

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

ROBERTO PEREZ VELASQUEZ (DECEASED), *Applicant*

vs.

**WORKFORCE/EMPLOYERS HR, LLC, insured by SECURITY NATIONAL
INSURANCE COMPANY, as administered by AMTRUST NORTH AMERICA;
DEPARTMENT OF INDUSTRIAL RELATIONS, DEATH WITHOUT
DEPENDENTS UNIT, *Defendants***

**Adjudication Number: ADJ11303705
Pomona District Office**

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

Defendant Department of Industrial Relations Death Without Dependents Unit (DWD) seeks reconsideration of the Findings and Award (F&A) issued on August 23, 2021, wherein the workers' compensation administrative law judge (WCJ) found as follows:

Applicant, minor child and total dependent of decedent Roberto Perez Velasquez is entitled to interest on the Order issued February 27, 2021¹ for repayment by DWD to Amtrust and applicant's attorney, Neil Gilmore is awarded attorneys' fees at the rate of \$400 per hour to be deferred for specificity of time spent for attending a Status Conference on July 15, 2020, and preparation of Petition for Penalties, Sanctions, Attorneys' Fees and Interest, herein payable by DWD.

The WCJ issued an award in favor of applicant Leslie Perez, minor child and total dependent of decedent, for interest payable by DWD in the amount of \$11,369.86, and ordered that the issue of the amount of attorney's fees be deferred to ascertain the amount of time spent

¹ The record reveals that the WCJ issued the Findings of Fact and Order dated February 27, 2020, served on March 2, 2020. (Findings of Fact and Order, March 2, 2020.) Since this Findings of Fact and Order required DWD to reimburse AmTrust for its section 4706.5(a) payment, we conclude that the WCJ's reference in the F&A to the February 27, 2021 order was a clerical error, and we will correct it for our decision herein. (See *In re Candelario* (1970) 3 Cal.3d 702, 705; *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154-155]; *Morgan v. Board of Equalization* (1949) 89 Cal.App.2d 674, 682.)

attending the July 15, 2020 status conference and preparing the petition for penalties, sanctions, attorney's fees and interest, with applicant's attorney to calculate fees at the rate of \$400.00 per hour and submit the amount.

DWD contends that the WCJ lacks authority to award applicant interest for a delay in reimbursement of AmTrust's section 4706.5(a) payment and that the amount of interest awarded is based upon a miscalculation and violates Government Code 965.5. DWD further contends that the record lacks evidence of bad faith or delay tactics to support the imposition of attorney's fees and that it acted with reasonable justification.

We did not receive an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied; and, in the alternative, that the issue of attorney's fees be returned to the trial level for determination by the WCJ.

We have considered the allegations of the Petition and the contents of the Report. Based upon our review of the record, we will grant the Petition, and as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) applicant is not entitled to interest on the March 2, 2020 order for DWD to reimburse AmTrust; (2) applicant is entitled to attorney's fees at the rate of \$400.00 per hour for time spent preparing for and attending the July 15, 2020 status conference; and (3) the issue of the amount of attorney's fees is deferred. We will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

While employed as a janitor by defendant, applicant Roberto Perez Velasquez sustained injury resulting in death when he suffered a fall on March 6, 2017.

On March 2, 2020, the WCJ found that applicant Leslie Perez is the minor child and presumed dependent of applicant Roberto Perez Velasquez (decedent). (Findings of Fact and Order, March 2, 2020.) The WCJ ordered that DWD "shall reimburse funds distributed by Security National Insurance Company, administered by AmTrust, paid in error to due to the finding of at least Leslie Perez as a presumed dependent of Roberto Perez Velasquez." (*Id.*)

On June 18, 2020, the WCJ held a status conference at which applicant's attorney and defendant Workforce/Employers HR's attorney appeared telephonically. (Minutes of Hearing, June 18, 2020.) The parties sought a continuance, and the WCJ set a status conference for July 15, 2020. (*Id.*)

On July 15, 2020, the WCJ held a continued status conference at which applicant's attorney and Workforce/Employers HR's attorney appeared. (Minutes of Hearing, July 15, 2020.) The parties sought a continuance, and the WCJ set a mandatory settlement conference for August 5, 2020, commenting that applicant would file a petition for penalties for DWD's failures to reimburse AmTrust and appear at the second status conference. (*Id.*)

On July 30, 2020, applicant filed a petition for penalties, sanctions and attorney's fees, claiming that DWD's failure to repay AmTrust caused applicant Leslie Perez to be "unable to access indemnity benefits." (Petition for Penalties, July 30, 2020, p. 2.)

On October 12, 2020, applicant filed an amended petition for penalties, alleging that DWD failed to reimburse AmTrust and failed to appear at the June 18, 2020 and July 15, 2020 status conferences. (Petition for Penalties, October 12, 2020, pp. 1-3.)

On November 4, 2020, applicant and defendant Workforce/Employers HR filed a compromise and release of dependency claim, seeking to settle all dependency claims against Workforce/Employers HR and its insurance carrier, Security National Insurance Company. (Signed Compromise and Release, November 4, 2020, pp. 1-11.) The compromise and release excludes from settlement applicant's petition for penalties against DWD. (*Id.*)

On November 25, 2020, the WCJ issued the order approving compromise and release of dependency claim, awarding applicant the sum of \$305,000.00. (Order Approving Compromise and Release (Dependency Claim), November 25, 2020, p. 1.) The WCJ further ordered that "penalties, sanctions and attorney's fees with respect to Death Without Dependents herein are not waived nor are they included, herein." (*Id.*)

On December 3, 2020, applicant filed a second amended petition for penalties, seeking additional attorney's fees and interest. (Second Amended Petition for Penalties, December 3, 2020, pp. 1-17.)

On April 22, 2021, the matter proceeded to trial as to the issues of whether or not DWD "will be responsible for penalties, interest, and sanctions, under Labor Code Section 5814, 5814.5, 5813, and 5800, along with attorney fees." (Transcript of Proceedings, April 22, 2021, pp. 7:25-8:9.)

At trial, the parties stipulated to the following facts:

As of the September 30, 2020 Mandatory Settlement Conference, dependent had paid no benefits to the applicant found dependent upon decedent . . .

DWD reimbursed Superior National Insurance Company \$250,000.00 with a check dated August 11, 2020 that was sent with a letter of August 14, 2020 that is alleged to have been received on August 17, 2020. (*Id.*, p. 6:11-20.)

On June 28, 2021, the matter proceeded to continued trial. (Transcript of Proceedings, June 28, 2021, p. 1.)

In the Opinion on Decision, the WCJ states:

DWD is found responsible for interest and attorneys' fees under Labor Code Sections 5800 and 5813.

...

DWD attorney, James Hall failed to attend not one, but two Status Conferences set for the purpose of determining the status of repayment to Amtrust so that . . . the minor child, could be paid the amount due per Findings and Order by Judge Bather. The court is willing to excuse an absence at the first conference held in June 18, 2020 without assessing attorney's fees, due to the pandemic in its early stages. However, failure to appear at a second Status Conference after being told by defense counsel, in writing, that he missed the first Status Conference, with no effort made by Mr. Hall to check EAMS, per testimony on June 28, 2021, (MOH, SOE page 7, Lines 6-8), to determine the date of the next Status Conference, such that a second Status Conference in July 15, 2020 was missed, the court finds unacceptable. . . .

DWD witness, James Hall testified that it was COVID 19 that caused him to miss not only one but two Status Conference dates because the department had a lack of staff in the office to scan Notices of Hearing and send them to him. However, Mr. Hall had simply to access EAMS to be advised when the second Status Conference was scheduled. He failed to do so, or to apologize to the parties who did attend, nor ask for the court to excuse his absences, as noted by his testimony at trial June 28, 2021, (MOH, SOE, page 7, Lines 6-8). Mr. Hall's failure to appear at two Status Conferences, caused applicant's attorney to prepare for the Status Conferences, confer with his client, defense attorney and the court, expending time for which reasonable reimbursement is found payable to Mr. Gilmore by DWD. Pursuant to CCR10421(b)(1), sanctions may be assessed under Labor Code Section 5813 for failure to appear or provide a reasonable excuse, and doing so twice, shows a pattern of such conduct.

...

Therefore, the WCJ finds that interest is due . . . in the total amount of \$11,369.86 payable to the minor child of decedent, along with Attorney's Fees in the amount of \$400 per hour for costs of the appearance by the applicant's attorney at the second Status

Conference on July 15, 2020, when DWD failed to appear as well as the amount for preparation of the Petition for Sanctions, Penalties, Interest and Attorneys' Fees by applicant's counsel. Given no appearance nor any attempt to advise the court or other parties when DWD would comply with the Finding and Order, nor an apology made even to the court, for either missed court date, until trial on this matter is the reasonable finding, herein.

Said Attorneys' Fee amount is deferred to establish time spent. Applicant's attorney is Ordered to prepare costs and fees for said missed 2nd Status Conference and submit the same to the court for review and approval.
(Opinion on Decision, pp. 7-12.)

In the Report, the WCJ states:

The death benefit of \$250,000 was initially paid to Death Without Dependents, after a review of applicant's dependents was done, only to find thereafter, that the applicant/decedent had a minor child, Leslie Perez and that a Finding and Order dated February 27, 2020, issued by the undersigned and served on March 2, 2020 finding that Leslie Perez was a minor child of applicant/decedent and therefore, presumed dependent under Labor Code Section 3501. The Order also provided that the DWD shall . . . reimburse funds distributed by Security National Insurance Company administered by AmTrust . . .

Despite Finding and Order for DWD to repay the \$250,000 to defendant . . . no sums were repaid to said defendant by DWD until a check dated August 14, 2020, sent to "Superior National Company" in the amount of \$250,000 found its way to Amtrust . . .

A Trial was held on the issues presented in said petition by applicant's attorney . . .
(Report, p. 2.)

DISCUSSION

DWD argues that the WCJ lacks authority to award applicant interest for a delay of reimbursement of AmTrust's section 4706.5(a) payment. Specifically, DWD argues that because section 4706.5(g) explicitly requires that it reimburse decedent's employer or the employer's insurance carrier, it cannot be construed to confer compensation or benefits upon applicant and therefore cannot give rise to a section 5800 interest award.

To evaluate DWD's contention, we apply "well-established" principles of statutory construction. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 817-818.) These require that we "examine the words themselves because the statutory language is generally the most reliable

indicator of legislative intent . . . The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.” (*Id.* at p. 818 (quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715-716.) When the words of a statute are clear, we must follow their plain meaning. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [33 Cal.Comp.Cases 1036].) If the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls. (*In re Jennings* (2004) 34 Cal.4th 254, 263.)

Here, section 4706.5 provides as follows:

(a) Whenever any fatal injury is suffered by an employee under circumstances that would entitle the employee to compensation benefits, but for his or her death, and the employee does not leave surviving any person entitled to a dependency death benefit, **the employer shall pay a sum to the Department of Industrial Relations equal to the total dependency death benefit that would be payable to a surviving spouse with no dependent minor children.**

...

(g) When, after a reasonable search, the employer concludes that the deceased employee left no one surviving who is entitled to a dependency death benefit, and concludes that the death was under circumstances that would entitle the employee to compensation benefits, the employer may voluntarily make the payment referred to in subdivision (a). . . . Thereafter, if the appeals board finds that the deceased employee did in fact leave a person surviving **who is entitled to a dependency death benefit**, upon that finding, all payments referred to in subdivision (a) that have been made **shall be forthwith returned to the employer, or if insured, to the employer’s workers’ compensation carrier that indemnified the employer** for the loss.

(§ 4706.5(a)(g) [Emphasis added].)

Section 5800 provides:

All awards of the appeals board **either for the payment of compensation or for the payment of death benefits, shall carry interest** at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award. . . .

(§ 5800 [Emphasis added].)

In addition, these statutes are set forth in the context of section 3207, which defines “compensation” under the Workers’ Compensation Act as “every benefit or payment conferred . . . upon an injured employee, or in the event of his or her death, upon his or her dependents. (§ 3207.)

Here, the record before us shows that AmTrust issued a payment of \$250,000.00 to DWD based upon its understanding that applicant had no dependents. (Report, p. 2.) Subsequently, the WCJ found that applicant did in fact have a minor child, Leslie Perez, who was presumed dependent under section 3501. (Findings of Fact and Order, March 2, 2020.) Based upon this finding, the WCJ ordered DWD to “reimburse funds distributed by Security National Insurance Company, administered by AmTrust.” (*Id.*) Because applicant had not received compensation more than four months after the WCJ’s order, applicant filed a petition for penalties, sanctions and attorney’s fees, alleging that DWD’s delay of reimbursement to AmTrust rendered applicant “unable to access indemnity benefits.” (Petition for Penalties, July 30, 2020, p. 2.)²

Considering the novel issue of whether the WCJ may award applicant interest based upon a delay of section 4706 reimbursement, we observe that section 4706.5(g) requires DWD to reimburse the “employer” or the employer’s “insurance carrier” if either made a section 4706.5(a) payment to DWD and there was a subsequent determination that the employee whose decease gave rise to the payment has a survivor “entitled to a dependency death benefit.” (§ 4706.5(g).) The language of section 4706(g), however, contains no reference to applicant, whether as an indirect beneficiary of reimbursement, possessor of a right of enforcement, or at all. Therefore, we conclude that section 4706(g) does not provide applicant with a legal remedy for a delay of section 4706(g) reimbursement.

Furthermore, we observe that section 5800 requires the WCJ to award interest for delay of payment of “compensation” and “death benefits” but no other type of payment. Because these statutorily-defined payments are made directly to or on behalf of an injured employee or the employee’s dependents, and because we conclude above that section 4706(g) requires reimbursement to employers and insurance carriers and not dependents of deceased employees, we are unable to discern legal grounds for the WCJ’s award of interest to applicant for DWD’s delay of reimbursement to AmTrust. (§§ 5800, 3207; accord, *Rock v. Workers’ Comp. Appeals*

² Applicant’s claims against Workforce/Employers HR were resolved by the November 25, 2020 Order Approving Compromise and Release (Dependency Claim), and applicant does not seek any penalties, interest or attorney’s fees for a delay of payment, if any, on its part. (Order Approving Compromise and Release (Dependency Claim), November 25, 2020, p. 1.)

Board (1997) 63 Cal.Comp.Cases 104 (writ denied) (finding that section 5800 does not authorize an award of interest in favor of a lien claimant because it was not entitled to “compensation.”) Accordingly, we conclude that the WCJ awarded applicant interest for DWD’s delay of reimbursement in error; and, therefore, we will therefore rescind the F&A and substitute a finding that applicant is not entitled to interest on the March 2, 2020 order for DWD to reimburse AmTrust.

DWD also argues that the amount of interest awarded is based upon a miscalculation and violates Government Code 965.5. However, because we conclude that the WCJ awarded applicant interest in error, we do not address these arguments.

We now address DWD’s contention that the record lacks evidence of bad faith or delay tactics to support the imposition of attorney’s fees and that it acted with reasonable justification.

Section 5813 authorizes the WCJ to order a party or attorney to pay reasonable expenses incurred by another party as a result of “bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (§ 5813.) Further, WCAB Rule 10421 specifies that such actions or tactics are those that result from a willful failure to comply with a statutory or regulatory obligation, result from a willful intent to delay or disrupt the proceedings of the Appeals Board, or are indisputably without merit. (See Cal. Code Regs., tit. 8, § 10421(b).) Examples of these include, but are not limited to, failing to appear or appearing late at a conference or trial where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct. (Cal. Code Regs., tit. 8, § 10421(b)(1).)

Here, DWD’s attorney, James Hall, testified that the COVID-19 pandemic caused him to fail to appear at two status conferences because his office lacked staff to scan the notices of hearing for the conferences and send the notices to him. (Opinion on Decision, p. 11.) However, as the WCJ concluded, notwithstanding Mr. Hall’s testimony that he missed the first status conference due to changes in office procedures resulting from the pandemic, he could have accessed EAMS to be advised when the second status conference was scheduled. (*Id.*) Further, inasmuch as the minutes of the July 15, 2020 status conference reflect that applicant would seek a penalty for applicant’s failure to appear at that status conference, and the subsequent record shows no evidence that Mr. Hall apologized or sought to be excused by the WCJ for his absences, the record fails to demonstrate that Mr. Hall’s conduct was reasonably justified. (Minutes of Hearing, July 15, 2020; Opinion on Decision, p. 11.) Thus, we conclude that applicant is entitled to attorney’s fees for time spent preparing for and attending the July 15, 2020 status conference.

However, we have explained that the WCJ lacks authority to award applicant interest for DWD's delay of reimbursement to AmTrust. Consequently, applicant is not entitled to an award of attorney's fees for time spent preparing the petition for penalties based upon DWD's delay. Accordingly, we will substitute findings that applicant is entitled to attorney's fees at the rate of \$400.00 per hour for time spent preparing for and attending the July 15, 2020 status conference and that the issue of the amount of fees is deferred.

Accordingly, we will rescind the F&A and substitute findings that (1) applicant is not entitled to interest on the March 2, 2020 order for DWD to reimburse AmTrust; (2) applicant is entitled to attorney's fees at the rate of \$400.00 per hour for time spent preparing for and attending the July 15, 2020 status conference; (3) the issue of the amount of attorney's fees is deferred; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on August 23, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on August 23, 2021 is **RESCINDED AND SUBSTITUTED** as set forth below.

FINDINGS OF FACT

1. Applicant Leslie Perez, minor child and total dependent of decedent Roberto Perez Velasquez, is not entitled to interest on the March 2, 2020 order for DWD to reimburse AmTrust.
2. Applicant is entitled to attorney's fees of \$400.00 per hour for time spent preparing for and attending the July 15, 2020 status conference.
3. The issue of the amount of attorney's fees to which applicant is entitled is deferred.

IT IS FURTHER ORDERED THAT this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING BUT NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 16, 2021

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

**ROBERTO PEREZ VELASQUEZ (DECEASED)
DEATH WITHOUT DEPENDENT UNIT
OFFICE OF THE DIRECTOR – LEGAL UNIT
DOMINGO ELIAS
GILMOR LAW**

SRO/ara

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