owed,  
7 and it was within the WCJ's discretion to deny defendant that relief.

8 For these reasons, I respectfully dissent.



15 **WORKERS' COMPENSATION APPEALS BOARD**

16 *Anne Schmitz*

17 **ANNE SCHMITZ, DEPUTY COMMISSIONER**

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

19 **APR 16 2018**

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

22 **ERIC MOREHOUSE**  
23 **ADELSON, TESTAN, BRUNDO, NOVELL & JIMENEZ**

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27 **AW/mm**

**MOREHOUSE, Eric**



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

Case No. ADJ182746

Applicant: ERIC MOREHOUSE

Defendant: ANTHONY INDRIERI, d.b.a.  
ORLANDO ELECTRIC AND AIR and  
HARBOR SPECIALTY INSURANCE  
administered by EMPLOYERS'  
COMPENSATION INSURANCE  
COMPANY

Workers' Compensation Administrative  
Law Judge:  
DUDLEY R. PHENIX

Date of Injury: July 30, 2003

**REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION**

**INTRODUCTION**

Defendant has filed a timely Petition for Reconsideration. The question raised at the time of trial herein was whether defendant appropriately paid the TD and PD awarded to the applicant on January 5, 2017. On January 19, 2018, Findings and Orders issued, along with an Opinion on Decision, that provided specific calculations and which concluded that defendant substantially underpaid both the TD and PD awarded. In its petition, defendant does not take issue with the fact that there has been a substantial underpayment of benefits. Rather, defendant argues that it should be allowed to apply a claimed temporary disability (TD) overpayment against the period of TD awarded, that prior payments of VRMA/VRTD should be applied against the period of TD awarded, and finally, that the claimed TD overpayment should also be applied against the permanent disability (PD) awarded.

**RELEVANT FACTS**

On January 5, 2017, Amended Findings, Award and Orders issued. Finding of Fact Number 3 found applicant temporarily totally disabled (TTD) from July 31, 2003 to July 25, 2016. Award Number 1 specifically awarded applicant the entire period of TTD.

Defendant did not appeal the award of TD. The period awarded amounted to 4,739 days or 677 weeks. 677 weeks multiplied by applicant's weekly TD rate equals \$404,392.41.

The Amended Findings, Award and Orders, also awarded applicant 66% PD. 66% PD is worth \$72,936.25. Again, defendant did not appeal this award.

It is important to note, that both prior to the January 5, 2017 Amended Findings, Award and Orders, and afterwards, applicant has consistently maintained that he was not appropriately paid TD. In fact, this issue was raised in applicant's previous petition for reconsideration and was further addressed in the prior February 15, 2017 Report and Recommendation (R&R). In the prior R&R, it was recommended that the matter be remanded so that applicant's entitlement to additional temporary and/or permanent disability could be addressed. In the WCAB's April 7, 2017 Opinion and Order Dismissing Petition for Reconsideration, the panel noted "to the extent the Petition raises an issue related to alleged non-payment of benefits due under the WCJ's award, that issue may be properly raised before the WCJ via a Petition and accompanying Declaration of Readiness".

On September 19, 2017, the issue of applicant being properly paid temporary disability and permanent disability was set for trial. Defendant was ordered to file a current benefit printout as well as all benefit notices issued to date.

On January 4, 2018, at the time and place for trial, defendant appeared with a benefit printout but no benefit notices. Defendant further provided the court with a December 21, 2017 letter to applicant essentially describing what defendant believed it continued to owe applicant. The issue of the appropriate payment of benefits was submitted for decision.

On January 19, 2018, the undersigned issued his Findings and Orders with an accompanying Opinion on Decision. As is set forth in more detail in the Opinion on Decision, after carefully reviewing the Indemnity Payment Listing (Defendant's Exhibit J), it appeared defendant underpaid the awarded TTD by \$61,509.19 and continued to owe applicant PD in the sum of \$16,297.44.

### DISCUSSION

This case has had a long and very difficult history. Applicant suffered an admitted head injury which has caused him to behave in a very confrontational and volatile fashion. Applicant had difficulty obtaining the appropriate and necessary medical care for his injury. There have been multiple medical-legal evaluators that have warned that applicant presented a danger to both the court and defense counsel. The undersigned has extended a great deal of effort, including the appointment of repeated "regular physicians" under Labor Code Section 5701, in an effort to get the case resolved for the benefit of both defendant and applicant.

Accordingly, although not directly pertinent to the issues raised by defendant's petition, it is entirely a mystery why defendant has underpaid this case to the extent its own petition appears to admit that it has. According to its petition, defendant acknowledges that it has underpaid the January 5, 2017 Amended Findings, Award and Orders by at least \$43,516.23 which it assures the WCAB that it is "in the process of paying" (see defendant's petition, page 3, lines 21 to 23). As is explained below, after again reviewing all of the evidence, defendant's arguments in its petition are without merit and the numbers reflected in January 19, 2018 Findings and Orders appear to be correct.

As far as what is owed and not yet paid in this case, the undersigned does not believe this to be an overly complex issue. As thoroughly addressed by the January 19, 2018 Opinion on Decision, there has been a final decision finding applicant TTD for the period from July 31, 2003 to July 25, 2016. Based on the number of weeks awarded and applicant's TD rate, applicant should have indisputably received the total sum of \$404,392.41. Based on defendant's own information, specifically Exhibit J, for the period

of TD awarded, defendant only paid \$342,883.22. Thus, before any overpayments or VRMA/VRTD benefits paid are considered, applicant is owed an additional \$61,509.19 in TD benefits.

Where defendant's petition becomes confusing is where defendant addresses the claimed temporary disability overpayment (TDOP). Although TTD was awarded through only July 25, 2016, defendant continued to pay TD until December 28, 2016. At the bottom of page 2 of its petition, defendant is correct, that the undersigned did not include the TD paid after July 25, 2016 in the amount owed to the applicant. This was not factored in because the undersigned was only looking at the period awarded and the amount paid during the period awarded. Defendant's petition is confusing to the extent defendant attempts to apply this TDOP against both the TD and PD owed without first considering whether the TDOP should be allowed in the first place.

In the fourth paragraph of the Opinion on Decision, the undersigned specifically explained why the claimed TDOP in the amount of \$13,311.93 should not be allowed. The undersigned found that it would be unduly harsh to apply that TDOP against the approximately \$16,000 left owing on the PD awarded (it would effectively eliminate all of the PD remaining to be paid) and that it further appeared unfair to apply that overpayment to TD benefits that were awarded over a year ago that should have already been paid.

Thus, contrary to defendant's petition, if the TDOP is not allowed, \$61,509.19 has still not been paid in awarded TD, not the \$48,197.26 argued in defendant's petition.

Defendant next argues that, as best that can be deciphered, that defendant should be allowed to apply the VRMA/VRTD paid in the case against the TD that was awarded. However, if defendant did not believe that it owed the TD that was awarded on January 5,

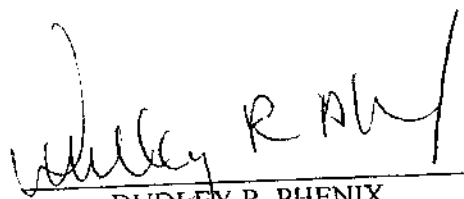
2017, it should have appealed that award. Moreover, it is difficult to evaluate this argument to the extent defendant does not specify whether it was VRMA or VRTD paid. The distinction could make a difference. Additionally, defendant provides no authority that would support the proposition that the payments of these benefits would off-set the TTD awarded.

As far as defendant's argument relating to PD is concerned, as mentioned above, the claimed TDOP was disallowed. Accordingly, and as is again discussed in more detail in the Opinion on Decision, Exhibit J showed that \$56,638.81 has been paid in PD. Accordingly, since the 66% PD awarded equals \$72,936.25, there remains \$16,297.44 to be paid in PD. As is also pointed out in the Opinion on Decision, unlike the awarded TD, the PD that remains owing may not all be due and payable but payable after the first 306.15 weeks of PD is actually paid.

In conclusion, after again carefully reviewing the evidence, the undersigned is certain that there have been no "error in calculations". To the contrary, the evidence offered at the time of trial herein established that defendant continues to owe the amounts ordered to be paid.

#### RECOMMENDATION

It is recommended that the petition should be denied and the matter remanded back to the trial judge so that the additional issues raised concerning Labor Code Section 4650, 5813 and 5814 can be addressed.

  
DUDDLEY R. PHENIX  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

Eric Morehouse ADJ182746  
Report and Recommendation on  
Petition for Reconsideration  
page 6

DRP: vw

Served on all parties as listed on the Official Address Record:

By: V. White  
V. White