WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA OROZCO, *Applicant*

vs.

CENTRAL CALIFORNIA CHILD DEVELOPMENT SERVICES; PROCENTURY INSURANCE COMPANY, administered by ILLINOIS MIDWEST SPRINGFIELD, *Defendants*

Adjudication Number: ADJ13806639
Fresno District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Lien claimant/cost petitioner, Kenneth R. Mackie, applicant's former attorney, seeks removal of the "Amended Order Granting Lien Claimant Kenneth R. Mackie's Petition for Reimbursement of Costs and Interest" (Order) issued on July 16, 2025, wherein the workers' compensation administrative law judge (WCJ) ordered that lien claimant be reimbursed for the costs he incurred for a vocational expert evaluation, with interest, and that determination of penalties was deferred until the end of the case in chief.

Lien claimant contends that the WCJ erred by not awarding penalties when awarding costs and interest.

We did not receive an answer from any party.

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

We have considered the allegations of the Petition and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report, and for the reasons discussed below, we will grant the Petition as one seeking reconsideration. As our Decision After Reconsideration, we will affirm the WCJ's July 16, 2025 Order, except that we will amend it to defer the issue of interest and penalties.

FACTS

On November 2, 2020, applicant filed an application for adjudication alleging specific injury on July 14, 2020 to multiple body parts arising out of and during the course of employment as a housekeeper. Applicant was initially represented by Mr. Mackie, the lien claimant.

On May 22, 2024, lien claimant petitioned to withdraw as applicant's attorney of record. On May 31, 2024, a Notice of Intention to Grant Withdrawal of Counsel was issued by the WCJ. No objection was filed and the Petition to Withdraw was granted by operation of law.

Thereafter, applicant retained new counsel.

On June 24, 2025, lien claimant filed a petition for reimbursement of costs, penalties, and interest alleging defendant had not responded to a request on June 12, 2024 to reimburse lien claimant for costs incurred to retain a vocational expert. (Lien Claimant Kenneth R. Mackie's Petition for Reimbursement of Costs, Penalties, and Interest, June 24, 2025, p. 1, lines 12-18.) Lien claimant sought an award of costs in the amounts of $3,675.00 for applicant's vocational evaluation, $367.50 for penalties under Labor Code section 4622, and $262.89 for interest. (Id. at p. 4, lines 12-18.)

In response, the WCJ issued an order granting lien claimant's petition for reimbursement consisting of costs in the amounts of $3,675.00 and interest in the amount of $262.89; no penalties were awarded.

Lien claimant filed an objection to the WCJ's order granting lien claimant's petition for reimbursement because it deleted all references to penalties requested pursuant to Labor Code section 4622(a)(1). (Objection to Order Granting Lien Claimant Kenneth R. Mackie's Petition for Reimbursement of Costs and Interest, July 10, 2025, p. 1, line 14-20.)

The WCJ then issued an Amended Order Granting Lien Claimant Kenneth R. Mackie's Petition for Reimbursement of Costs and Interest, which did not award penalties and stating in relevant part:

> IT IS FURTHER ORDERED THAT all other issues and penalties requested pursuant to LC section 4622 (a)(1) are deferred until the end of case in chief.

Thereafter, lien claimant sought review of the Amended Order.

DISCUSSION

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 6, 2025 and 60 days from the date of transmission is Sunday, October 5, 2025. The next business day that is 60 days from the date of transmission is Monday, October 6, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, October 6, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 6, 2025, and the case was transmitted to the Appeals Board on August 6, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 6, 2025.

II.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) 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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) 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].) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See, *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as

a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, petitioner is challenging the interlocutory finding that deferred the determination of penalties until the end of the case in chief. However, the WCJ issued an order for reimbursement of applicant's vocational assessment and interest, which is a final finding as to monetary liability. Thus, the WCJ's decision is a final order subject to reconsideration rather than removal.

The issue before us is whether the WCJ improperly deferred the issue of penalties until the end of the case in chief. As discussed below, we conclude the WCJ's decision to defer the determination of penalties was proper, but that the determination of interest should have also been deferred.

We first turn to lien claimant's argument that because the WCJ awarded the full amount of costs and interest, an award of penalties was mandatory under Labor Code section 4622(a). We reject this argument and clarify that application of Labor Code section 4622 with respect to *this* lien claimant in *this* case is improper.

Labor Code section 4622(a) provides, in relevant part, as follows:

> All medical-legal expenses for which the employer is liable shall, upon receipt by the employer of all reports and documents required by the administrative director incident to the services, be paid to whom the funds and expenses are due, as follows:
>
> (a)
>
> > (1) Except as provided in subdivision (b), within 60 days after receipt by the employer of each separate, written billing and report, and if payment is not made within this period, that portion of the billed sum then unreasonably unpaid shall be increased by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of receipt of the bill and report by the employer. If the employer, within the 60-day period, contests the reasonableness and necessity for incurring the fees, services, and expenses using the explanation of review required by Section 4603.3, payment shall be made within 20 days of the service of an order of the appeals board or the administrative director pursuant to Section 4603.6 directing payment.

(Lab. Code, § 4622 (a) (1).)

As explained by the WCJ in the Report in relevant part:

> Furthermore, Labor code 4622(a) provides for a penalty assessment of 10 percent, plus 7 percent per annum interest if an employer does not pay or object to a medical-legal invoice within 60 days of receipt. However, this penalty provision is designed to protect the medical-legal provider directly, not the applicant or applicant's attorney who may have fronted the payment. Therefore, Mr. Mackie's contention for mandatory penalties under labor code section 4622 does not apply.

(Report, August 6, 2025, p. 4, ¶ 4.)

We agree. (See also, *Colamonico v. Secure Transport* (2019) 84 Cal.Comp.Cases 1059, 1063 (Appeals Board en banc) ["In sum, sections 4620 and 4621 pertain to a medical-legal provider's service, and section 4622 pertains to the reasonable value of the service]; Cal. Code Regs., tit. 8, § 10786 [implementing, interpreting, or making specific Labor Code section 4622, WCAB Rule 10786 reflects that the focus is on making the medical-legal provider whole.].) Here, lien claimant is not a true lien claimant with respect to applicant's vocational assessment because lien claimant is not the actual medical-legal provider who rendered the medical-legal services for which lien claimant now seeks reimbursement. Instead, lien claimant paid the medical-legal provider for their services and is now seeking reimbursement for those costs. Thus, in this case lien claimant asserts the lien in his capacity as applicant's former attorney, not as a medical-legal provider. However, lien claimant does not step into the shoes of the medical-legal provider who rendered the services by virtue of paying those costs up front. Accordingly, lien claimant does not have standing to seek mandatory penalties under Labor Code section 4622(a)(1).

III.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it.

Because application of Labor Code section 4622 was improper given the facts in this case, we next consider the specific award issued by the WCJ. We note that lien claimant's claim for

reimbursement falls under Labor Code section 5811(a), which states in relevant part that "costs as between parties may be allowed by the appeals board." For the reasons discussed below, we conclude the WCJ's award of interest was premature and determination should be deferred until the end of the case in chief.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) As stated by the Court of Appeal:

> A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. However, if the denial of due process prevents a party from having a fair hearing, the denial of due process is reversible per se.

(*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd*. (*Pinkney*) (1994) 26 Cal.App.4th 789, 806 [59 Cal.Comp.Cases 461], citations omitted.)

As noted by the WCJ in the Report, lien claimant "is asking for a judgement on the pleadings which deny opposing parties due process rights." (Report, p. 4, ¶ 3.) The same rationale applies to an award of interest. Here, lien claimant's claim for penalties requires an evidentiary hearing, and the claim for interest is not ripe because there has been no award on the reimbursement of costs. Therefore, we defer the issue of interest, in addition to the issue of penalties.

Although the issues of interest and penalties are deferred, the WCJ may wish to consider the following discussion of Labor Code section 5814 in adjudicating a request for penalties. As detailed above, application of Labor Code section 4622 is improper in this case and lien claimant's

request for reimbursement properly falls under Labor Code section 5811(a); however, we note that the applicable statute for interest is Labor Code section 5800 and the applicable statutes for penalties are Labor Code sections 5814 and 5814.5.

In considering lien claimant's request for penalties, it is vital that we highlight the long-held recognition that any penalty under section Labor Code section 5814 belongs to *applicant*, rather than their attorneys or any lien claimant. (See, *Vogh v. Workers' Comp. Appeals Bd.* (1968) 264 Cal.App.2d 724, 728 [33 Cal.Comp.Cases 491] ["If the [Labor Code section 5814] penalty is appropriate, it applies to the compensation to which the applicant is entitled and it is payable to the *applicant* and not to the lienholder"]; see also Lab. Code, § 4902.) Accordingly, lien claimant does not have standing to seek penalties on his own behalf in connection with his petition for reimbursement of costs; any penalties assessed would be awarded to applicant.[2] If a trier of fact subsequently found that an award of penalties was appropriate, any claim by cost petitioner for costs and fees falls under Labor Code section 5814.5.

Accordingly, we grant the Petition for Reconsideration, and affirm the Order, except that we amend it to defer the issue of penalties and interest.

For the foregoing reasons,

IT IS ORDERED that that lien claimant's Petition of July 25, 2025 is **GRANTED**.

[2] Moreover, the burden is on applicant to show a delay in the provision of benefits. (Lab. Code, § 5705 [the burden of proof is on the party holding the affirmative of the issue].) Once applicant establishes a delay in the provision of benefits, the burden shifts to defendant to prove that the delay was reasonable. (*Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 230 [36 Cal.Comp.Cases 152]; see also *Kamel v. West Cliff Medical* (2001) 66 Cal.Comp.Cases 1521, 1523 (Appeals Board en banc); *Berry v. Workmen's Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381, 383 [34 Cal.Comp.Cases 507] ["Once delay is shown, a satisfactory explanation must be made by the employer"].) The Court of Appeal has held that in the event of a delay of benefits, the "only satisfactory excuse…is genuine doubt from a medical or legal standpoint as to liability for benefits, and that the burden is on the employer or his carrier to present substantial evidence on which a finding of such doubt may be based." (*Kerley*, *supra*, at p. 227.)

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Order issued on July 16, 2025 by the WCJ is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

* * *

GOOD CAUSE APPEARING, IT IS ORDERED THAT

Defendant pay Kenneth Mackie, within 30 days of the date of this Order:

$3,675.00 for Applicant's Vocational Evaluation.

IT IS FURTHERED ORDERED THAT all other issues, including interest and penalties requested, are deferred until the end of the case in chief.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 6, 2025

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

PATRICIA OROZCO
CALIFORNIA WORKERS' COMPENSATION LAWYERS
KENNETH R. MACKIE
LAW OFFICES OF BRADFORD & BARTHEL

DC/*cs*

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