

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

DONALD TATE, *Applicant*

vs.

**INTERNATIONAL PAPER COMPANY;
OLD REPUBLIC INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ13411734; ADJ11084519
Santa Ana District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 2, 2023, wherein it was found in case ADJ13411734 that "Applicant is entitled to temporary disability [indemnity] for the period beginning 1/19/2021 to and including 11/10/2021 payable at the rate of \$1,172.57 per week, in the amount of \$49,582.96, less reasonable attorneys fees in the amount of \$7,437.44." It was also found that "there is not evidence of overlapping TTD periods" between case ADJ13411734 and case ADJ11084519. Finally, it was found that "Applicant is entitled to a penalty in the amount of \$10,000.00 pursuant to Labor Code section 5814" and "Applicant is entitled to additional attorney fees to be paid by defendant in the amount of \$4,250.00 pursuant to Labor Code section 5813(a)."

In these matters, in a Joint Findings and Award of December 22, 2022, it was found in case ADJ13411734 that while employed during a cumulative period ending on July 8, 2017 as a maintenance mechanic, applicant sustained industrial injury to his neck, back, knees, and shoulders causing temporary disability from January 19, 2021 to November 10, 2021, permanent disability of 65% and the need for further medical treatment. It was found in the same December 22, 2022 decision that while employed in the same position on July 8, 2017 in case ADJ11084519, applicant sustained industrial injury to his left knee causing permanent disability of 17% and the need for further medical treatment. Temporary disability was not placed at issue in case ADJ11084519, and no stipulations regarding the payment of temporary disability in case ADJ11084519 were placed on the record in the proceedings leading up to the December 22, 2022 decision. The award

of temporary disability in case ADJ13411734 stated that defendant could “assert credit for any overlapping TTD periods, previously paid in case ADJ11084519.”

Defendant contends that the WCJ erred in not allowing a credit for temporary disability payments made in case ADJ11084519, and in ordering Labor Code section 5814 penalties and attorney’s fees. We have received and Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will affirm the finding that defendant is not entitled to a credit for temporary disability payments made in case ADJ11084519, but we grant reconsideration and amend the Findings and Award of November 2, 2023 to defer the issues of Labor Code section 5814 penalties and attorneys’ fees pending further proceedings on those issues.

As noted above, in the Joint Findings and Award of December 22, 2022, it was found that applicant was temporarily disabled as a result of his cumulative injury in ADJ13411734 from January 19, 2021 to November 10, 2021. Defendant did not seek reconsideration of that finding, and that finding is now final. Defendant was allowed to “assert credit for any overlapping TTD periods, previously paid in case ADJ11084519.” No stipulations or findings were made regarding applicant’s period of temporary disability in the specific ADJ13411734 case. However, in the instant Petition for Reconsideration, defendant states that it “administered a total of \$122,654,27 in TTD (temporary total disability) from 08/26/2017 – 08/27/2019 at a weekly rate of \$1,172.57....” (Petition for Reconsideration at p. 2.) We note that applicant’s primary treating physician in the specific case, anesthesiologist and pain medicine specialist Michael H. Lowenstein, M.D. wrote in a November 9, 2017 report, as far as applicant’s work status, “No lifting, pushing, or pulling greater than 15 pounds. No climbing ladders. Limited walking, stooping and bending. It is my understanding that the patient’s employer cannot accommodate light duty. If this is the case then the patient is temporarily totally disabled.” (November 9, 2017 report at p. 9.) Defendant explains in the Petition for Reconsideration that applicant was temporarily disabled in the specific injury from August 26, 2017 and continuing thereafter. (Petition for Reconsideration at pp. 8-9.)

However, despite the finding in the Joint Findings and Award of December 22, 2022 that is now final that applicant sustained temporary disability in the cumulative injury case from January 19, 2021 to November 10, 2021, defendant now appears to argue that applicant was actually temporarily disabled in the cumulative injury case during the 104-week period

commencing on August 26, 2017. However, the time to raise and present evidence on this issue was prior to the issuance of the December 22, 2022 decision. Having failed to raise or present evidence on this issue, and having failed to seek reconsideration from the December 22, 2022 decision, defendant cannot now say that applicant was temporarily disabled in the cumulative case during any period other than January 19, 2021 to November 10, 2021. (Lab. Code, § 5904.) The only way defendant could show it was entitled to a credit for overlapping periods of temporary disability is to show that applicant was temporarily disabled in the specific injury case at some point during the period between January 19, 2021 and November 10, 2021. But defendant admits in its Petition that this is not the case. We therefore affirm the WCJ's decision that applicant is entitled to full payment of the award of temporary disability indemnity in case ADJ13411734.

However, with regard to the issues of penalties and attorneys' fees, the WCJ must better explain his decision. First, the WCJ must analyze the issue of whether defendant's mistaken belief that the allowance of a credit for overlapping periods in the December 22, 2022 decision allowed it to relitigate the issue of applicant's period of compensable temporary disability created a reasonable factual or legal doubt as to its liability.

Assuming defendant's conduct justified section 5814 penalties, the WCJ must do a full analysis under *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc) regarding the amount of penalties awarded. The WCJ did not explain the basis of his imposition of a maximum penalty. Labor Code section 5814(a) permits a penalty of "up to 25 percent." (Emphasis added.) The amount of the penalty is discretionary, and the full 25 percent penalty should be reserved for the most culpable conduct on the part of a defendant. In *Ramirez*, we emphasized that Labor Code section 5814 affords a WCJ discretion in determining the penalty which should be assessed, with a primary view towards the goals of encouraging the prompt payment of benefits by making delays costly on defendants, and of ameliorating the effects of any delays on the injured worker. To that end, in *Ramirez*, we listed several factors to be considered by the WCJ in assessing a Labor Code section 5814 penalty. The factors listed in *Ramirez* are: (1) evidence of the amount of the payment delayed; (2) evidence of the length of the delay; (3) evidence of whether the delay was inadvertent and promptly corrected; (4) evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error; (5) evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a

specified number of days; (6) evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance; (7) evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable; (8) evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it; and (9) evidence of the effect of the delay on the injured employee. (*Ramirez, supra*, 73 Cal.Comp.Cases at pp.1329-1330.)

Finally, the WCJ must explain the basis behind the attorney's fee award, specifically explaining a reasonable rate and the specifying the time expended in enforcing the award. The WCJ should also explain the basis of awarding fees pursuant to Labor Code section 5813 which deals with bad faith litigation tactics rather than Labor Code section 5814.5 which deals with fees for enforcing an award of compensation.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of November 2, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of November 2, 2023 is **AMENDED** as follows:

FINDINGS OF FACT

1. Donald Tate, while employed during the periods of 1/1/1982 through 7/8/2017, in case ADJ13411734, as a maintenance mechanic, occupational group number 470, at Anaheim, California, by International Paper Company, sustained injury to his neck, back, left knee, right knee and bilateral shoulders, arising out of and occurring in the course of employment.
2. There is no basis for TTD overpayment.
3. There is no evidence of overlapping TTD periods.
4. There is no good cause to develop the record on TTD.
5. Applicant is entitled to temporary disability indemnity corresponding to the period beginning 1/19/2021 to and including 11/10/2021 in

case ADJ13411734 payable at the rate of \$1,172.57 per week, in the amount of \$49,582.96, less reasonable attorney fees in the amount of \$7,437.44.

6. The issue of Labor Code section 5814 penalties and attorneys' fees is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of DONALD TATE against OLD REPUBLIC INSURANCE COMPANY of:

a. Temporary disability indemnity for the period beginning 1/19/2021 to and including 11/10/2021 payable at the rate of \$1,172.57 per week, in the amount of \$49,582.96, less reasonable attorney fees in the amount of \$7,437.44.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 26, 2024

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

**DONALD TATE
KATNIK & KATNIK
MATIAN LAW GROUP**

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