WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES L. LEINON, ***Applicant,*** **vs.** **FISHERMEN'S GROTTO; MID-CENTURY INSURANCE COMPANY,** ***Defendant(s).***	**Case No. WCK 45264** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On April 3, 2003, the Appeals Board granted reconsideration of the Supplemental Findings and Award issued by the workers' compensation administrative law judge ("WCJ") on January 13, 2003. In that decision, the WCJ found defendant Mid-Century Insurance Company liable for a penalty under Labor Code section 4650(d)[1] on all temporary disability indemnity ("TDI"), where it paid the TDI within fourteen (14) days after finality of a prior Findings and Award that had determined the disputed issues of injury and temporary disability.

In its petition for reconsideration, defendant contended that it avoided a section 4650(d) penalty by sending applicant a delay letter, that there is no obligation to pay benefits until adjudication of industrial injury, that there is no penalty in this case because TDI was timely paid, that the imposition of a section 4650(d) penalty is a denial of due process and equal protection, that section 4650 does not apply in a post-award situation, and that the WCJ's decision is not supported by the legislative record and scheme relating to penalties.

Applicant filed an answer.

In order to secure uniformity of decision in the future, and because of important legal issues raised by the Court of Appeal in *Rivera v. Workers' Comp. Appeals Bd.* (2003) 112 Cal.

---

[1] All statutory references are to the Labor Code, unless otherwise indicated.

App. 4th 1124 [68 Cal. Comp. Cases 1460], the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[2] Based on our review of the relevant statutory and case law, we hold that where injury, disability or indemnity rate is disputed, no section 4650(d) penalty arises if the disputed disability indemnity payments are made within 14 days of a final order, decision or award imposing liability for those benefits or within 14 days of a defendant's acceptance of liability for the injury and disability benefits. We also hold that an order, decision or award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them.

BACKGROUND

Applicant claimed a cumulative trauma (CT) injury to his spine, left hip, and right knee for the period ending November 1, 1998. Defendant disputed injury from the outset by sending applicant a timely delay letter; later it timely denied the claim.[3] In a Findings and Award issued May 30, 2001, the WCJ found that applicant sustained the CT injury as alleged, and that the injury caused temporary total disability from November 2, 1998 to March 6, 2001 and continuing. The Appeals Board denied defendant's petition for reconsideration, followed by the Court of Appeal's denial of defendant's petition for writ of review, followed by the Supreme Court's denial of review on January 3, 2002. Thereafter, applicant claimed that defendant failed to pay a section 4650(d) penalty when it paid the TDI required by the May 30, 2001 Findings and Award. The WCJ heard the penalty claim based on the parties' stipulation that on January 9, 2002 (i.e., within 14 days of the Supreme Court's denial of review), defendant paid the correct amount of TDI but did not include any section 4650(d) penalty. In the decision reconsidered

---

[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

[3] Section 5402(b) provides in part that "[i]f liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable…rebuttable only by evidence discovered subsequent to the 90-day period."

here, the WCJ found defendant liable for a section 4650(d) penalty on the TDI due under the May 30, 2001 Findings and Award.

DISCUSSION

Section 4650 provides in relevant part:

> "(a) If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid, unless liability for the injury is earlier denied.
>
> "(b) If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid.
>
> "(c) Payment of temporary or permanent disability indemnity subsequent to the first payment shall be made as due every two weeks on the day designated with the first payment.
>
> "(d) 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). No increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether temporary disability indemnity payments are owed and advises the employee, in the manner prescribed in rules and regulations adopted pursuant to Section 138.4, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability indemnity payments are owed, and when the employer expects to have the information required to make the decision."

In *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal. App. 4th 1284, 1293 [66 Cal. Comp. Cases 584, 590-591], the Court stated that "[t]he legislative history indicates that the purpose of enacting the [1989] changes to section 4650 was to promote prompt payment of benefits and certainty of timing…The new legislation also included increased compensation for

late payments as an incentive, apart from the increased compensation for unreasonable refusal or delay under section 5814." (Citations omitted.)[4]

Thus, the language of section 4650 includes multiple references to the words "injury" and "disability," and the statute's purpose is to promote the prompt payment of benefits and certainty of timing. We conclude that it is consistent with the language and purpose of the statute to construe the section 4650(d) penalty as being applicable only where liability for injury and disability benefits is not in dispute.

In *Rivera v. Workers' Comp. Appeals Bd.* (2003) 112 Cal. App. 4th 1124 [68 Cal. Comp. Cases 1460], liability for injury and disability benefits was not in dispute, and the injured worker claimed penalties under sections 4650(d) and 5814 for late payment of an approved Stipulations and Award. The Award included accrued and continuing periodic indemnity payments, and was accompanied by a simultaneous order of commutation of the future indemnity payments into a lump sum. The Court affirmed the Appeals Board's en banc decision in *Rivera v. Tower Staffing Solutions* (2002) 67 Cal. Comp. Cases 1473, holding that section 4650 does not apply to lump sums that are commuted future periodic indemnity payments. (See 112 Cal. App. 4th at 1136 [68 Cal. Comp. Cases at 1468].) The Court also addressed the issue of whether the section 4650(d) penalty applies to accrued indemnity payments. The Court concluded that application of section 4650(d) to accrued TDI and PDI is consistent with the statute's "broader" purpose of not only providing for scheduled indemnity payments, but "also a procedure for ensuring financial support to injured workers during the recovery period following an industrial injury." (112 Cal. App. 4th at 1135 [68 Cal. Comp. Cases at 1468], citation omitted.) The section 4650(d) penalty applies to accrued disability indemnity because "the needs addressed by section 4650 are even greater where periodic disability indemnity has accrued during the recovery period and has not been

---

[4] Before 1989, section 4650 provided in relevant part, "[i]f an injury causes temporary disability, a disability payment shall be made for one week in advance as wages on the fourth day after the injured employee leaves work as a result of the injury…If the injury causes permanent disability, a disability payment shall be made for one week in advance as wages on the fourth day after the injury becomes permanent or the date of the last payment of temporary disability, whichever date first occurs." Section 4651 provided in relevant part, "[s]uch permanent or temporary disability payments shall thereafter be made not less frequently than twice in each calendar month, unless otherwise ordered by the appeals board." Thus, the statutes had no penalty provisions and no clear timing of periodic payments.

paid." (*Id*.) As noted above, *Rivera* involved an approved Stipulations and Award, i.e. liability for injury and indemnity payments was not in dispute. Thus, the Court concluded that section 4650(d) applies to accrued indemnity in a case where liability had been accepted. However, the Court did not define when accrued benefits are "due" for purposes of section 4650(d).

The question of when accrued benefits are "due" was addressed by the Appeals Board in *Mike v. Workers' Comp. Appeals Bd.* (2003) 68 Cal. Comp. Cases 266 [writ denied], which involved section 4650(d) and 5814 penalties for failure to pay TDI at the correct rate during a good-faith earnings dispute. After the WCJ issued an award resolving the dispute, defendant paid the correct TDI within 14 days. The Appeals Board quoted subdivisions (a) and (d) of section 4650 and stated, "[o]n its face, the language of the statute refers to periodic payments. Defendants have an incentive to make periodic payments, i.e., if a defendant misses a periodic payment it has the option of immediately picking up payments and 'self-imposing' a 10% penalty on the missed payment, instead of risking a section 5814 penalty on the entire species of temporary (or permanent) disability indemnity. Therefore, the statute should be applied only to periodic payments where liability is accepted." (68 Cal. Comp. Cases at 273.) The Appeals Board denied both the section 4650(d) penalty and the section 5814 penalty, noting that defendant's liability for the higher TDI rate was not certain until the WCJ issued an award, after which the differential was paid within 14 days. Quoting subdivision (a) again, the Appeals Board stated that "the difference in the temporary disability rate from that paid and that ultimately found by the WCJ only became 'then due' within the meaning of the statute at the time the WCJ made the decision on the disputed issues of earnings and [TDI] rate…" (*Id*.) The Appeals Board concluded, "in a case where there is a bona fide dispute over the correct indemnity rate, the increased payment is not 'due' until the WCJ decides that it is due…the parties stipulated that payment on the Award…was made within 14 days. Therefore, defendant's payment of the award was 'timely' under section 4650(d)." (*Id*.)

Thus, section 4650 is phrased in terms of an accepted injury, and benefits which are not in dispute are payable for this accepted injury. Therefore, the section 4650(d) penalty will not

apply under the conditions described in subdivisions (a) and (d) (further discussed below), and the increase will not apply when injury or indemnity benefits are disputed, thus taking the matter outside of section 4650, until that dispute is finally resolved. Accordingly, based on the language and purpose of section 4650 as discussed in *Gangwish* and *Rivera*, and consistent with the Appeals Board's analysis in *Mike*, we hold that the penalty under section 4650(d) applies only to periodic payments, including accrued periodic payments, where liability is accepted or where liability is ultimately imposed and the determination becomes final. An award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them. Thus, an award becomes final after a WCJ issues an award and reconsideration is not sought, or after the Appeals Board makes a determination on reconsideration and review is not sought in the Court of Appeal, or after appellate review of the Appeals Board's decision is denied (or the decision is affirmed). In the instant case, the award of disputed benefits did not become final until the Supreme Court's ultimate denial of review.

However, there is no "grace period" for delay in payment provided by the statutory right to reconsideration or appellate review. (See *Jensen v. Workers' Comp. Appeals Bd.* (1985) 170 Cal. App. 3d 244, 247 [50 Cal. Comp. Cases 369, 371]; *California Highway Patrol v. Workers' Comp. Appeals Bd. (Erebia)* (2003) 68 Cal. Comp. Cases 227, 232 [writ denied].) Thus, if a defendant does not file a petition for reconsideration from an award of disputed benefits but does not pay within 14 days of the award, it must include a section 4650(d) penalty. Likewise, if a defendant does not file a petition for writ of review from an adverse decision after reconsideration but does not pay within 14 days of that decision, it must include a section 4650(d) penalty.

By reference to the 14-day period for timely payment set forth in section 4650, and consistent with *Mike, supra,* we also hold that in a disputed case, the defendant has 14 days to pay the disputed benefits after a final determination of the dispute, without risk of incurring the section 4650(d) penalty. This conclusion is consistent with the Supreme Court's approach to penalties on medical mileage in *Avalon Bay Foods v. Workers' Comp. Appeals Bd. (Moore)*

(1998) 18 Cal.4th 1165 [63 Cal. Comp. Cases 902]. In that case, the Court adopted from section 4603.2(b) the 60-day time limit for timely payment of medical treatment bills; the Court allowed employers 60 days to pay medical treatment mileage bills without risk of incurring a penalty under section 5814. (See 18 Cal.4th at pp. 1179-1180 [63 Cal.Comp.Cases at pp. 912-913].)

Finally, we observe that section 4650 describes several situations in which the penalty will be avoided. Under subdivision (a), no increase on TDI will apply where liability for the injury is denied within 14 days after knowledge of the injury and disability. Under subdivision (b), no increase on PDI will apply where the first payment is made within 14 days after the date of last payment of TDI and the employer continues the payments until the employer's reasonable estimate of PDI due has been paid, and if the amount of PDI has been determined, until that amount has been paid. Under subdivision (d), the penalty will not apply where the employer continues the employee's wages under a defined salary continuation plan, and no increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401.[5] And there is no penalty when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether TDI payments are owed and advises the employee, in a specified manner, why payments cannot be made within the 14-day period.

In this case, it was stipulated that defendant paid TDI within 14 days of the final determination rendering the TDI due for purposes of section 4650 (i.e., the Supreme Court's denial of review of the May 30, 2001 Findings and Award). Accordingly, there is no basis for applying the penalty under section 4650(d), and we will reverse the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Appeals Board (En Banc), that the Supplemental Findings and Award of January 13, 2003 is **RESCINDED**, and the following Findings are **SUBSTITUTED** in its place:

---

[5] Based on the language of section 5401, no section 4650(d) penalty will apply to any payment due prior to or within 14 days after a claim form is personally delivered to the employer or mailed to the employer by first-class or certified mail.

FINDINGS

"1. When it paid the May 30, 2001 Findings and Award, defendant paid the correct amount of retroactive temporary disability payments calculated on a weekly rate of $485.06, plus post-award interest, by check to applicant dated January 9, 2002."

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

"2. As injury and disability was in dispute, defendant was not obligated to include the 10% increase under Labor Code section 4650(d)."

"3. Applicant's demand for penalty under section 4650(d) is denied."

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

_____

MERLE C. RABINE, Chairman

_____

WILLIAM K. O'BRIEN, Commissioner

_____

JAMES C. CUNEO, Commissioner

_____

JANICE JAMISON MURRAY, Commissioner

_____

FRANK M. BRASS, Commissioner

_____

RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

8/25/04

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN* ON THE *OFFICIAL ADDRESS RECORD.

tab

LEINON EN BANC