

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

ROBERTO MICHEL, *Applicant*

vs.

**DE BERNARDI BROS.; CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY, *Defendants***

**Adjudication Number: ADJ12728144
Oxnard District Office**

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

We have considered the allegations of the Petition for Reconsideration and/or Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate except as noted below, and for the reasons discussed below, we will grant reconsideration, amend the WCJ's decision for the sake of clarifying that two separate penalties are awarded regarding two separate periods of temporarily disability and that defendant is entitled to credit for relevant penalties already paid. We will otherwise affirm the February 16, 2021 Findings and Award.

We do not adopt or incorporate the WCJ's recommendation that the petition be denied. Rather, we grant reconsideration solely to amend the Findings and Award for the sake of clarity as described above.

WCAB Rule 10955 provides that in seeking removal a petitioner must "demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold"

issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Here, the WCJ's decision makes findings as to causation of injury and permanent disability. These findings make the WCJ's decision a final order subject to reconsideration rather than removal.

For the foregoing reasons,

IT IS ORDERED that reconsideration of February 16, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that February 16, 2021 Findings and Award is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. A 10% penalty is owed by Defendant on all temporary disability indemnity not timely paid and owing to Applicant for the periods from November 18, 2019 to and including January 17, 2020 and from March 22, 2020 to and including November 28, 2020, pursuant to Labor Code §4650(d), payable to Applicant, less credit for any sums heretofore paid on account thereof, with jurisdiction reserved at the trial level if there is any dispute.

6. A 25% penalty is owed by Defendant on all temporary disability indemnity unreasonably delayed and owing to Applicant for the periods from November 18, 2019 to and including January 17, 2020 and from March 22, 2020 to and including November 28, 2020, pursuant to Labor Code §5814(a), payable to Applicant, less credit for any sums heretofore paid on account thereof, with jurisdiction reserved at the trial level if there is any dispute.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 10, 2021

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

**ROBERTO MICHEL
THOMAS ANDERSON
GOLDMAN MAGDALIN & KRIKES
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant, born 1/24/1960, worked as a seasonal farm worker for the employer when he alleged an injury on 8/6/2019 to his low back and bilateral hips. Only the low back injury is accepted by defendant currently. Defendant is the Petitioner herein, and filed a timely, verified Petition for Reconsideration/Removal (hereinafter, the “Petition”) on 3/9/2021. Petitioner takes issue with this court’s Findings and Award dated 2/12/2021 and served by the court 2/16/2021. In that Findings and Award, the undersigned WCJ found, amongst other things, that Defendant is liable for two separate penalties for untimely payment of temporary total disability indemnity pursuant to Labor Code §4650(d) and for unreasonably delayed payments of the same temporary total disability indemnity pursuant to Labor Code §5814(a). Petitioner contends that the undersigned WCJ erred in so doing, contending that the Findings are ambiguous as to whether one or both penalties apply and contending that only one of the two penalties should apply.

II. STATEMENT OF FACTS:

This claim involves a partially accepted orthopedic injury, as indicated above, while Applicant was working as a seasonal farm worker. The parties utilized the services of an orthopedic PQME, Dr. Adam Sverdlin, to help resolve the pending medical disputes who generated two medical reports to date (*Applicant’s Exhibits 9 and 10*). Dr. Sverdlin, in the report dated 6/29/2020, indicated that Applicant had not yet reached maximum medical improvement status and is temporary partially disabled with restrictions given by the doctor (*Applicant’s Exhibit 10*, page 5). There was no evidence presented to this court to indicate defendant was ever able to accommodate those work restrictions.

In addition, Applicant was treating with Dr. Adam Orszag, who issued multiple medical reports (*Applicant’s Exhibits 7, 8, and 12*). Dr. Orszag found Applicant to be both temporarily totally disabled and temporarily partially disabled for different periods, with work restrictions given by the doctor (*Applicant’s Exhibit*

8 and 12). There was no evidence presented to this court to indicate defendant was ever able to accommodate those work restrictions either.

On 11/4/2020, Applicant filed a Petition for Penalties, Attorney Fees and Sanctions for defendant's failure to pay temporary disability indemnity for the period 3/22/2020 through 11/28/2020. Defendant had paid, by the time of that Petition, temporary disability indemnity for the period 12/2/2019 through 1/17/2020, which is when the seasonal work for that that employer would have ended.

On 11/11/2020, Applicant filed a Declaration of Readiness to Proceed to a mandatory settlement conference on the issue of unpaid temporary disability and penalties thereon.

On 11/23/2020, Defendant filed an objection to that Declaration of Readiness to Proceed. On 11/30/2020, Defendant filed a response to Applicant's petition for penalties.

On 12/1/2020, the parties appeared before the undersigned WCJ for a mandatory settlement conference. The parties were unable to resolve their pending dispute, and the matter was set for trial. The parties filed the pretrial conference statement on 12/9/2020, after being given leave of the court for additional time to do so.

On 1/8/2021, defendant issued a check to Applicant in the amount of \$9,161.02 (*Defendant's Exhibit A*). This amount alleges to cover temporary disability indemnity owing to Applicant for the period 3/22/2020 through 11/28/2020. Beyond that, there is no indication in the check or attached letter as to how Defendant calculated the amount being paid and what, if anything, was included in this payment.

On 1/13/2021, the parties appeared for trial in front of the undersigned WCJ, again. The parties were again unable to resolve their pending dispute, and the matter was submitted for decision as of that date, without witness testimony, and based upon the documentary evidence submitted. The issues for trial included Applicant's average weekly wage earnings, temporary disability claimed for the period 9/22/2019 through 11/28/2020, the lien of EDD who paid benefits during the period

claimed as temporary disability, attorney's fees, and penalties on the delayed temporary disability.

On 2/12/2021, this court issued the Findings and Award and Opinion on Decision. In that Findings, the undersigned WCJ found, amongst other things, that defendant was liable for temporary disability indemnity for the period 11/18/2019 to 1/17/2020 and 3/22/2020 to 11/28/2020, and that Defendant is liable for two separate penalties for untimely payment of temporary total disability indemnity pursuant to Labor Code §4650(d) and for unreasonably delayed payments of the same temporary total disability indemnity pursuant to Labor Code §5814(a).

On 3/9/2021, defendant filed the Petition at issue herein. Petitioner contends, as indicated above, that the Findings are ambiguous as to whether one or both penalties apply and contends that only one of the two penalties should apply.

No response to the Petition has been received by the court from Applicant to date.

III. DISCUSSION:

A. This court properly awarded penalties on the delayed temporary disability indemnity pursuant to Labor Code §4650(d) and Labor Code §5814(a):

Petitioner makes two different arguments, in rather short argument. Firstly, Petitioner contends "that Finding 5 and 6 are ambiguous as to whether one or both penalties apply" (*Petition*, page 3, lines 8 to 9). There is no ambiguity in this court's Findings. Both penalties were found owing by the undersigned WCJ, and both Penalties were Awarded.

Secondly, Petitioner contends "that only one of the two penalties apply depending upon whether payment of TTD was untimely, or, whether payment of TTD was unreasonably delayed" (*Petition*, page 3, lines 9 to 10). The undersigned WCJ disagrees with Petitioner that only one of the two penalties should apply. The undersigned WCJ followed the direction laid out in the Mote case. The court in that case stated:

"The section 4650 penalty does not duplicate or supersede the section 5814 penalty; . . . the section 4650 penalty, which is a self-executing, strict liability provision not dependent on a finding of unreasonable delay, is intended to supplement, not replace, the section 5814 penalty. [Citation

omitted] Thus, respondents are strictly liable for section 4650 penalties, without application or demand, in addition to any other penalties which may be assessed against them.” (Mote v. Workers' Comp. Appeals Bd. (1997) 56 Cal. App. 4th 902, 910)

In this case, Defendant should have paid the Labor Code §4650(d) when Defendant paid the retroactive temporary disability indemnity on 1/8/2021 (*Defendant's Exhibit A*). It is unclear from that payment record supplied to the court whether Defendant did include such a penalty, and Petitioner does not offer anything to clarify this ambiguity. If Defendant did pay that penalty, then the undersigned WCJ is obviously not ordering Defendant to pay two Labor Code §4650(d) penalties.

The payment or finding of the Labor Code §4650(d) penalty, however, does not preclude this court from also finding a penalty is also owed pursuant to Labor Code §5814(a). Petitioner does not appear to dispute that there was unreasonable delay in this matter, as Petitioner makes no argument in that regard. The undersigned WCJ, therefore, believes that it was appropriate to award two separate penalties for untimely payment of temporary total disability indemnity pursuant to Labor Code §4650(d) and for unreasonably delayed payments of the same temporary total disability indemnity pursuant to Labor Code §5814(a).

IV. RECOMMENDATION:

The undersigned WCJ recommends that the Defendant's Petition for Reconsideration/Removal dated 3/9/2021, be denied.

Date: **March 19, 2021**

Peter M. Christiano
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE