

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

REBECCA GAGE, *Applicant*

vs.

COUNTY OF SACRAMENTO, permissibly self-insured, *Defendant*

**Adjudication Number: ADJ8010054
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Applicant and defendant both seek reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 5, 2022. By the F&O, the WCJ found that applicant and defendant are expected to meet and confer to reach an agreement on a repayment plan per Labor Code² section 4850.4(f). (Lab. Code, § 4850.4(f).) The WCJ concluded that initial jurisdiction over a plan to repay advanced disability retirement benefits vests solely with the local agency who issued payment. The WCJ further found that the Appeals Board has non-exclusive jurisdiction over litigation of any repayment plan or applicant may seek a writ of mandate with the Superior Court, but jurisdiction with the Appeals Board only exists after the parties have completed the first two steps outlined in the statute.

Defendant contends that benefits distributed to applicant per section 4850.4 are compensation as defined by section 3207 and therefore, compliance with the process for repayment is within the jurisdiction of the Appeals Board. (Lab. Code, § 3207.) Defendant thus contends that the Appeals Board has the authority to compel applicant to participate in the process provided by the Labor Code.

Applicant contends that the Appeals Board does not have the authority to force applicant to participate in any informal repayment arrangement.

¹ Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

² All further statutory references are to the Labor Code unless otherwise stated.

We received an answer from applicant to defendant's Petition, but did not receive an answer from defendant to applicant's Petition. The WCJ issued an Amended Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny both Petitions.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&O and issue a new decision finding that the Appeals Board does not have jurisdiction to force applicant's participation to agree on a repayment plan or in the local agency administrative remedy process to determine a repayment plan. The issue of whether "litigation" per section 4850.4(f) includes proceedings before the Appeals Board will be deferred.

FACTUAL BACKGROUND

Applicant sustained injury to the lumbar spine through September 14, 2011 while employed as a deputy sheriff by the County of Sacramento. (Stipulations with Request for Award, July 29, 2014.)

In 2015, applicant requested advanced disability pension payments per section 4850.4. Defendant made payments, but applicant contended that the payments were unreasonably delayed and sought penalties per section 5814. (Lab. Code, § 5814.)

The issue of section 5814 penalties proceeded to trial. In his August 6, 2015 Findings of Fact and Order, the WCJ determined that advances made per section 4850.4 are compensation pursuant to section 3207 and subject to penalties under section 5814.

Defendant filed a Petition for Removal of the August 6, 2015 Findings of Fact and Order. The Appeals Board treated defendant's Petition as one seeking reconsideration since the decision was considered a final order and granted it for study. (Opinion and Order Granting Petition for Reconsideration, October 29, 2015.) In a subsequent Opinion and Decision After Reconsideration, a split panel held that advances for a disability pension paid under section 4850.4 are not compensation and consequently not subject to the penalty provisions of section 5814. (Opinion and Decision After Reconsideration, February 18, 2016.) The WCJ's decision was rescinded and a new decision issued with the majority's finding regarding this dispute.

Applicant filed a petition for writ of review of the Opinion and Decision After

Reconsideration. The Court of Appeal agreed with applicant that advanced disability pension payments are compensation under section 3207 and the Appeals Board thus has jurisdiction to issue penalties per section 5814 for an unreasonable delay of payments made pursuant to section 4850.4. (*Gage v. Workers' Comp. Appeals Bd.* (2016) 6 Cal.App.5th 1128 [81 Cal.Comp.Cases 1127].) The Court annulled the Opinion and Decision After Reconsideration and remanded the matter to the Appeals Board to determine if a penalty under section 5814 was warranted. In the March 21, 2017 Opinion and Decision After Remittitur, the Appeals Board affirmed the WCJ's August 6, 2015 Findings of Fact and Order and returned the matter to the trial level to address whether a penalty should be assessed.

The parties resolved all penalties to date per a Stipulation and Award issued on August 24, 2018. (Stipulation and Award, August 24, 2018.) According to defendant, applicant received advanced disability pension payments from May 8, 2015 through October 17, 2018 for a total of \$120,144.03. (Defendant's Petition for Reconsideration, January, 21, 2022, p. 3.) Applicant's disability retirement application was reportedly denied on October 17, 2018. (*Id.*) Defendant designated mediation as its independent level of resolution and scheduled a mediation with a retired judge for April 27, 2020. (*Id.* at p. 4.) Applicant did not attend the scheduled mediation. (*Id.*)

The matter proceeded to a status conference on May 24, 2021. The Minute Order from the hearing stated as follows:

Defendant seeks an order compelling applicant to participate in the resolution process of Labor Code section 4850.4(f). This request is denied because the WCAB does not have jurisdiction over this process, despite the Court of Appeal decision in this case that the WCAB has jurisdiction over penalties which apply resulting from failure to comply with section 4850(f). Defendant further requests that the court set a hearing over the question of jurisdiction in order to create a record, but this appears to be a pure legal question for which no record is necessary and so this request is likewise denied.

(Minute Order, May 24, 2021.)

No evidence was admitted into the record at the hearing and the matter was taken off calendar.

Defendant sought reconsideration or in the alternative removal of the May 24, 2021 Minute Order. In an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued by the Appeals Board on August 9, 2021, it was found that an order

regarding jurisdiction is a final order subject to reconsideration. It was also found that the disputed Minute Order was issued without creation of a record, which prevented a meaningful review of whether the Order was supported by substantial evidence. The Minute Order was rescinded and the matter returned to the trial level for further proceedings.

The matter subsequently proceeded to trial on December 13, 2021. The parties stipulated at trial that a mediation to determine a repayment plan was scheduled for April, 27, 2020, but applicant did not appear for the mediation. (Minutes of Hearing and Summary of Evidence, December 13, 2021, p. 2.) The sole issue at trial was “[j]urisdiction to enforce Labor Code, section 4850.4.” (*Id.*) The WCJ subsequently issued the F&O as outlined above.

DISCUSSION

Section 5300 provides as follows in relevant part:

All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4:

(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

...

(e) For obtaining any order which by Division 4 the appeals board is authorized to make.

(f) For the determination of any other matter, jurisdiction over which is vested by Division 4 in the Division of Workers’ Compensation, including the administrative director and the appeals board.

(Lab. Code, § 5300(a), (e)-(f).)

Section 4850.4 provides in pertinent part:

(a) A city, county, special district, or harbor district that is a member of the Public Employees’ Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees’ Retirement Systems, shall make advanced disability pension payments in accordance with Section 4850.3 unless any of the following is applicable...

...

(f) After final adjudication, if an employee’s disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision. The repayment plan shall take into account the employee’s ability to repay the advanced disability payments received. Absent an agreement on

repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced.

(Lab. Code, § 4850.4(a) and (f).)

Defendant contends that the Appeals Board has jurisdiction over repayment of applicant's advanced disability pension payments since the Court of Appeal held that the Appeals Board has jurisdiction to "enforce payment" of advances. (Defendant's Petition for Reconsideration, January, 21, 2022, p. 5.) This construction of the Court's holding improperly conflates jurisdiction over section 5814 penalties³ with jurisdiction over section 4850.4 payments. The Court held that the Appeals Board has jurisdiction to issue penalties pursuant to section 5814 for an unreasonable delay by defendant in making payments under section 4850.4 because these payments are "compensation" under section 3207.⁴ There is a distinction between jurisdiction to issue a penalty per section 5814 and jurisdiction over advanced disability pension payments made per section 4850.4. Although from a practical perspective the Appeals Board's jurisdiction to issue section 5814 penalties against a local agency for an unreasonably delay in making section 4850.4 payments may presumably compel the agency to initiate payments, jurisdiction over whether an employee qualifies for a disability retirement and therefore was entitled to those advanced payments remains with the local agency. The Court's decision in this matter did not confer jurisdiction on the Appeals Board over whether an employee qualifies for section 4850.4 payments; rather, it recognized the Appeals Board's authority to issue penalties for an

³ Section 5814 provides for penalties as follows:

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...

(Lab. Code, § 5814(a).)

⁴ Section 3207 contains the following definition:

"Compensation" means compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.

(Lab. Code, § 3207.)

unreasonable delay by a local agency in making those payments as part of compensation subject to section 5814.

Defendant ultimately denied applicant's disability application, a determination that was solely within defendant's purview as the local agency.⁵ This is similar to other issues where jurisdiction is split between another agency and the Appeals Board. For example, in *Kosowski v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632 [50 Cal.Comp.Cases 427], the Court of Appeal held that the Appeals Board has jurisdiction to allow a credit against section 4850⁶ benefits for the employee's self-employed earnings during the period he was receiving those benefits. The Court analyzed whether payment of full salary in lieu of temporary disability benefits per section 4850 is compensation within the meaning of section 3207. The Court concluded in pertinent part:

Although the Board has no jurisdiction to make an award of section 4850 benefits (*Boyd v. City of Santa Ana, supra*, 6 Cal.3d at p. 397), the Board had jurisdiction, under a 1977 amendment to section 4851, to determine whether or not the disability referred to in section 4850 arose out of and in the course of employment and also, in any disputed case, to determine when such disability commenced and ceased, and the amount of benefits to which the employee is entitled during the period of such disability.

(*Id.* at p. 637, italics omitted.)

Similarly in *Reynolds v. City of San Carlos* (1981) 126 Cal.App.3d 208, 213-214, the Court of Appeal held that workers' compensation law and the Public Employees' Retirement Law "supplement each other," with the Appeals Board holding exclusive jurisdiction over whether an injury or disability is service-connected, while the City's retirement board has the authority to determine eligibility for retirement. (See also Gov. Code, § 21166 [outlining the Appeals Board's

⁵ Government Code section 20026 contains the following definition as relevant to defendant's jurisdiction to determine applicant's eligibility for a disability retirement:

"Disability" and "incapacity for performance of duty" as a basis of retirement, mean disability of permanent or extended duration, which is expected to last at least 12 consecutive months or will result in death, **as determined by the board, or in the case of a local safety member by the governing body of the contracting agency employing the member, on the basis of competent medical opinion.**

(Gov. Code, § 20026, emphasis added.)

The "board" in this statute "means the Board of Administration of the Public Employees' Retirement System." (Gov. Code, § 20021.)

⁶ Section 4850 provides for certain public service employees to receive full salary for up to one year in lieu of temporary disability benefits for a disability resulting from an industrial injury. (Lab. Code, § 4850.)

jurisdiction to determine whether a disability is industrial as limited “solely to the issue of industrial causation”].)

Defendant contends that the Appeals Board may compel applicant to participate in the “mandatory process” in section 4850.4(f) to determine a repayment plan. (Defendant’s Petition for Reconsideration, January, 21, 2022, p. 7.) Section 4850.4(f) outlines a multi-step process for repayment of advance disability pension payments if the employee’s disability application is denied. Initially, the local agency and employee “shall arrange” for repayment. The next step in the statute was summarized by the Court of Appeal: “If the employee’s disability application is denied, the employee must repay these benefits; if the employer and the local agency cannot agree on a repayment plan, the matter shall be submitted to the local agency administrative appeals remedy.” (*Gage, supra*, 6 Cal.App.5th p. 1130.)

“When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.” (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.) The words of a statute “must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.” (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286], quoting *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652].) When a word is used in a particular sense in one part of a statute, it is presumed to have the same meaning if it appears in another part of the same statute. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 41, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 468.)

It must therefore be presumed that “local agency” as that phrase is used in the first sentence of section 4850.4(f) has the same meaning when the same phrase is used again in the third sentence of this statutory subdivision. The first sentence of section 4850.4(f) refers to the “local agency” as the “city, county, special district, or harbor district” for which the employee works per section 4850.4(a), which in this matter is the County of Sacramento (defendant). Defendant suggests that submission of the matter to a “local agency administrative appeals remedy” may include submission of the repayment dispute to the Appeals Board. This suggestion would entail defining “local agency” as referring to the Appeal Board, although this same phrase refers to the County in the first sentence of section 4850.4(f). Adopting different definitions of “local agency” as that phrase is used within the same statutory subdivision conflicts with long established rules of

statutory construction.⁷

The parties have not reached an agreement for applicant to repay the advanced disability pension payments she received. Pursuant to section 4850.4(f), if the parties do not agree on a repayment plan, the matter must be submitted to the local agency administrative appeals remedy. Defendant reports that it attempted to submit the dispute to a retired WCJ for mediation as its “independent level of resolution,” but applicant declined to participate. To date, the dispute has not been submitted to an administrative appeals remedy provided by defendant as the “local agency.”

Although applicant’s participation is presumably helpful to determine a “reasonable repayment plan,” there is nothing in the statute that relieves defendant from its obligation to provide an administrative appeals remedy due to applicant’s lack of participation. It is unclear why the matter of a repayment plan may not be submitted to a mediator (the local agency’s administrative appeals remedy) without applicant’s participation if she declines involvement in the process.⁸

The last sentence of section 4850.4(f) permits the local agency to “take reasonable steps, including litigation” to recover the advanced payments “[i]f repayment is not made according to the repayment plan.” At this juncture, there is no repayment plan in place. Defendant may not pursue litigation to recover the advanced payments it made until applicant has failed to make payments per a repayment plan adopted either by an agreement between the parties or following submission of the issue to defendant’s administrative appeals remedy. It is thus premature to

⁷ Defendant acknowledges that the *Gage* Court stated in dicta as follows in relevant part:

Subdivision (f) grants jurisdiction to resolve disputes over repayment of advance disability pension payments, where the final adjudication is that the disability retirement is denied, to the local agency’s administrative appeal remedy, not to the WCAB. (§ 4850.4, subd. (f).) But the fact that the resolution of disputes over repayment is excluded from the WCAB’s jurisdiction does not show the lack of jurisdiction to impose penalties.

(*Gage, supra*, 6 Cal.App.5th p. 1133, emphasis added.)

“Dicta may not decide a case but can be persuasive and influence later cases.” (*Masry v. Masry* (2008) 166 Cal.App.4th 738, 741.) Although the Court’s dicta is not binding since it was not necessary to reach its holding, we find the Court’s conclusion that jurisdiction over a repayment dispute lies with the local agency’s administrative appeal remedy is persuasive for the reasons discussed herein.

⁸ Although the repayment plan must account for the employee’s “ability to repay the advanced disability payments received” pursuant to section 4850.4(f), an employee who chooses not to participate in determining a reasonable repayment plan risks adoption of a plan formulated without the employee’s input on individual factors affecting their ability to pay.

address whether “litigation” as that term is used in the statute entails proceedings before the Appeals Board or in civil court, or both.

In conclusion, we will rescind the F&O and issue a new decision as outlined above. The matter will be ordered off calendar.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Order issued by the WCJ on January 5, 2022 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant and the local agency have not agreed on a repayment plan per section 4850.4(f) to repay the advanced disability pension payments she received.
2. Initial jurisdiction over establishing a plan to repay advanced disability pension payments issued per section 4850.4(f) vests solely with the local agency who issued the payment, who must establish an administrative appeals remedy.
3. The Appeals Board does not have jurisdiction to force applicant’s participation to agree on a repayment plan or in the local agency’s administrative appeals remedy.
4. It is premature to address whether “litigation” under section 4850.4(f) includes proceedings before the Appeals Board until there is a repayment plan in place and repayment has not been made pursuant to that plan.

ORDER

IT IS ORDERED that this matter be taken off calendar.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 21, 2022

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

**MASTAGNI HOLSTEDT
REBECCA GAGE
TWOHY DARNELILLE & FRYE**

AI/pc

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