

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

SHERRY DULANEY, *Applicant*

vs.

**JOHN MUIR MEDICAL CENTER;
SAFETY NATIONAL CASUALTY COMPANY, *Defendants***

**Adjudication Number: ADJ8835104
Sacramento District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration to defer the issue of Labor Code¹ section 5814.5 fees and to amend the award of section 5814 penalties to reflect that they are payable to applicant and not applicant's attorney. We will otherwise affirm the WCJ's decision for the reasons stated in the Report, which we adopt and incorporate, except as noted below.

Under section 5814(a), when payment of compensation either prior to or subsequent to an award has been unreasonably delayed or refused, the part of the payment that has been delayed or refused shall be increased up to twenty five percent (25%) or \$10,000.00, whichever is less. Compensation under an award includes stipulated commuted attorney's fees. Under subsection (a), compensation is increased after a finding of unreasonable behavior by defendant. As a result, the "penalty" is part of the award and is payable to applicant. (See *Mintzer v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1491.) Thus, by the plain language of section 5814, even when the penalty is awarded for unreasonable delay in payment of attorney's fees, the penalty is to be

¹ All further statutory references are to the Labor Code, unless otherwise noted.

awarded to applicant, and not to applicant's attorneys. Because the issue of attorney fees was raised at trial, we have deferred the issue of section 5814.5 fees.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the December 1, 2022 Findings and Award for Penalties Pursuant to Labor Code section 5814 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 1, 2022 Findings and Award for Penalties Pursuant to Labor Code section 5814 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The issue of Labor Code section 5814.5 fees is deferred.

AWARD

AWARD IS MADE in favor of **SHERRY DULANEY** against **SAFETY NATIONAL CASUALTY COMPANY** of:

1. Penalties pursuant to Labor Code section 5814 in the amount of \$2,376.75 payable in one lump sum to Applicant, Sherry Dulaney (representing a 15% penalty of \$15,845).

2. Penalties pursuant to Labor Code section 5814 in the amount of \$6,014.48 payable in one lump sum to Applicant, Sherry Dulaney (representing a 15% penalty of \$40,096.50).

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 21, 2023

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

**SHERRY DULANEY
WALTERS & ZINN
LLARENA, MURDOCK, LOPEZ & AZIZAD**

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

| | |
|---------------------------------|--|
| <u>Date of Injury:</u> | January 21, 2013 |
| <u>Age on DOI:</u> | 35 years old |
| <u>Occupation:</u> | Phlebotomist |
| <u>Parts of Body Injured:</u> | Headaches, neck, bilateral arms, and bilateral wrists |
| <u>Identity of Petitioners:</u> | Defendant |
| <u>Timeliness:</u> | Petition was filed timely |
| <u>Verification:</u> | Petition was verified |
| <u>Date of Order:</u> | November 28, 2022 (Served December 1, 2022) |
| <u>Petitioners Contentions:</u> | Defendant contends the evidence does not support the Findings of Fact and the Findings of Fact do not support the Award. Defendant contends the WCJ acted in excess of their powers by awarding 15% penalty. Defendant contends there was no unreasonable delay and that they promptly reissued payment. |

II

FACTS

Applicant was employed on January 21, 2013 as a phlebotomist at John Muir Medical Center when she sustained an industrial injury involving headaches, neck, bilateral arms, and bilateral wrists. The parties reached an agreement by Stipulation with Request for Award of 65% permanent disability with future medical which was approved. Applicant filed a Petition for Penalties per Labor Code section 5814 contending the checks were not received within 30 days and were not accompanied by a self-imposed penalty. Defendant filed an answer to the petition and a Petition for Penalties per Labor Code section 5813 contending Applicant's petition was unsupported and made in bad faith. The matter went to trial regarding attorney fees and penalties.

After trial, Applicant's Petition for Penalties pursuant to Labor Code section 5814 was granted in part and Defendant's Petition for Penalties pursuant to Labor Code section 5813 was denied. An Award issued of penalties pursuant to Labor Code section 5814 in the amount of \$2,376.75 to Applicant's attorney (representing a 15% penalty of \$15,845) and \$6,014.48 to Applicant (representing a 15% penalty of \$40,096.50). Defendant filed a Petition for Reconsideration.

III
DISCUSSION

APPLICANT'S PETITION FOR PENALTIES

The parties settled the case by Stipulation with Request for Award. The Award was approved on January 26, 2022 and served on Defendant on February 3, 2022. As part of the Stipulation with Request for Award, the parties agreed interest and penalties were waived if payment was made within 30 days.

Labor Code section 4650(d) states in pertinent part as follows:

If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan, as defined in subdivision (g). [...]

Labor Code section 5814(a) states as follows:

- (a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.

At trial, Defendant offered copies of checks dated February 23, 2022. One check is in the amount of \$40,096.50 payable to Applicant. The second check is in the amount of \$15,845 payable to Walters and Zinn. Defendant offered two envelopes, both with a postage stamp dated February 23, 2022. (Defendant Exhibit B) There is no indication of when the checks were placed in an outgoing mailbox or deposited at the Post Office.

On March 2, 2022, Claims Assistant Paris Gibbs emailed Applicant attorney the Award Letter. (Defendant Exhibit D) The Award Letter is addressed to Applicant and is dated February 22, 2022. It provides a breakdown of the settlement including attorney fees of \$15,845 and a balance to Applicant of \$40,096.50 after permanent disability advances and attorney fees. At the bottom, the Award Letter indicates it was copied to the file, Applicant attorney, and Defendant attorney. (Applicant Exhibit 5) However, at trial, Linda Marie Chase testified that the Award Letter dated February 22 was not sent until March 2 or March 3. Ms. Chase testified this was the last day for the claims assistant to complete that task. At trial, Applicant testified credibly that she did not receive the Award Letter until she received the trial exhibits. In summary, the Award Letter dated February 22, 2022 and addressed to Applicant with a carbon copy to her attorney was only sent to Applicant attorney and was sent over one week after it was dated.

On March 9, 2022, Applicant attorney notified Defendant attorney that neither he nor Applicant received their checks from the Stipulations. Applicant attorney indicated his client expected payment as soon as possible and with a self-imposed penalty. Applicant attorney asked when they could expect to receive the checks. (Defendant Exhibit E) Defendant attorney replied indicating both were paid in full on February 23, 2022 and provided check amounts and addresses. Defendant attorney also asked whether the checks should be stopped and reissued. (Defendant Exhibit F)

Two days later, on March 11, 2022, Applicant attorney emailed Defendant attorney indicating Applicant received the check dated February 23, 2022. Applicant attorney anticipated that his check had arrived as well. (Defendant Exhibit G) At trial, Applicant attorney represented he did in fact receive his check that day. This is consistent with Applicant's credible trial testimony that she normally received checks by mail from CCMSI within one or two days. This supports Applicant's contention that the checks dated February 23, 2022 were not sent until after March 9, 2022 when Defendant was notified that payment had not been received.

Defendant attorney replied indicating the checks were stopped and replacement checks were drafted and would print on Monday, March 14, 2022. (Defendant Exhibit J) At trial, Applicant testified credibly that she received a reissued check on March 17.

Applicant attorney emailed Defendant attorney on May 13, 2022, inquiring about the self-imposed penalty. (Defendant Exhibit L) There is no evidence that Defendant provided a self-imposed penalty.

Linda Marie Chase testified on behalf of Defendant at trial. However, her testimony was of little worth. She testified in pertinent part as follows: She is currently employed by CCMSI and has worked there for nearly 10 years. She is not the claims examiner that input the check information for Applicant. Her knowledge is based on a review of the information in the computer system and their notes. She works out of the Concord Office. The checks are printed and mailed from the Illinois office. She has no personal knowledge of when these checks were printed, stuffed into envelopes, and stamped. She has no documentation regarding when the checks left the Illinois facility. She did not know what happened to the checks between February 23 and when they were received but speculated it was delayed by the Post Office.

There is no dispute as to entitlement to permanent disability as shown in the Award Letter. (Defendant Exhibit D) The payment was received late and there is no evidence that the checks were sent before 30 days had lapsed. Defendant demonstrated no reason for the delay except speculation regarding the Post Office. Defendant reissued the checks but disregarded the need to provide a self-imposed penalty. As a result, a petition, Mandatory Settlement Conference, and Trial were necessary. The delayed payments to Applicant and her attorney were not minimal amounts but had a combined total of \$55,941.50. Furthermore, the parties agreed to a specific deadline of 30 days, but the checks were received 42 days after service of the Award.

Under these circumstances, a penalty slightly higher penalty than the self-imposed penalty of 10% is reasonable. The record supports a 15% penalty of \$2,376.75 to Applicant's attorney (representing 15% of \$15,845) and \$6,014.48 to Applicant (representing 15% of \$40,096.50).

DEFENDANT'S PETITION FOR PENALTIES

Defendant filed a Petition for Penalties pursuant to Labor Code section 5813 dated September 16, 2022. Defendant contends Applicant's Petition for Penalties was made in bad faith. This is unfounded. The record does not support a finding of penalties against Applicant.

ATTORNEY FEES

Attorney fees were considered in the findings above.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: January 4, 2023

Ariel Aldrich
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE