

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

MARIA VALLEJO, *Applicant*

vs.

**VENTURA COUNTY OFFICE OF EDUCATION;
PERMISSIBLY SELF-INSURED, ADMINISTERED BY YORK RISK
SERVICES GROUP, *Defendants***

**Adjudication Numbers: ADJ9602729 (MF), ADJ9602730
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to further study the factual and legal issues presented. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the workers' compensation administrative law judge's (WCJ) Findings of Fact and Order (F&O) of November 4, 2022, wherein it was found that applicant shall take nothing on her petition for penalties. In the F&O, the WCJ found that on November 25, 2013, while employed by the defendant as a dental assistant instructor, applicant sustained industrial injury to her back. In the F&O, the WCJ further found that while employed during a cumulative period ending September 23, 2013 as a dental assistant instructor, applicant sustained industrial injury to her back.

Applicant contends that the WCJ erred in finding that the Compromise and Release (C&R) settlement proceeds were paid timely to applicant by defendant, that applicant is entitled to interest from the period of July 8, 2021 through October 2, 2021, and that applicant is entitled to penalties and attorney fees pursuant Labor Code sections 4650(d), 5814, and 5814.5.¹ We have not received an Answer from defendant. The WCJ has filed a Report and Recommendation on Petition for Reconsideration recommending we deny reconsideration.

¹ All statutory references not otherwise identified are to the Labor Code.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record and the WCJ's analysis of petitioner's arguments in the report, and as our decision after reconsideration, we will rescind the WCJ's decision, and award applicant penalties, interest and attorney's fees.

FACTUAL BACKGROUND

The parties entered into a C&R agreement on June 24, 2021. The Order Approving the C&R (OACR) was issued on June 29, 2021 but only included one of the two ADJ numbers. A second OACR was issued on July 8, 2021 for both ADJ numbers. An amended OACR was issued on July 19, 2021. The settlement terms as relevant herein were:

\$45,000 less permanent disability advances (PDAs) of \$6,698.88,
Less applicant attorney fees of \$1,350.00
Balance to applicant: \$36,951.12

[...]

This Compromise and Release includes compensation for interest and/or penalties provided in the settlement is paid within thirty (30) days following receipt by defendant of the Order of the Compromise and Release.

(Applicant's Exhibit 1, Signed Compromise and Release, June 24, 2021, pp. 6-7.)

On August 30, 2021, applicant's counsel sent a letter to defense counsel which stated in relevant part:

The undersigned has subbed in as new counsel. Albeit the file is pending from prior applicant's counsel to fully assess the subject dispute, [applicant] only received one check pursuant to the Order Approving Compromise and Release totaling \$6,824.12. It is check number 40065 dated July 23, 2021. As such, a demand is made for a 25% penalty to issue in the amount of \$7,531.75 within ten days to [applicant] to rectify this deficiency. Further, attorney fees in pursuing this defect.

(Applicant's Exhibit 4, HB Law Group letter to defense counsel, August 30, 2020, p. 1.)

Defendant issued a check, dated July 26, 2021, made payable to applicant's name and corresponding address as was stated in the OACR. The amount of that check was for \$30,130.00. (Defendant's Exhibit A, Check number 40067, July 26, 2021.)

On September 10, 2021, applicant filed a petition for penalties pursuant to Labor Code section 5814.

On September 22, 2021, defendant issued a stop payment on the July 26, 2021 check. (Defendant's Exhibit C, Stop payment on check number 40067, September 22, 2021, p. 1.)

On September 29, 2021, defendant issued a check made payable to applicant's name and corresponding address as was stated in the OACR. The amount of that check was for \$30,130.00. (Applicant's Exhibit 9, VCSSFA check number 42714, September 29, 2021, p. 1.)

The parties proceeded to trial on July 27, 2022. According to the Minutes of Hearing and Summary of Evidence (MOH/SOE), the issues for trial were: attorney's fees, penalties and interest on the late payment of the C&R pursuant to Labor Code section 4650(d), Labor Code section 5814, and attorney's fees pursuant to Labor Code section 5814.5.

In the F&O, the WCJ found that the two checks the defendant issued on July 23, 2021 and July 26, 2021, the sum of which equal the balance owed to applicant pursuant to the C&R, were timely. Applicant contends that because there was no evidence presented to rebut her claim that the check dated July 26, 2021 was never received by her, that payment was not timely and therefore penalties, interest and attorney's fees are owed by defendant.

As explained below, we will rescind the WCJ's F&O, and award applicant penalties, interest and attorney's fees.

DISCUSSION

Labor Code section 5814(a) states:

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.

In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc), 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 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.)

Here, the delay in payment of settlement proceeds owed to applicant was over 80 days, which was unreasonable. Defendant did not offer any evidence regarding any of the mitigating *Ramirez* factors. While defendant introduced evidence that payment was issued, that does not establish that defendant actually sent the check to applicant via US mail. Defendant is entitled to rely on the US Postal Service for mailing correspondence, but in this case, defendant offered no evidence that it put the payment in the mail. Defendant provided no testimonial evidence from claims adjusters or supervisors regarding the purported payment. Therefore, we find a penalty appropriate to the facts herein, plus interest and attorney's fees.

Accordingly, we will amend the WCJ's decision to reflect that applicant is entitled to penalties, interest and attorney's fees pursuant to Labor Code sections 5800, 4650(d), 5814 and 5814.5 for the unreasonably delayed payment of settlement proceeds.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order of November 4, 2022 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Defendant unreasonably delayed payment of settlement proceeds to applicant.
2. Applicant is entitled to penalties under Labor Code sections 4650 and 5814, plus interest.
3. Applicant's attorney is entitled to attorney's fees under Labor Code section 5814.5.

ORDER

IT IS ORDERED that the amount of said penalties, interest and fees in accordance with the Findings of Fact are to be informally adjusted by the parties, with jurisdiction reserved at the trial level if the parties cannot informally resolve the issues.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2023

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

**MARIA VALLEJO
HB LAW GROUP
INGBER & WEINBERG, LLP**

HAV/ara

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