

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

MIGUEL HUITRON, *Applicant*

vs.

**GREEN WASTE RECOVERY;
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants***

**Adjudication Number: ADJ8115072
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 23, 2023

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

**MIGUEL HUITRON
BOXER & GERSON
LAURA G. CHAPMAN & ASSOCIATES**

AH/cs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Applicant, Miguel Huitron, while employed on 11/6/2011, as a sorter, in San Jose, California, by Green Waste, sustained an injury arising out of and arising in the course of employment to the lumbar spine, psyche, lungs (respiratory), and gastrointestinal system, with injury resulting in a sleep disorder, and sexual dysfunction, and claims to have sustained an injury arising out of and arising in the course of employment to the urological system, and injury resulting in hypogonadism.

The Findings and Award in this case issued on 11/02/2022 and were served on 11/03/2022. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration. The Petition for Reconsideration is not legally defective. Applicant has filed an Answer on 11/29/2022.

Petitioner contends that it was error to award Labor Code section 5814 penalties in this case as Labor Code section 5814(g) prevents an award of penalties more than two years from when the compensation was due.

II.

FACTS

Applicant suffered an admitted specific injury to his low back in 2011. He underwent treatment including surgical intervention, but he did not have a successful outcome. Applicant has failed back syndrome, and his injury has progressed to include multiple body systems.

The parties have utilized an Agreed Medical Examiner (AME) Dr. Edington, and there are various Qualified Medical Examiners (QMEs) in various specialties. Applicant's medical presentation is quite complex, and the medical-legal reporting is extensive.

Applicant received temporary disability and then began receiving permanent disability advances. In 2017, the permanent disability advances ceased as Defendant had advanced a reasonable amount based upon the medical at the time. However, the medical evidence continued to be developed, and there were then multiple instances where Applicant alleged additional permanent disability was then due.

Applicant filed a Labor Code section 5814 Penalty Petition on 10/26/2021 and thereafter filed a Declaration of Readiness. A Mandatory Settlement Conference was held on 04/07/2022 with WCJ Pauline Suh, who set the case for trial on limited issues, including the Penalty Petition. The matter was heard over multiple days and a Findings and Award issued on 11/03/2022 awarding three (3) separate penalties.

Defendant has filed a timely and verified Petition for Reconsideration raising the 2-year Statute of Limitations contained within Labor Code section 5814(g) for the first time. Applicant has filed an Answer to the Petition for Reconsideration.

III.

LEGAL ARGUMENTS

1. ARE APPLICANT'S PENALTY CLAIMS BARRED BY LABOR CODE SECTION 5814(g)?

Applicant correctly points out in his Answer to Petition for Reconsideration that the 2-year limitation contained in Labor Code section 5814(g) is an affirmative defense, and it can be deemed waived if not raised/asserted.

A review of the 04/07/2022 Pretrial Conference Statement does not reflect any mention of an affirmative defense nor does it mention Labor Code section 5814(g).

At trial, this Judge spent a considerable amount of time with the parties refining and clarifying the stipulations and issues and identifying the evidentiary record. There was no reference made to any affirmative defense, and Labor Code section 5814(g) was never mentioned.

The first time Defendant raised and/or asserted any Labor Code section 5814(g) affirmative defense was in the Petition for Reconsideration. As such, this Judge did not "turn her mind" to whether or not there was any bar to the award of penalties and focused solely on whether or not Defendant had properly advanced permanent disability.

The failure to raise an affirmative defense amounts to a waiver. Applicant correctly cites Labor Code section 5409 and *Romano v. Kroger* 2013 Cal. Wrk. Comp PD LEXIS 125 (panel decision) which cites *Abney v. Aera Energy* (2004) 69 CCC 1552 (en banc). Here, Defendant cannot and does not show how or when it raised the now claimed affirmative defense prior to the submission of this case. As such, the affirmative defense is deemed waived.

There is no argument made (that I can tell) alleging that the facts as stated in the Findings and Award, the dates, the medical evidence, or the ratings are in any way incorrect. As such, it does not appear that there is any dispute as to the accuracy of the determinations therein, and the only issue on Reconsideration is whether the 2-year statute of limitations bars the penalties awarded. As the statute of limitations was not raised until Reconsideration, and is deemed waived, there are no other issues to address.

IV.

RECOMMENDATION

The Petition for Reconsideration should be denied.

DATE: 12/02/2022

A handwritten signature in blue ink, appearing to read "Adoralida Padilla". The signature is fluid and cursive, with the first name being the most prominent.

ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE