

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **JUAN A. RIVERA,**

Case No. POM 240908

4 *Applicant,*

**OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)**

5 **vs.**

6 **TOWER STAFFING SOLUTIONS; STATE
7 COMPENSATION INSURANCE FUND,
8 *Defendant(s).***

9 **CALVIN CRUMP,**

Case No. LAO 712097

10 *Applicant,*

**OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)**

11 **vs.**

12 **LOS ANGELES UNIFIED SCHOOL
13 DISTRICT, Permissibly Self-Insured, Adjusted
14 by HELMSMAN MANAGEMENT SERVICE,**

15 *Defendants,*

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21 On March 28, 2002, the Workers' Compensation Appeals Board (Board) granted
22 reconsideration of decisions issued by workers' compensation administrative law judges (WCJs) in
23 *Rivera v. Tower Staffing Solutions* (POM 240908) and *Crump v. Los Angeles Unified School*
24 *District* (LAO 712097). In *Rivera*, the WCJ imposed two penalties under Labor Code section
25 5814,¹ one for the late payment of a commuted award and one for failure to correctly calculate a

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

1 section 4650(d) penalty on the commuted award. In *Crump*, the WCJ found that although a section
2 4650(d) penalty may apply to a Compromise and Release (C&R) of death benefits, applicant
3 waived his right to assert the penalty.

4 Because of the important legal issues presented, as well as to assure uniformity of decision
5 in the future, the Chairman of the Board, upon a majority vote of its members, consolidated these
6 two cases and reassigned them to the Board as a whole for an en banc decision. (Labor Code,
7 §115.)² Based on our review of the relevant statutory and case law, we conclude that section
8 4650(d) applies only to periodic indemnity payments, and not to the proceeds of commutations or
9 C&R agreements, both of which reduce the underlying benefits to a lump sum, taking them outside
10 the scope of the periodic indemnity payments set forth in section 4650.

11 **BACKGROUND**

12 *Rivera v. Tower Staffing Solutions* (POM 240908)

13 On December 12, 2000, the applicant and defendant, State Compensation Insurance Fund
14 (“SCIF”), submitted for the WCJ’s approval Stipulations With Request for Award and a Petition
15 for Commutation of Future Payments of the Award with regard to applicant’s industrial injury to
16 his left hand and psyche of March 4, 1999. The parties stipulated to 75% permanent disability
17 payable at \$153.33 per week beginning May 1, 2000, in the total sum of \$72,295.09, followed by a
18 life pension of \$51.75 per week. The Petition for Commutation requested commutation of all
19 future payments, including the life pension. The WCJ approved the Stipulated Award and
20 simultaneously issued an Order of Commutation. The WCJ added to the Order of Commutation a
21 notation allowing SCIF 15 days to object to the commutation (hereinafter, “commuted award.”)
22 No objection was filed. Subsequently, applicant filed a Declaration of Readiness to Proceed
23 (DOR) to request a hearing on SCIF’s alleged late payment of the commuted award. At the
24 Mandatory Settlement Conference (MSC) applicant claimed: “1) Penalties (5814 & 4650(d))

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26 ² The Board’s en banc decisions are binding precedent on all Board panels and WCJs. (*Gee v. Workers’ Comp.*
27 *Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; WCAB/DWC Policy &
Procedure Manual, Index No. 6.16.1.)

1 Interest & *Gellie* penalty – *Moulton* penalty” and “2) Underpayment of Order [of Commutation].”³

2 The parties filed briefs and attachments, and the matter was submitted on the record.

3 On January 4, 2002, the WCJ issued the Amended Findings and Award disputed here. The
4 WCJ imposed two penalties under section 5814 for unreasonable delay in paying the commuted
5 award: one penalty for the delay itself, and one penalty because SCIF, when it did pay the
6 commuted award, miscalculated the self-imposed penalty under section 4650(d). SCIF filed a
7 petition for reconsideration, conceding liability for one section 5814 penalty for delaying payment
8 of the commuted award, but contending in substance that the miscalculation of the section 4650(d)
9 penalty was one course of conduct justifying a single penalty under section 5814.

10 In his Report on SCIF’s petition, the WCJ provided the following rationale for imposing
11 two section 5814 penalties:

12 “The fifteen days to object [to the Order of Commutation] expired on
13 December 27, 2000...

14 “SCIF failed to object... On [January 26, 2001], defendant paid
15 \$18,088.62 in attorneys fees and paid applicant \$22.13. The defendant
16 identifies the extra \$88.62 added to the attorney’s fees as interest but the
17 evidence is insufficient to state why the applicant was only paid \$22.13 at
18 that point in time. The undersigned found that this was an unreasonable
19 delay and subject to a penalty under § 5814. SCIF does not object to that
20 finding.

21 “With respect to interest and penalties under...§ 4650(d), applicant
22 received \$10,424.84 in §4650(d) penalties and \$1,535.93 in interest. The
23 interest amount was calculated correctly but the §4650(d) penalty was not.
24 Between the Award and the Order of Commutation, \$109,659.08 in
25 benefits should have been paid the applicant and applicant’s attorney by
26 January 2, 2001. This would mean that the proper amount of the §4650(d)
27 penalty should have been \$10,965.91, not \$10,424.84 as alleged by SCIF.
The undersigned found that this was a separate and distinct legal act and
subjected SCIF to a second §5814 penalty in the amount of \$12,685.16
pursuant to *Christian v. WCAB* (1997) 15 Cal.4th 505, 62 CCC 576.”

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3 The full citations of the cases named by applicant are *Gellie v. Worker's Comp. Appeals Bd.* (1985) 171 Cal.App.3d 917 [50 Cal.Comp.Cases 470] and *Moulton v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th 837 [65 Cal. Comp. Cases 1259].

1 As noted at the outset, SCIF's petition for reconsideration was granted to allow sufficient
2 opportunity to further study the factual and legal issues. It was subsequently determined that an en
3 banc decision would be appropriate to address the issue of whether a section 4650(d) penalty
4 applies to the proceeds of commutations.

5 *Crump v. Los Angeles Unified School District (LAO 712097)*

6 This case involves an underlying claim for death benefits, which was found compensable
7 by the WCJ in a Findings and Award issued March 19, 1999. On May 5, 1999, the Board denied
8 defendant's petition for reconsideration. On August 24, 1999, the Court of Appeal denied
9 defendant's petition for writ of review. Thereafter, the parties entered into a C&R settling the
10 matter for the lump sum of \$140,000.00, less attorney's fees of \$20,000.00. On May 25, 2000,
11 the WCJ issued an Order Approving Compromise and Release (OACR). On July 24, 2000,
12 applicant's attorney filed a Petition for Multiple Penalties under section 5814, alleging that
13 defendant failed to make timely payment of the C&R proceeds, interest on the proceeds,
14 applicant's attorney's fees, and interest on the attorney's fees. After trial, the WCJ issued a
15 decision dated May 15, 2001, finding defendant liable for two section 5814 penalties on the
16 entire amount of the C&R. Both parties filed petitions for reconsideration.⁴

17 In a decision issued July 18, 2001, the panel of the Appeals Board then assigned to the
18 matter reversed one of the section 5814 penalties, concluding in essence that defendant's late
19 payment of the C&R and its failure to pay interest was a single course of conduct, justifying a
20 single penalty under section 5814. The panel also concluded in relevant part, "section 4650(d) is
21 being raised for the first time upon reconsideration, and...is not properly before the Board at this
22 time. The applicant may raise the issue at the trial level, and the WCJ may proceed as necessary
23 or appropriate."⁵ Upon return of the case to the trial level, applicant filed a DOR and an
24 "Amended Petition for Multiple Penalties Pursuant to...sections 5814 and 4650(d) and Interest

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26 ⁴ Applicant's letter-answer to defendant's petition was treated as a petition for reconsideration because it raised
objections to the WCJ's decision in reference to attorney's fees and section 4650(d).

27 ⁵ The panel noted that section 4650(d) was not raised in the penalty petition filed by applicant at the trial level, it was
not raised at the MSC, and it was not raised at trial.

1 Pursuant to...section 5800.” On January 3, 2002, the matter was submitted on the record without
2 further evidence or testimony. In the Findings and Order of January 17, 2002 disputed here, the
3 WCJ issued a take-nothing order, finding that applicant waived the issue of penalty under section
4 4650(d). But in his Opinion on Decision, the WCJ offered an alternative analysis:

5 “If in fact the WCALJ is not upheld on [the waiver] issue, the WCALJ
6 would impose a Labor Code section 4650(d) penalty under the facts of this
7 case...[T]he case of *Vince Phillips (Deceased) v. Sacramento Municipal*
8 *Utilities District, PSI, 63 CCC 585...*stands for the proposition that death
benefits are to be paid in the same manner and at the same rate as
temporary disability benefits pursuant to Labor Code section 4661.5.”

9 Applicant filed a petition for reconsideration, contending that he was not required to raise
10 section 4650(d) in a penalty petition or at the MSC because the penalty is supposed to be self-
11 executing, without application by the employee. Applicant also contended that he did not waive
12 any penalty under section 5814 because the penalty under section 4650(d) does not arise until there
13 is a determination that an indemnity payment was paid late and without the self-imposed penalty.
14 The defendant, Los Angeles Unified School District (“LAUSD”) filed an answer. Reconsideration
15 was granted to allow sufficient opportunity to further study the factual and legal issues. It was
16 subsequently determined that an en banc decision would be appropriate to address the issue of
17 whether a section 4650(d) penalty applies to the proceeds of a C&R for death benefits.

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1 **DISCUSSION**

2 Section 4650 provides in relevant part:

3 “(a) If an injury causes temporary disability, the first payment of
4 temporary disability indemnity shall be made not later than *14 days*
after knowledge of the injury and disability...

5 “(b) If the injury causes permanent disability, the first payment
6 shall be made within *14 days* after the date of last payment of
temporary disability indemnity...

7 “(c) Payment of temporary or permanent disability indemnity
8 subsequent to the first payment shall be made as due *every two*
9 *weeks* on the day designated with the first payment.

10 “(d) *If any indemnity payment is not made timely as required by*
11 *this section*, the amount of the late payment shall be increased 10
12 percent and shall be paid, without application, to the employee,
13 unless the employer continues the employee's wages under a salary
14 continuation plan... No increase shall apply to any payment due
15 prior to or within *14 days* after the date the claim form was
submitted to the employer under Section 5401. No increase shall
16 apply when, within *the 14-day period* specified under subdivision
17 (a), the employer is unable to determine whether temporary
18 disability indemnity payments are owed...” (Lab. Code, § 4650,
19 emphasis added.)

20 By its own wording, section 4650 applies to periodic payments of temporary and
21 permanent disability indemnity. Subdivision (d) provides that if any indemnity payment is not
22 made timely as required by this section, the amount of the late payment shall be increased 10
23 percent and shall be paid, without application, to the employee.

24 In *Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal.4th 1213, 1227 [58 Cal. Comp.
25 Cases 172, 183], the Supreme Court stated that the “penalty [under section 4650(d)] is a self-
26 executing, strict liability provision, that applies only to delays in the payment of temporary or
27 permanent disability payments...” (See also *Christian v. Worker's Comp. Appeals Bd.* (1997) 15
Cal.4th 505, 517 [62 Cal.Comp.Cases 576, 586]; *Mote v. Worker's Comp. Appeals Bd.* (1997) 56
Cal.App.4th 902, 910 [62 Cal.Comp.Cases 891, 895]; *State of California v. Worker's Comp.*
Appeals Bd. (Ellison) (1996) 44 Cal.App.4th 128, 139 [61 Cal.Comp.Cases 325, 333].)

1 In *State Compensation Insurance Fund v. Worker's Comp. Appeals Bd. (Stuart)* (1998) 18
2 Cal.4th 1209, 1213 [63 Cal.Comp.Cases 916, 918], the Supreme Court again noted that “if a
3 payment is late, *that individual payment* is automatically increased by 10 percent, and this
4 penalty [under section 4650(d)] applies irrespective of the reason for the delay.” (Emphasis
5 added, citing *Ellison, supra* at 44 Cal.App.4th 128, 139 [61 Cal.Comp.Cases 325, 333].)

6 In *Gangwish v. Worker's Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1293 [66 Cal.
7 Comp. Cases 584, 590], the Court of Appeal explained that “the purpose of enacting the changes
8 to section 4650 was to promote prompt payment of benefits and *certainty of timing*.” The Court
9 also stated that “former section 4651 provided that payments of TD or PD were to be made not
10 less frequently than twice each month, except by order of the WCAB. This *chronology of*
11 *benefits* was essentially recodified in section 4650, subdivision (c)... [This provision] is further
12 substantiation of the Legislature's purpose, since it provides for payment of continuing TD or PD
13 at *regular intervals*.” (89 Cal.App.4th 1284, 1294 [66 Cal. Comp. Cases 584, 591], emphasis
14 added.)

15 In *Farris v. Workers' Comp. Appeals Bd.* (2000) 65 Cal. Comp. Cases 824, 828 (en banc),
16 the Appeals Board held that the section 4650(d) penalty is not a separate class or category of
17 benefit, explaining that the penalty “has no ‘separate existence,’ independent of the late *disability*
18 *indemnity* to which it attaches...the section 4650(d) penalty is clearly ‘derivative of’ and
19 ‘dependent on and ancillary to’ the *underlying disability indemnity*.” (Emphasis added.)

20 Based on the language of the statute, and consistent with the foregoing authorities, we
21 conclude that the section 4650(d) penalty applies only to periodic indemnity payments and not to
22 the lump sum proceeds of C&Rs and commutations. Once it is ordered that indemnity payments
23 should be commuted to a lump sum, or reduced to a lump sum by reason of a settlement
24 agreement, the commutation or agreement takes the proceeds outside the scope of section
25 4650(d).⁶ In other words, the proceeds of a commutation or a settlement agreement are no longer

26 ⁶ By definition, C&R agreements and commutations change the character of the underlying benefits from periodic,
27 installment-type payments to a one-time, lump sum payment. (See 2 *California Workers' Compensation Practice*
(4th ed., Cont. Ed. Bar 2000) §§ 16.2 et seq. and §§ 23.61 et seq.)

1 periodic, installment indemnity payments as described in section 4650, subdivisions (a) through
2 (c). Nor is payment governed by the time requirements of that section. Rather, the proceeds
3 become a single lump sum payment. If a delay occurs, it is not a delay in the timing of payments
4 “as required by this section[.]” Thus, the commutation or settlement proceeds are not subject to
5 the provisions of subdivision (d).

6 In *Crump*, the WCJ opined that death benefits are subject to the section 4650(d) penalty,
7 and we agree with that conclusion, but for different reasons. The section 4650(d) penalty does
8 not apply in *Crump* because the death benefits were settled by C&R and paid in a lump sum,
9 which we now hold is not subject to the penalty.

10 With regard to death benefits, section 4702(b) provides in relevant part that “[t]he death
11 benefit in all cases shall be paid *in installments in the same manner and amounts as temporary*
12 *total disability indemnity* would have to be made to the employee, unless the appeals board
13 otherwise orders...” (Emphasis added.) In its en banc decision *Phillips v. Sacramento Municipal*
14 *Utilities District* (1998) 63 Cal. Comp. Cases 585 at 588, the Board explained:

15 “[B]ecause the statutes specifically require that death benefits are to be paid in the
16 same manner and amount as temporary disability indemnity, the provisions of not
17 only sections 4453, 4650(d) and 4653, but also the provisions of Labor Code
18 section 4661.5 are applicable and result in the increase in the indemnity rate. We
19 see no basis for applying only the provisions of the first three sections and not the
20 provisions of Labor Code section 4661.5, nor has such a distinguishing basis been
21 provided. Moreover, the Legislature could have amended Labor Code sections
22 4702(b) and 4703.5 to make death benefits payable in the same manner and
23 amount as permanent total disability and thus, make the provisions of section
24 4661.5 inapplicable pursuant to the rationale of [*Duncan v. The Singer Company*
25 (1978) 43 Cal.Comp.Cases 467 (en banc)] but it did not do so. Or the Legislature
26 could have amended those sections to specifically exclude the application of the
27 provisions of section 4661.5. No such amendments have been made. Therefore,
while death benefits and temporary disability benefits may be a different species,
those benefits under the provisions of the Labor Code are to be paid in the same
manner and amount.”

Based on section 4702(b) and the *Phillips* case, we conclude that death benefits are
installment payments which are subject to the provisions of section 4650. Therefore, if death

1 benefits are not commuted, or if they are not paid in a lump sum under a C&R, they are subject
2 to the ten percent increase on untimely payments set forth in section 4650(d).

3 Finally, while the application of section 4650(d) to vocational rehabilitation maintenance
4 allowance (VRMA) is not being raised in these two cases, we wish to observe that statutory and
5 case law support the conclusion that VRMA is the functional equivalent of temporary disability
6 indemnity, and therefore the section 4650(d) penalty would apply to periodic payments of
7 VRMA.

8 Section 139.5, subdivisions (c) and (d) provide in relevant part that an employee who
9 participates in vocational rehabilitation is entitled to receive a maintenance allowance payable in
10 “[t]he amount the employee would have received as continuing *temporary disability*
11 *indemnity*,...” (§139.5(d)(1), emphasis added.) These provisions also state that the VRMA may
12 be supplemented from future permanent disability indemnity to provide a weekly amount up to
13 the employee’s temporary disability indemnity rate.

14 In *Ritchie v. Workers’ Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1185 [59
15 Cal.Comp.Cases 243, 250], the Court of Appeal reviewed the legislative history of section 139.5
16 and found “an unmistakable expression of legislative intent that VRMA be treated as a form of
17 TD...”

18 We further note that Administrative Director (AD) Rule 10125.1(a) provides that VRMA
19 payments shall be made every 14 days on the day designated with the first payment. (Cal. Code
20 Regs., tit. 8, § 10125.1(a).) The language of the rule mirrors that of section 4650(c) with respect
21 to periodic payments. Therefore, VRMA is comprised of installment or periodic payments which
22 are tied to, and constitute the functional equivalent of, temporary disability indemnity. Thus, the
23 nature and timing of VRMA payments fall within the scope of section 4650, and periodic
24 payments in the form of VRMA are subject to the increase imposed under subdivision (d) for
25 failure to comply with the statute.

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1 **CONCLUSION**

2 In *Rivera v. Tower Staffing Solutions* (POM 240908), the parties resolved the case by
3 Stipulations with Request for Award together with a request that the entire Award be commuted
4 and paid in a lump sum to the applicant. For the reasons discussed above, the commutation
5 proceeds are not subject to section 4650(d). Therefore, the defendant, SCIF, is not liable for a
6 section 5814 penalty for failure to correctly calculate the section 4650(d) penalty. We will rescind
7 the WCJ’s decision and replace it with our findings that section 4650(d) does not apply, and that
8 SCIF is liable for only one section 5814 penalty for unreasonable delay in paying the commutation
9 proceeds.

10 In *Crump v. Los Angeles Unified School District* (LAO 712097), we disagree with the
11 WCJ’s finding that applicant waived the penalty under section 4650(d). While it is good practice
12 to raise the issue as early as possible, the panel concluded in its prior opinion that “the applicant
13 may raise the issue at the trial level, and the WCJ may proceed as necessary or appropriate.”
14 Under the circumstances, we conclude that there was no waiver of section 4650(d).
15 Nevertheless, as we have explained, the section 4650(d) penalty does not apply. Therefore, we
16 will rescind the WCJ’s decision and replace it with our findings that while applicant did not
17 waive section 4650(d), there is no basis for any further penalties under sections 4650(d) or 5814
18 in connection with LAUSD’s late payment of the C&R for death benefits. In view of the
19 reduction in penalties, we will proportionately reduce the fee of applicant’s attorney.

20 For the foregoing reasons,

21 **IT IS ORDERED**, as the Decision After Reconsideration of the Board (En Banc) in *Rivera*
22 *v. Tower Staffing Solutions* (POM 240908), that the Amended Findings and Award of January 4,
23 2002 is **RESCINDED**, and the following Findings and Award is **SUBSTITUTED** in its place:

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1 **FINDINGS**

2 1. Defendant, State Compensation Insurance Company, unreasonably delayed the
3 payment of benefits pursuant to an Award and Order of Commutation dated December 12, 2000,
4 justifying one penalty under Labor Code section 5814.

5 2. Labor Code section 4650(d) does not apply to the proceeds of the commutation.

6 3. There is no basis for any penalty under section 5814 for failure to comply with
7 section 4650(d).

8 4. The reasonable value of services and disbursements of applicant's attorney is
9 \$1,738.28, calculated from 15% of the penalty in Finding 1.

10 **AWARD**

11 Award is made in favor of Juan Rivera against Tower Staffing, Inc. and State
12 Compensation Insurance Fund as follows:

13 a) One 10% penalty under section 5814 in the amount of \$11,588.57.

14 b) Attorney's fees in the amount of \$1,738.28, to be deducted from the above penalty.

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17 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Board (En
18 Banc) in *Crump v. Los Angeles Unified School District* (LAO 712097), that the Finding and Order
19 of January 17, 2002 is **RESCINDED**, and the following Findings and Order is **SUBSTITUTED** in
20 its place:

21 **FINDINGS**

22 1. Applicant did not waive the issue of penalty under Labor Code section 4650(d).

23 2. Section 4650(d) does not apply to the proceeds of the C&R for death benefits.

24 3. There is no basis for any penalty under section 5814 for failure to comply with
25 section 4650(d).

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1 **ORDER**

2 It is ordered that applicant take nothing further by reason of his request for penalties
3 under sections 4650(d) and 5814.

4 ***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

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7 ***MERLE C. RABINE, Chairman***

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10 ***JAMES C. CUNEO, Commissioner***

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12 ***WILLIAM K. O'BRIEN, Commissioner***

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14 ***FRANK M. BRASS, Commissioner***

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17 ***JANICE J. MURRAY, Commissioner***

18 ***DATED AND FILED IN SAN FRANCISCO, CALIFORNIA***

19 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD***
20 ***EXCEPT THE LIEN CLAIMANTS.***

21 ***tab***