

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

ROBERTO AVILA, *Applicant*

vs.

**INLAND VALLEY HUMANE SOCIETY & SPCA; NOVA CASUALTY INS. CO. c/o
TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ12135074
Pomona District Office**

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

Applicant seeks reconsideration of the Findings and Order (F&O) issued on May 20, 2021, wherein the workers' compensation administrative law judge (WCJ) found no basis to impose penalties, attorney's fees or interest beyond the amount that defendant previously paid.

Applicant contends that the WCJ erroneously (1) found that defendant paid applicant a self-imposed penalty under Labor Code section 5814(b),¹ thereby precluding imposition of section 5814(a) penalties, attorney's fees and interest; (2) failed to award penalties, attorney's fees and interest under section 5814(a); and (3) failed to award attorney's fees under section 5814.5.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will grant the Petition, rescind the F&O, and return the matter to the trial level for further proceedings consistent with this decision.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

FACTUAL BACKGROUND

While employed as a manager on December 15, 2017, applicant sustained injury arising out of and in the course of employment to his left wrist. (Minutes of Hearing (Reporter), October 13, 2020, p. 2:3-4.)

On October 13, 2020, the matter proceeded to trial as to the following issues: “What the amount of the penalty should be; whether there is interest; and if there is a separate penalty for late payment of applicant's attorney's fees.” (*Id.*, p. 2:12-13.)

The parties stipulated that the issues framed for trial arose following late payment of a stipulated award issued on January 27, 2020. (*Id.*, p. 2:9-10.)

The matter was submitted based upon the parties’ legal briefs without evidence entered into the record. (*Id.*, p. 2:15-18.)

The WCJ found no basis to impose penalties, interest or attorney’s fees beyond the amount that defendant previously paid; applicant sought reconsideration; and we granted reconsideration, ordering development of the record as to applicant’s claims and defendant’s defenses thereto. (Findings and Order, October 27, 2020, p. 1; Opinion and Order Granting Reconsideration and Decision After Reconsideration, January 5, 2021, pp. 1-4.)

On May 6, 2021, the matter again proceeded to trial as to applicant’s claims for penalties, attorney’s fees and interest. (Minutes of Hearing, May 6, 2021, p. 2:1-2.)

The WCJ admitted the following exhibits into evidence: Exhibit 1, Postmarked Envelope dated March 3, 2020; Exhibit 2, Award dated January 27, 2020; Exhibit 3, Check for \$1,315.88 dated March 2, 2020; Exhibit A, Correspondence to Applicant’s Attorney dated March 26, 2020; Exhibit B, Payment Listing dated July 30, 2020; and Exhibit C, Payment Listing dated October 7, 2020. (*Id.*, p. 2:4-12.)

The Award dated January 27, 2020 provides in pertinent part that applicant is awarded temporary and permanent disability benefits as provided by the parties’ stipulation and \$1,315.88 in attorney’s fees. (Exhibit 2, Award, January 27, 2020.)

The Correspondence to Applicant’s Attorney dated March 6, 2020 includes the following:

Thank you for your correspondence dated March 10, 2020 regarding our March 6, 2020 phone conference.

Please accept this correspondence as an offer to resolve the issues you have raised for \$877.25 in full and final satisfaction.

Your prompt response to this correspondence will be greatly appreciated.

(Exhibit A, Correspondence to Applicant's Attorney dated March 26, 2020.)

The Payment Listing dated October 7, 2020 shows that on July 30, 2020 defendant issued applicant checks in the amount of \$875.08 for "FAULT" and \$31.28 for "Penalty/Interest." (Exhibit C, Payment Listing dated October 7, 2020.)

The parties did not present witness testimony and the matter was re-submitted for decision. (Minutes of Hearing, May 6, 2021, p. 1-2:15.)

In her Opinion on Decision, the WCJ states:

The sole issue presented for trial was the request for interest, additional penalties and attorney's fees for a five day late payment of a Stipulated Award.

Applicant and defendant settled via Stipulated Award. Relevant to this issue, the Stipulation upon which the award was based provided for suspension of interest should the Award be paid within thirty days. Applicant's Exhibit 2. On the thirty-fifth day payment issued. Applicant's Exhibits 1 & 3. Applicant's attorney informed defendant that the payment was late. Defendant self-imposed a 10% penalty . . . and forwarded that sum, along with interest to applicant. They also forwarded an interest payment to applicant's counsel. Defense Exhibits B & C.

(Opinion on Decision, May 20, 2021, p. 2.)

In the Report, the WCJ states:

An Award based on a Stipulation was issued on January 27, 2020. Exhibit 2. Payment was issued on March 2, 2020, admittedly late. Exhibits 1 & 3.

...
On July 30, 2020 payment for interest and ten percent (10%) penalty was paid. Exhibits B & C. . . .

...
Defendant admitted that the checks were issued five (5) days late.

...
Applicant and defendant settled via Stipulated Award. Relevant to this issue, the Stipulation upon which the award was based provided for suspension of interest should the Award be paid within thirty days. On the thirty-fifth day payment issued. Applicant's attorney informed defendant that the payment was late. Defendant self-imposed a 10% penalty – as no court had imposed a greater penalty – and forwarded that sum, along with interest to applicant. They also forwarded an interest payment to applicant's counsel.

(Report, pp. 2, 4.)

DISCUSSION

Section 5814 provides, in pertinent part, as follows:

(a) 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. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.

(b) If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this section, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused. This self-imposed penalty shall be in lieu of the penalty in subdivision (a).
 (§ 5814 (a)(b) [Emphasis added].)_

Applicant contends that the WCJ erroneously found that defendant paid applicant a self-imposed penalty under section 5814(b), thereby precluding imposition of section 5814(a) sanctions. Here, the record shows that defendant paid the Award five days after the deadline; and, thereafter, applicant's attorney notified defendant of the late payment and demanded penalties and attorney's fees. (Opinion on Decision, May 20, 2021, p. 2; Report, pp. 2, 4; Exhibit A, Correspondence to Applicant's Attorney dated March 26, 2020.) Approximately five months later, defendant paid applicant an amount equaling ten percent of the Award. (Exhibit C, Payment Listing dated October 7, 2020.) It follows that the record does not show that defendant discovered its late payment before applicant submitted his demand for penalties and attorney's fees or paid a self-imposed penalty within 90 days of discovering the late payment. As such, the WCJ's conclusion that defendant's payment of ten percent of the Award constitutes a self-imposed penalty under subsection (b) is without support. Accordingly, we will rescind the F&O.

We observe that a decision by the WCJ "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring

to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Although we have determined that defendant's payment of an amount equaling ten percent of the Award does not constitute a self-imposed penalty, we note that the record is unclear as to how, if at all, defendant's payments of \$875.08 and \$31.28 may affect the determination of whether applicant may be entitled to section 5814(a) penalties, attorney's fees and interest, and, if applicant is so entitled, the amount of section 5814.5 attorney's fees to which his attorney would also be entitled. (Exhibit C, Payment Listing dated October 7, 2020.)

Specifically, defendant's March 6, 2020 correspondence "offer[ed] to resolve the issues . . . for \$877.25 in full and final satisfaction," but the record does not reveal whether applicant's acceptance of the payments, if any, may evidence acceptance of defendant's offer or otherwise suggest that the parties' settled applicant's claims for sanctions, attorney's fees, and interest. (Exhibit A, Correspondence to Applicant's Attorney dated March 26, 2020.) The record is similarly unclear as to whether defendant's payments may evidence voluntary overpayments, payments applicable against potential sanctions, or payments subject to reimbursement based upon mistake or other alleged grounds pending determination of applicant's claims for sanctions, attorney's fees and interest.

However, the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].) Accordingly, we will return the matter to the trial level so that the WCJ may develop the record as to applicant's claims and defendant's defenses thereto.

Accordingly, we will grant the Petition, rescind the F&O, and 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 Order issued on May 20, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on May 20, 2021 is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 27, 2021

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

**ROBERTO AVILA
LAW OFFICES OF DONALD FAIR
STOODY & MILLS**

SRO/oo

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