WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

COLE PUTNAM, *Applicant*

vs.

BLAIR'S TOWING; EVEREST NATIONAL INSURANCE adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ7227217
Anaheim District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After Reconsideration.

Applicant and defendant seek reconsideration of Findings, Award and Order (F&O) issued on February 10, 2020, wherein the workers' compensation administrative law judge (WCJ) found: (1) applicant's earnings at the time of injury were $1,437.02 per week producing a temporary disability rate of $958.01 per week and a permanent disability indemnity rate of $270.00 per week; (2) applicant's injury caused permanent disability of 81 percent, entitling applicant to 609.25 weeks of permanent disability indemnity payable at the rate of $270.00 per week in the total sum of $164,467.50 beginning December 22, 2011, which, after deduction of permanent disability advances of $104,513.07, leaves a balance of $59,954.43, with applicant attorney's fee assessed at 15 percent of the permanent disability award, or $24,670.12, and all amounts subject to defendant's third party credit; (3) applicant is entitled to a penalty under Labor Code section 5814[2] for defendant's failure to pay permanent disability advances at the appropriate rate of $270.00 per week, with defendant to pay a 25 percent penalty on the amount of benefits delayed, $10,005.49, or $2,501.37, subject to the third party credit; (4) applicant is entitled to a life pension of $162.34 per week beginning after the last payment of permanent disability on August 27, 2023; applicant's attorney is awarded a 15 percent fee of the net present value of the life pension based upon the life

[1] Deputy Commissioner Schmitz, who was previously on the panel in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

tables after deduction of the remaining third party credit of $8,209.80; (5) defendant is entitled to a credit of $920.00 for duplicative payments to the Employment Development Department (EDD); (6) defendant's credits are to be taken against any benefits due and owing at the time of trial and will apply as follows:

Third party Credit	$71,585.60
Penalty	-$2,501.37
EDD Dup.	-$920.00
Attorney fees	-$24,670.12
Balance of Credit	$43,494.11;

and, applying this amount to the balance of the permanent disability benefits owed after subtracting permanent disability advances from the permanent disability award results in a remaining third party credit in the amount of $8,209.80 to be applied to the life pension ($164,467.50 - $104,513.07 - $24,670.12 = $35,293.68 net permanent disability subject to the credit); (7) defendant's request for credit for the overpayment of temporary disability benefits for the period November 5, 2011 through December 22, 2011 is denied; and (8) defendant's request for credit in the amount of $110,000.00 for applicant's benefits received from the Victims Restitution Fund is denied.

The WCJ issued an award consistent with these findings and ordered the attorneys to obtain from the DEU a commutation to the present value of the 15 percent attorney's fee based on the present value of the life pension.

Applicant contends that the WCJ erroneously failed to (1) find that applicant sustained permanent disability of 100 percent; and (2) calculate applicant's attorney's fees based upon the determination that applicant sustained permanent disability of 81 percent.

Defendant contends that the WCJ erroneously failed to (1) find it entitled to a credit for overpayment of temporary disability benefits; (2) correctly apply the stipulated credit for the duplicative payments to the EDD; and (3) find that applicant is not entitled to a section 5814 penalty for defendant's failure to pay permanent disability benefits at the correct rate.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petitions for Reconsideration (Report). The Report recommends that applicant's Petition be denied. The Report further recommends that defendant's Petition be granted as to defendant's contentions regarding its entitlement to credits for overpayment of temporary disability benefits and duplicative EDD payments and denied as to defendant's contention that applicant is not entitled to a section 5814 penalty.

We have considered the allegations of the Petitions, defendant's Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that defendant is entitled to credit for overpayment of temporary disability benefits in the amount of $6,432.35 and for duplicative payments to the EDD in the amount of $920.00, to be applied along with defendant's third party credit; defer the issue of the application of defendant's credit; defer the issues of whether and to what extent applicant is entitled to a section 5814 penalty, and, as appropriate, a section 4650(d) penalty; affirm that applicant's injury caused permanent disability of 81 percent; and defer the issue of whether or not applicant's former attorney, Rose Klein, is entitled to attorney's fees pursuant to *Sierra Pacific Industries v. Workers' Comp. Appeals Bd.* (*Lewis*) (1979) 44 Cal.Comp.Cases 573 (writ den.); and we will order that the parties' attorneys obtain from the DEU a commutation to the present value of the 15 percent attorney's fee based on the present value of the life pension and the matter be returned to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On December 24, 2009, while employed by defendant as a tow truck driver, applicant sustained injury arising out of and in the course of employment to his head, brain, spine, both upper and lower extremities, gastrointestinal systems, eyes/vision, hearing, ribs, chest, RSD, psyche, jaw, teeth, circulatory system, and erectile dysfunction, and claims to have sustained injury to his sleep. (Minutes of Hearing and Summary of Evidence, June 29, 2019, p. 2:4-10.)

On April 5, 2010, applicant's attorney, Rose Klein, filed an application for adjudication on his behalf. (Application for Adjudication, April 5, 2010.)

On October 11, 2012, Rose Klein filed a lien on applicant's claim herein. (Notice and Request for Allowance of Lien, October 11, 2012.)

On October 15, 2012, applicant filed a substitution of attorneys, naming the Rondeau Law Firm as his attorney of record. (Substitution of Attorneys, October 15, 2012.)

On November 20, 2012, applicant filed a substitution of attorneys, naming Berman More as his new attorney of record. (Substitution of Attorneys, November 20, 2012.)

On June 10, 2013, Berman More filed an amended application for adjudication on behalf of applicant. (Amended Application for Adjudication, June 10, 2013.)

On March 11, 2019, the parties stipulated that defendant is "entitled to a third party credit in the amount of $71,585.60, pending adjudication of the permanent disability in the case in chief."

(Stipulation and Award/Order, March 11, 2019.) The WCJ ordered that defendant "shall defer application of the credit until an award is made in the case in chief." (*Id*.)

On June 20, 2019, the matter proceeded to trial on the following issues: permanent disability; apportionment; defendant's failure to pay permanent disability at the rate of $310.50 based upon section 4658(d)(2); defendant's overpayment of temporary disability benefits for the period of November 5, 2011 through December 22, 2011for 47 days in the amount of $6,432.25; whether defendant is entitled to credit of $110,000 for payment received by applicant from the Victim's Restitution account; whether applicant is entitled to permanent disability retroactively based upon section 466; and whether applicant is entitled to a section 5814 penalty for defendant's failure to pay permanent disability benefits at the proper rate from November 5, 2011 through the present. (Minutes of Hearing and Summary of Evidence, June 20, 2019, pp. 2:24-3:17.)

The parties stipulated that, at the time of applicant's injury, his earnings would generate a maximum rate temporary disability benefits of $958.01; defendant paid temporary disability benefits at the rate of $958.01 from December 25, 2009 through December 22, 2011 and permanent disability at the rate of $230.00 per week from January 6, 2012 through February 13, 2016, at the rate of $264.50 from February 14, 2016 through December 27, 2018, and at the rate of $270.00 from December 28, 2018 to present and continuing; applicant's net recovery from his third party case was $71,585.60; defendant is entitled to a credit of $920.00 for duplicative payments made to the EDD for the period of December 23, 2011 through January 19, 2012; and applicant became permanent and stationary on November 5, 2011. (*Id.*, pp. 2:11-3:17.)

On October 21, 2019, the matter proceeded to continued trial, and the WCJ clarified for the record that applicant's section 5814 claim alleges that he is entitled to a penalty on the grounds that defendant failed to retroactively adjust the rate it paid him permanent disability benefits to $270.00 per week for the period of November 5, 2011 through December 28, 2018. (Minutes of Hearing and Summary of Evidence, October 21 2019, p. 2:12-13.)

In the Report, the WCJ states:

> This case began with the filing of an Application for Adjudication of Claim on 3/29/10 alleging a specific injury on 12/24/09. . . . Defendant filed a petition for credit for both the applicant's third party recovery and his recovery from the Victims Restitution Fund. As to the Petition for credit the parties reached a stipulated resolution of the matter on 3/11/19, see MOH EAMS Document #69597434. In that Stipulation the parties

agreed defendant is entitled to a third party credit for $71,585.60 . . .

After a review of the record as a whole including the analysis by the AMEs, Dr. Furst, Dr. Richman, Dr. Frank, Dr. Wakim, and the PTP, Dr. Lechuga, the vocational reports from Mr. Bonneau and Mr. Wilkinson the court determined that the record when taken as whole was complete and adequately represented the applicant's condition. . . .

Defendant contends this court erred in not granting its petition for credit from the overpayment of TTD, awarding a 5814(a) penalty and improperly applying the EDD stipulated credit of $920.00 for duplication of the EDD benefits. In regards to the failure to grant the TTD overpayment credit . . . the court erred in not granting the credit . . . The parties stipulated the applicant was declared permanent and stationary on 11/4/11 and that PD was to begin on 11/5/11, see MOH 6/20/19 page 3 paragraph 5(e). Therefore, the defendant is entitled to this credit and the court requests the Board grant reconsideration and amend the Findings, Award and Order and find the overpayment of $6,432.35. . . .

As to the defendant's second point raised in the petition for reconsideration, the court erred in applying the stipulated credit for the duplication of the EDD payments. This court requests the Board grant reconsideration as it improperly applied the credit. The $920.00 should be applied either before or after the third party credit is applied to the PD awarded . . . The court requests the Board grant reconsideration and amend the Findings, Award and Order and allow the credit for the duplication of the EDD payments be applied along with the third party credit. . . .

Defendant's third point is that this court erred in awarding a 5814(a) penalty for the defendant's failure to adjust the weekly PD rate to $270.00 per week once the evidence showed with a reasonable medical probability that the PD would exceed 70%. The 25% 5814(a) penalty was awarded due to the fact the defendant once it knew that the PD rate was $270.00 per week did not correct the rate and self-impose the 10% penalty under 5814(b). Defendant initially paid the applicant at $230.00 per week then increased the rate to $264.50 based on the 15% increase due to 4658(d)(2). It was later stipulated to, and waived as an issue by the parties, that the defendant did not have more than 50 employees so this increase did not apply. Subsequent to this on 12/28/18 the defendant increased the weekly PD payments to $270.00. At the time of increasing the rate, all the AME's had declared the applicant MMI and set forth the factors of disability. . . . The real dispute at that time was whether the applicant was 100% permanent and totally disabled. Defendant in the petition states that there was a large credit so they did not have to pay. The problem with this argument is that the petition for credit had not been filed at that time and further the parties stipulated on 3/11/19 and the court ordered that the credit would not be taken or applied to the PD

until after the trial was completed, EAMS document #69597436. Defendant also contends that due to the credit they had no obligation to pay the retroactive amounts due. . . . The obligation to adjust the payments was before the credit existed. The defendant cannot benefit by taking the credit and avoiding liability for failure to properly advance the PD. The penalties awarded are subject to the credit. Defendant owes no additional monies, the credit is used up faster than they wish. Based on the PD awarded, $164,467.50 and the amount due as of the date of the decision less the advances as set forth above the amount of the PD subject to the penalty is $10,005.49, ($114,518.56 - $104,513.07 = $10,005.49). This would result in a 25% penalty or $2,501.37. This amount is subject to the credit as set forth below. Defendant contends that the actual PD paid was $110,903.00 but this amount was not supported by the evidence submitted at trial and no proof was provided with the petition either. . . .

Therefore, this court requests the Board deny defendant's petition for reconsideration as to the penalties awarded and uphold the 5814(a) penalty of $2,501.37.

As to the credit, the court requests the Board make the following findings:

Third Party Credit	$71,585.60
TTD overpayment	+$ 6,432.35
EDD duplication	+$920.00
Total Credits	**$78,937.95**

PD Awarded	$164,467.50
Attorney Fees	-$ 24,670.13
PDAs	-$104,513.07
Net PD owed	**$ 35,284.30**

Total Credits	$78,937.95
PD owed	-$ 35,284.30
Attorney Fees	-$ 24,670.13
5814(a) penalty	-$ 2,501.37
Balance of credit applied to L.P	**$ 16,482.15**

The credit applies to all benefits due and owing to the applicant including the attorney fees, which will be discussed further below in applicant's petition for reconsideration. The balance of the credit or $16,482.15 will be applied to the life pension and the attorney fees awarded therein in once the parties obtain a commutation from the DEU. . . .

Therefore, this court requests the Board grant defendant's petition for reconsideration as to issues one and two and grant the credit as set forth above and deny as to issue three and uphold this court and the awarding of

the 5814(a) penalty. The penalty though awarded is still subject to the credit as set forth above.

. . .

Applicant contends this court erred in not making a finding that the applicant was 100% permanent and totally disabled and unable to compete in the open labor market and that it failed to award attorney fees. Applicant claims that the attorney fees are not subject to the credit. This creates a potential conflict with the applicant as will be discussed below.

This court relied on the record as a whole including the report of Dr. Wakim. Applicant contends that Dr. Wakim opined that the applicant was unable to compete in the open labor market.

He did not do this on an orthopedic basis. If the Board looks at Dr. Wakim's report dated 1/19/19, Board Exh. X-4, and his latest report dated 8/9/19, Exh X-8, Dr. Wakim after reviewing the subrosa films opines that the applicant cannot be a tow truck driver but that "(O)therwise his level of function would be considered consistent with the work restrictions I provided", Board Exh. 4 dated 1/19/19, page 4. On an orthopedic basis in his 7/2/14 report, Board Exh. X-4, the doctor found the applicant on page 55 of that report to have the following work restrictions, "prophylactically restricted from repetitive squatting both knees and or climbing. Precluded from repetitive lifting over 30 pounds occasional lifting 70 pounds and no overhead work on a repetitive basis." Nowhere does this imply from an orthopedic standpoint the applicant was precluded from working in the open labor market. . . . The parties selected neuropsychiatrist Dr. Furst to act as an AME in this matter. Dr. Furst's reports are very demonstrative that the applicant is not permanent and totally disabled. Mr. Bonneau the applicant's vocational rehabilitation expert in his report requested this evaluation. In his reporting, he fails to discuss in depth the reporting of Dr. Furst.

. . .

Dr. Furst has made some very critical assessments of the applicant. First, he finds the applicant did not suffer a traumatic brain injury as claimed. He felt he might have had a mild concussion. In his report of 10/19/17 Board Exh. 3, Dr. Furst finds the applicant able to take care of his basic welfare and ADLs. On page 13 of the report, the doctor opines that the MMPI test results raise a concern for over reporting by the applicant. That there was non-credible responses to the cognitive and somatic symptoms. He also reported a larger number of infrequent responses, which he stated may be attributed to the applicant's psychological difficulties. On page 15, the doctor finds the applicant has a post concussive syndrome but did not have brain injury. He further opines that the applicant developed a belief that he has a significant brain injury, but that is not borne out by the testing or the reporting. On pages 16-17, Dr. Furst finds that though well intentioned, the referral to Winways may not have been in the applicant's best interest. The applicant does not have a significant brain injury but rather a concussion

and by putting this type of applicant in with person with severe brain injuries, allow them to believe they are far more injured that they are. Dr. Furst, on page 17, finds the applicant's inconsistencies on the testing both in effort and in performance was most likely a subconscious and not volitional act on the part of the applicant. The applicant believes he has greater injuries that he does. That is why Dr. Furst finds a Somatoform Cognitive Impairment rather than a true cognitive impairment. Dr. Furst also questioned the reporting of Dr. Lechuga on page 17 wherein he questions why there were no tests done by Dr. Lechuga to assess the effort and validity being put forth in the neurocognitive testing he did. Based upon this thorough report Dr. Furst found the applicant with a 14% Somatoform Cognitive Impairment. He did not find the applicant unable to compete in the open labor market.

Dr. Frank, the AME in Psychiatry found in his 5/13/13 report that the applicant form a psychiatric basis could do his usual and customary job, Bd. Exhibit X-2. On page 47 of his 10/28/15 report Dr. Frank opined "(I)n this matter, the available evidence in not consistent with major traumatic injury and is not consistent with major cognitive deficits. There are mild neurocognitive deficits…" He went on to say in in 10/3/18 report he had no comment on his ability to compete in the open labor market and to do so would be speculative. He found no major traumatic brain injury.

Dr. Lechuga, the applicant's primary treating psychologist, Applicants Exh. 7, deferred on the cognitive effects of the accident to Dr. Furst. He does not find the applicant unable to compete in the open labor market. He finds the applicant had 4%WPI on a psychiatric basis. In his 7/21/17 report, he found the applicant capable of returning to work.

Dr. Richman, the AME in Neurology, in his 4/17/13 report, Board Exh. X-1 found the applicant to have a 4% WPI mostly related to headaches. Also, in the 7/21/17 report of Dr. Richman Wilkinson the defense vocational expert. In his 1/30/18 report on page 5, Dr. Richman agrees with Dr. Furst that the applicant that there are inconsistencies in the testing and that this may not be volitional but done unconsciously by the applicant. Further, reiterating that the applicant does not have a cognitive brain impairment but rather a psychologically based belief he is injured greater than the physical evidence shows. He also notes throughout his various reports that the applicant's history varies. At times he states he was unconscious other times he was not. The records reviewed show the applicant was alert and oriented at the time following the accident and coherently spoke to the police and the first responders.

. . .

The totality of the record shows the applicant had significant injuries which led to the awarding of 81% permanent partial disability together with the

> life pension. The record as a whole does not support the finding of the applicant to be 100% permanent and totally disabled. . . .
> (Report, pp. 1-10.)

DISCUSSION

We turn first to defendant's contentions that the WCJ erroneously failed to find that it is entitled to a credit for overpayment of temporary disability payments and incorrectly applied the stipulated credit for duplicative payments to the EDD. In this regard, the WCJ states that he erred by not calculating the credit for overpayment of temporary disability payments based upon the parties' stipulation that defendant was required to begin issuing permanent disability benefits on November 5, 2011, the day after applicant was deemed permanent and stationary, and by failing to apply the EDD credit along with the third party credit. (Report, pp. 3-4.) Therefore, the WCJ requested that we amend the F&O to find defendant entitled to a credit for overpayment of temporary disability benefits in the amount of $6,432.35 and a credit for the duplicative EDD payments in the amount of $920.00, and that both credits be applied along with the third party credit in the amount of $71,585.60, so that a total credit of $78,937.95 may be applied against all of applicant's remaining benefits. Accordingly, we will rescind the F&O and substitute findings that defendant is entitled to a credit for overpayment of temporary disability benefits in the amount of $6,432.35 and a credit for the duplicative EDD payments in the amount of $920.00.

We recognize that the WCJ also requested that defendant's total credit of $78,937.95 be applied against the amount of permanent disability benefits still owed of $35,284.30, attorney's fees of $24,670.13 and the section 5814 penalty of $2,501.37, leaving a positive credit balance of $16,482.15, which the WCJ recommended be applied to the life pension upon calculation of its present value. (Report, pp. 5-6.)

However, in our view, defendant's credit should be applied initially against the outstanding permanent disability benefits of $35,284.20 and the life pension (upon calculation of its present value), with the remaining credit, if any, to be applied against attorney's fees. Under this process, the credit would not be applied disproportionately to applicant's attorney's fee and thereby allow applicant to receive a double recovery on his claim herein after application of defendant's credit. (See *Soliz v. Spielman* (1974) 44 Cal.App.3d 70, 71-72 [40 Cal.Comp.Cases 130] (*Soliz)* (stating that the Legislature's scheme for ensuring that an employer or its carrier shares in any third party recovery is intended to prevent a double recovery by the injured employee).) We therefore

conclude that the record should be further developed regarding the application of defendant's credit. Accordingly, we will substitute findings that defer the issue of how defendant's credit will be applied. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

We turn next to defendant's contention that the WCJ erroneously found applicant entitled to a section 5814 penalty for defendant's failure to pay permanent disability benefits at the correct rate. In particular, defendant argues that it had no obligation to retroactively adjust the permanent disability payments made from November 5, 2011 until December 28, 2018 because it was entitled to a credit on applicant's third party case.

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.
> (§ 5814 (a).)

Under this statutory language, the penalty is to be applied only when the employer unreasonably delays or refuses the relief, and an employer's genuine doubt as to legal liability, or actual obligation to pay, constitutes a basis for nonpayment and serves to excuse the employer's failure to timely pay benefits. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (1982) 130 Cal.App.3d 933, 939 [47 Cal.Comp.Cases 358] (*Brown*).) The rationale behind allowing delay for genuine medical or legal doubt is that there may ultimately be no medical or legal obligation to pay. (*Id*.)

For example, in *Brown*, the court held that it was error to impose a section 5814 penalty for a defendant's failure to make full payment of a permanent disability award where the injured worker had received a third-party settlement significantly larger than the remaining balance due for the permanent disability, reasoning that the defendant's "genuine legal doubt as to liability was patently obvious . . . [in that] [it] had paid all but $1,045 of its obligation for permanent disability, and plaintiff negotiated a settlement from which he received more than $4,000." (*Id*., at p. 938.)

In this case, the record is unclear as to how, if at all, the WCJ evaluated the evidence that defendant held genuine doubt as to its legal liability or actual obligation to retroactively increase

the permanent disability payments it made from November 5, 2011 until December 28, 2018. Specifically, although the WCJ notes that defendant's petition for credit had not been filed when it increased permanent disability payments to the rate of $270.00 per week, we are unable to discern how the procedural status of defendant's petition for credit may suggest that defendant lacked genuine doubt as to the merits of whether or not it held an obligation to retroactively adjust past permanent disability payments.

Likewise, although the WCJ notes that he ordered that defendant "defer application of the [$71,585.60] credit" until after trial, we are unable to discern how the order may have put defendant on notice that it was affirmatively required to retroactively adjust the past permanent disability payments in addition to its obligation to refrain from applying the credit to reduce ongoing payments—especially given that the order appeared in the context of a stipulation as to defendant's entitlement to a "credit in the amount of $71,585.60." (Stipulation and Award/Order, March 11, 2019.)

Furthermore, we do not read the order to suggest that by entering the stipulation defendant was waiving its right to defend against a potential sanctions claim in connection to its past payments to applicant, but rather to avoid a dispute as to the precise amount of credit which defendant would receive as a result of applicant's third party claim.

We also note that when the WCJ issued the F&O, he reasoned that "[d]efendant owes no additional monies" and explicitly made the entire award subject to defendant's credit, implicitly suggesting the possibility that defendant's credit may exceed its total obligation and, therefore, that defendant may have grounds to demonstrate that it had a genuine belief that it had no obligation to retroactively pay permanent disability benefits at the increased rate. (Report, p. 5.)

In addition, although the parties framed the section 5814 issue as whether applicant was entitled to a penalty based upon defendant's failure to retroactively apply the rate of $270.00 per week to the period from November 5, 2011 until December 28, 2018 period, the WCJ did not calculate the penalty based upon an accounting of the amount deemed retroactively due as of December 28, 2018, but "on the PD awarded, $164,467.50 and the amount due as of the date of the decision [$114,518.56 on February 10, 2020] less the advances [$104,513.07]", to determine a past due amount of $10,005.49 subject to a 25 percent penalty of $2,501.37. (*Id.*) Thus, to the extent that applicant may be entitled to a penalty, it is unclear how, if at all, the amount of the

penalty awarded corresponds with the sum deemed due for the period of November 5, 2011 through December 28, 2018.

Furthermore, as to the sum deemed due for the period of November 5, 2011 through December 28, 2018, we observe that section 4650(d) provides as follows:

> If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan, as defined in subdivision (g) . . .
> (§ 4650(d).)

Unlike a section 5814 penalty, which applies when benefits are unreasonably delayed or denied, section 4650(d) is an "automatic, strict liability penalty." (*Rhiner v. Workers' Comp. Appeals Bd*. (1993) 4 Cal.4th 1213, 1227 [58 Cal.Comp.Cases 172].)

Thus, any failure by defendant to timely pay permanent indemnity benefits would automatically give rise to a section 4650(d) penalty against which its third party credit would be applicable. Moreover, defendant's credit would not retroactively supersede imposition of a section 4650(d) penalty because an award of credit is discretionary and requires approval from the WCJ and therefore may not subsequently alter defendant's obligation to make timely payment. (See, e.g., § 3861 (Deering, Lexis Advance through Chapter 11 of the 2022 Regular Session, Opinion Notes, Third Party Actions – Credit – Penalties).); *Robertson v. Veterinary Ctrs. of Am*., 2013 Cal. Wrk. Comp. P.D. LEXIS 282.[3])

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

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See G*ee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

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.)

Because the record fails to explain how the WCJ evaluated the issue of whether applicant is entitled to a section 5814 penalty or calculated the penalty amount, and because a failure by defendant to timely pay permanent indemnity benefits would give rise to a section 4650(d) penalty, we conclude that the record should be further developed as to these issues. Accordingly, we will substitute a finding that defers the issues of whether and to what extent applicant is entitled to section 5814 penalty, and, as appropriate, a section 4650(d) penalty. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

We next address applicant's contention that the WCJ erroneously failed to find that applicant's injury caused permanent disability of 100 percent. Upon review of the record before us, we are persuaded that the WCJ properly relied upon the opinions of the agreed medical evaluators (AMEs), i.e., Drs. Furst, Frank, Richman, and Wakim, whom the parties presumably chose based upon their expertise and neutrality. (Report, pp. 6-10.) The WCJ was presented with no good reason to find the AMEs' opinions unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Accordingly, our substituted findings will affirm that applicant's injury caused permanent disability of 81 percent.

Next, we address applicant's attorney's argument that the WCJ erroneously failed to calculate attorney's fees based upon the determination that applicant's injury caused permanent disability of 81 percent. In particular, applicant's attorney argues that the WCJ erred by failing to allocate 15 percent of the permanent disability award as attorney's fees not subject to defendant's credit for overpayment of disability advances on the grounds that defendant was required to set aside attorney's fees with every advance.

Preliminarily, we note that applicant's attorney seeks an increase in attorney's fees by way of the Petition without a proof of service of notice to applicant of his adverse interest and applicant's right to seek independent counsel. (See Report, p. 11.) Under WCAB Rule 10842, all requests for an increase in attorney's fee shall be accompanied by proof of service on the applicant of written notice of the attorney's adverse interest and applicant's right to seek independent counsel. (Cal. Code Regs., tit. 8, former § 10778, now 10842.) We therefore admonish applicant's

attorney to comply with Rule 10842 in the future and that any failure to do so may result in sanctions.

As to the merits of applicant's attorney's argument, we note that while we addressed the issue of how defendant's credit is to be applied with respect to applicant's attorney's fees above, the record shows that applicant's former attorney, Rose Klein, filed an application for adjudication on his behalf and subsequently asserted a lien herein. (Application for Adjudication, April 5, 2010; Notice and Request for Allowance of Lien, October 11, 2012.) In this regard, we observe that it is long-settled law that an applicant's attorney's appearance in a matter is tantamount to the filing of a lien claim because it puts the defendant on notice that a fee will be claimed. (E.g.; *Lewis, supra*; *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 380 (Appeals Board en banc); *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd.* (*Chester*) (1971) 36 Cal.Comp.Cases 678 (writ den.).)

In *Lewis*, *supra*, defendant advanced applicant's permanent disability benefits without withholding monies for applicant's attorney's fee. When the court determined that defendant had overpaid applicant's permanent disability benefits, the WCJ opined that applicant's attorney could bill his client to collect his fee as a result of the overpayment. However, the Appeals Board rescinded the WCJ's decision, concluding that because defendant was on notice of the attorney's appearance in the case and hence on notice of the attorney's lien, defendant was required to pay the attorney's fees even though this would result in double liability. (*Lewis, supra,* at p. 574.) The Appeals Board reasoned that, having been put on notice of the attorney's appearance, defendant had a duty to withhold funds sufficient to pay the lien that would follow—and the appeals court denied review. (*Id*.)

Here, as in *Lewis*, there is no dispute that defendant issued applicant's permanent disability benefits without withholding funds sufficient to pay attorney's fees, fees of which it was on notice based upon Rose Klein's filing of an application for adjudication and assertion of a lien. Consequently, pursuant to *Lewis*, the issue of whether or not defendant was required to withhold funds to pay applicant's attorney's fees and is therefore subject to liability to Rose Klein for failing to do so should be further developed. Accordingly, we will substitute a finding that defers the issue of whether applicant's former attorney Rose Klein is entitled to attorney's fees pursuant to *Lewis*. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117

[63 Cal.Comp.Cases 261].)

Accordingly, we will rescind the F&O and substitute findings that defendant is entitled to credit for overpayment of temporary disability benefits in the amount of $6,432.35 and duplicative payments to the EDD in the amount of $920.00, to be applied along with defendant's third party credit; defer the issue of the application of defendant's credit; defer the issues of whether and to what extent applicant is entitled to a section 5814 penalty, and, as appropriate, a section 4650(d) penalty; affirm that applicant's injury caused permanent disability of 81 percent; and defer the issue of whether or not applicant's former attorney, Rose Klein, is entitled to attorney's fees pursuant to *Lewis*; and we will order that the parties' attorneys obtain from the DEU a commutation to the present value of the 15 percent attorney's fee based on the present value of the life pension and that the matter be returned to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order issued on February 10, 2020 is **RESCINDED** and **SUBSTITUTED** as set forth below:

FINDINGS OF FACT

1. Applicant was employed on December 24, 2009 as a tow truck driver, occupational group number 350 at Newport Beach, California, by Blair's Towing, then insured for workers' compensation purposes by Everest National Insurance, adjusted by Sedgwick CMS.

2. It is found that applicant sustained injury arising out of and in the course of employment to his head, brain, spine, both upper and lower extremities, gastrointestinal systems, eyes/vision, hearing, ribs, chest, RSD, psyche, jaw, teeth, circulatory system, and erectile dysfunction based upon the stipulations of the parties and the AME medical report(s) of Dr. Richman, MD, Dr. Frank, Dr. Furst, and Dr. Wakim.

3. Applicant's earnings at the time of injury were $1,437.02 per week producing a temporary disability rate of $958.01 per week and a permanent disability indemnity rate of $270.00 per week.

4. Applicant's injury caused permanent disability of 81 percent, entitling applicant to 609.25 weeks of disability indemnity payable at the rate of $270.00 per week in the total sum of $164,467.50 beginning on November 5, 2011. Applicant's current attorney is entitled to an attorney's fee in the amount of 15 percent of applicant's permanent disability benefits, or $24,670.12.

5. The issues of whether and to what extent applicant is entitled to a section 5814 penalty, and, as appropriate, a section 4650(d) penalty, are deferred.

6. Applicant is entitled to a life pension of $162.34 per week beginning after the last payment of permanent disability. The life pension will begin on August 27, 2023.

7. Applicant's current attorney is awarded a 15 percent fee of the net present value of the life pension based upon the life tables.

8. Defendant is entitled to a credit pursuant to Labor Code 3861 in the amount of $71,585.60 and to a credit in the amount of $920.00 for duplicative payments made to the EDD.

9. Defendant is entitled to a credit for overpayment of temporary disability payments in the amount of $6,432.35.

10. Defendant is not entitled to a credit in the amount of $110,000.00 for the benefits received by applicant from the Victims Restitution Fund.

11. Applicant is entitled to future medical treatment to cure or relieve from the effects of the industrial injury to the injured body parts set forth above subject to the provision of the Labor Code.

12. The issue of application of defendant's credits in the amounts of $71,585.60, $920.00, and $6,432.35 is deferred.

13. The issue of whether applicant's previous attorney, Rose Klein, is entitled to attorney's fees pursuant to *Sierra Pacific Industries v. Workers' Comp. Appeals Bd.* (*Lewis*) (1979) 44 Cal.Comp.Cases 573 (writ den.) is deferred.

IT IS FURTHER ORDERED THAT the parties' attorneys obtain from the DEU a commutation to the present value of the 15 percent attorney's fee based on the present value of the life pension.

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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

BENTLEY & MORE, LLP
STOCKWELL, MARRIS, WOOLVERTON & HELPHREY
COLE PUTNAM

SRO/*pc*

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