

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

**MARIA GARCIA, *Applicant***

**vs.**

**ST. JOHN KNITS; TRAVELERS PROPERTY AND CASUALTY COMPANY OF  
AMERICA, *Defendants***

**Adjudication Numbers: ADJ7148169  
Marina Del Rey District Office**

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

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued on February 10, 2022, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that the doctrine of res judicata does not bar the trial herein; applicant is entitled to back wages from November 21, 2010 to July 23, 2011 at the weekly rate of \$700.00, less credit for amounts paid by defendant, EDD benefits and attorney fees; defendant is not entitled to costs and fees pursuant to its petition dated July 9, 2021; defendant unreasonably delayed payment of \$4,000.00 of the July 18, 2016 award; applicant is entitled to a Labor Code section 5814<sup>1</sup> penalty of fifteen percent of the delayed payment of \$4,000.00, which is calculated to be \$600.00; and applicant's attorney is entitled to a section 5814.5 penalty for enforcement of the July 18, 2016 award in the amount of \$1,200.00.

The WCJ issued an award to applicant and applicant's attorney as provided by these findings.

Defendant contends that the WCJ lacked authority to find applicant entitled to back wages because adjudication of that issue is barred by the doctrine of res judicata and violates the right of due process; and, alternatively, that the evidence fails to prove actual wage loss. Defendant also contends that the evidence fails to establish that it unreasonably delayed payment of \$4,000.00; and, therefore, that applicant and applicant's attorney are not entitled to penalties.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

We received an Answer from applicant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that that we amend the F&A to find that applicant is not entitled to a section 5814 penalty and applicant's attorney is not entitled to a section 5814.5 penalty.

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 reconsideration and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that the evidence fails to establish that defendant unreasonably delayed payment of \$4,000.00 of the July 18, 2016 award, applicant is not entitled to a section 5814 penalty, and applicant's attorney is not entitled to a section 5814.5 penalty, and to award applicant as provided by the amended findings.

### **FACTUAL BACKGROUND**

On February 24, 2009, while employed as a salesperson, applicant sustained injury to her right knee and psyche. (Minutes of Hearing and Summary of Evidence, May 11, 2016, p. 2:1-4.)

On February 23, 2010, applicant filed her application for adjudication. (Application for Adjudication of Claim, February 23, 2010.)

On March 23, 2010, applicant filed her Application for Benefits Pursuant to Labor Code §132(a), requesting "that he/she be awarded additional benefits consisting of an increase of one-half in compensation otherwise recoverable together with costs and expenses and attorney fees." (Application for Benefits Pursuant to Labor Code §132(a), March 23, 2010, p. 2:7-9.)

On September 9, 2014, the parties resolved the case in chief by Stipulation and Award. (Stipulation With Request for Award, September 9, 2014.)

On May 11, 2016, the matter proceeded to trial on the following issues:

1. Attorney fees.
2. Labor Code Section 132(a)

(Minutes of Hearing and Summary of Evidence, May 11, 2016, p. 2:11-13.)

On June 9, 2016, the WCJ denied applicant's 132a claim. (Findings and Order, June 9, 2016.) Applicant sought reconsideration and on July 11, 2016 the WCJ rescinded the June 9, 2016 Findings and Order.

On July 18, 2016, the WCJ found that applicant sustained her burden of proof that defendant violated section 132a, awarded applicant all benefits sought by her 132a application and deferred the issue of attorney's fees. (Findings of Fact and Award, July 18, 2016.) In her Opinion on Decision, the WCJ explained that the only evidence produced at trial was applicant's testimony and two documents (defendant's March 9, 2010 letter terminating applicant's employment and defendant's employee separation form). (Opinion on Decision, July 18, 2016, p. 1.) Based on her evaluation of the evidence, the WCJ found as follows:

The timing of Applicant's termination, along with the fact that she had been a long time employee, supported by her testimony that she was not aware that she had been released to light duties by her physician or offered a light duty position were sufficient to establish a prima facie case that the termination violated Labor Code Section 132 (a). Defendant did not introduce a witness to rebut Applicant's testimony or any documentation such as the medical report which would have established that Applicant had in fact been released to light duties. Additionally even if for the sake of argument the medical report had been introduced, Defendant never identified what light duty position was offered to Applicant or provide[d] evidence that the offer of a light duty position was ever made in writing. (*Id.*, pp. 2-3.)

On May 16, 2019, we affirmed the WCJ's findings, stating:

Thus, we concur with the WCJ that applicant sustained her burden of proof to establish a prima facie claim of discrimination in violation of section 132a, and that defendant failed to rebut applicant's prima facie claim by establishing that business realities required her termination. Accordingly, we will affirm the F&A. (Opinion and Decision After Reconsideration, May 16, 2019, p. 9:19-22.)

On November 23, 2021, the matter proceeded to trial as to the following issues:

1. Attorney fees.
  2. Defendant raises res judicata as a bar to any new trial subsequent to the July 18, 2020 Findings and Award.
  - ...
  4. Applicant's entitlement to back wages from March 9, 2010 to July 18, 2016 in the amount of \$232,400 at the weekly rate of \$700, based upon the July 18, 2016 Award.
  5. Penalties, sanctions, and costs for defendant's failure to timely pay the July 18, 2016 Award dated July 7, 2021.
- (Minutes of Hearing and Summary of Evidence, November 23, 2021, p. 3:1-10.)

The WCJ admitted exhibits entitled Letter to Applicant Attorney from Defendant Attorney Dated August 23, 2019, Letter to Applicant Attorney from Defendant Attorney dated September 9, 2019, Letter to Applicant Attorney from Defendant Attorney dated November 6, 2019, Letter to Applicant Attorney from Defendant Attorney dated November 20, 2020, and Letter to Applicant Attorney from Defendant Attorney dated May 7, 2021 into evidence. (*Id.*, pp. 3:18-4:8.)

Defendant's August 23, 2019 letter to applicant's attorney states in pertinent part:

Based on the Court's decision regarding your client's Application for benefits under Labor Code §132a, an Award is due to your client. At this time, I have no information as to what agreement for attorney fees you discussed with your client on any recovery for her 132a claim.

Please advise as to what percentage of applicant's Award should be sent to your office in attorney fees, if any.

(Ex D, Letter to Applicant Attorney from Defendant Attorney Dated August 23, 2019.)

Defendant's September 9, 2019 letter to applicant's attorney states in pertinent part:

As you are aware, I have requested you to provide me with the details of your fee agreement with applicant, regarding the 132a claim. I have made this request on multiple occasions and you have ignored this request.

Therefore, at this time, I have instructed my client to issue your client a check in the amount of \$6,000.00, withholding 40% of the \$10,000.00 due to your client from the 132a claim. This \$4,000.00 will be held in trust by my client, pending receipt of the details of your fee agreement. I do not anticipate that your attorney fees will be any higher than 40% in this case, based on the custom of the State of California and its regulations.

(Ex. E, Letter to Applicant Attorney from Defendant Attorney dated September 9, 2019.)

Defendant's November 6, 2019 letter to applicant's attorney states in pertinent part:

I still have not received information regarding your attorney fee agreement with your client regarding her Labor Code §132a claim. Therefore, my client will continue to hold in trust the remaining \$4,000.00 from the \$10,000.00 Labor Code §132a Award that your client received by Decision. \$6,000.00 has been sent to your client and upon receipt of the attorney fee agreement that you and your client made before you filed the Petition for Benefits under Labor Code §132a, I will then advise my client in regards to disbursement of the remaining \$4,000.00.

(Ex. F, Letter to Applicant Attorney from Defendant Attorney dated November 6, 2019.)

In the Report, the WCJ states:

On 5/16/2019, the Board issued their Opinion and Decision after Reconsideration and affirmed the Findings and Award issued on 7/18/2016. At some point thereafter, Defendant filed a Petition for Writ of Review, which was denied by the Fourth District Court of Appeal on 8/15/2019. The Court of Appeal then remanded the matter back to the Appeals Board to make a supplemental award of reasonable attorney fees to the attorney for respondent (Applicant), based upon the services rendered in connection with defendant's Petition for Writ of Review.

...

The matter finally commenced on the record after several continuances for various reasons on 11/23/2021. The Applicant was the only witness to testify and the matter was submitted on that date. Both parties offered additional documentary evidence which was admitted into the record.

...

The actual Petition for Reconsideration consists of 16 pages including Defendant's verification. The remainder of the 94 pages improperly attached to the Petition consist of a combination of Exhibits that were previously admitted into the evidentiary record, documents already contained within the Adjudication file and a number of documents which are neither a part of the Exhibits or the Adjudication file.

The documents that Petitioner attached which are either Exhibits in evidence or part of the Adjudication file are a violation of CCR Section 10945. With regard to the remaining documents, Defendant fails to assert any argument that these documents are newly discovered evidence and therefore the remaining 78 pages have been detached and discarded in accord with CCR Section 10945.

...

The Findings of Fact and Award dated 7/18/2016 became a final determination that Defendant violated Labor Code Section 132(a) on 8/15/2019 when Defendant's Petition for Writ of Review was denied by the Fourth District Court of Appeal. . . . In the instant case, the issue of whether or not Defendant violated Labor Code Section 132(a) is not at issue. What is before the court is whether Applicant is entitled to back wages based on the 7/18/2016 Award. Regarding this issue, the Appeals Board has continuing jurisdiction over all its orders, decisions and awards made and entered pursuant to Labor Code Section 5803. The issues presented on 11/23/2022 are not barred by Res Judicata and the WCJ continues to have jurisdiction over the 7/18/2016 Findings of Fact and Award when the parties are unable to agree on the terms of the actual Award itself and/or there is a deferral of the issues per the Findings of Fact and Award.

In the Opinion on Decision dated 7/18/2016 the WCJ found that Applicant's termination on 3/9/2010 was a violation of Labor Code Section 132(a).

Labor Code Section 132 (a) states that those employers who are found in violation of the section are "...guilty of a misdemeanor and the employees compensation shall be increased by one-half, but in no event more than ten thousand dollars (\$10,000.00), together with costs and expenses not in excess of two hundred fifty dollars (\$250.00). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits, caused by the acts of the employer."

...

At the initial trial on 5/11/2016, Applicant testified, that sometime in 2010 she was released to return to work by Dr. Kattar then looked for work but did not find any. (See Minutes of Hearing and Summary of Evidence dated 5/11/2016 page 3 lines 18 to 20) On cross-examination, the Applicant testified that she looked for work, applied for jobs after being released to return to work by Dr. Kattar but she was told there were no openings at the places she applied. (See Minutes of Hearing and Summary of Evidence dated 5/11/2016 page 4 lines 15 to 17)

Based on Applicant's testimony at the first trial, Defendant was placed on notice that Applicant had sustained lost wages as a result of her unlawful termination on March 9, 2010. The back wages awarded in the 2/10/2022 Findings of Fact and Award are supported by the entire record and not barred by Res Judicata. The trial on 11/23/2022 was conducted under the continuing jurisdiction of the WCJ over her previous Findings of Fact dated 7/18/2016.

...

After reviewing the entire record, the WCJ concurs that she erred in awarding Labor Code Section 5814 and Labor Code Section 5814.5 penalties in her 2/10/2022 Findings of Fact and Award. On 8/15/2019 the 7/18/2016 Findings of Fact and Award became final when the 4th District Court of Appeals denied the Petition for Writ of Review. . . . Defendant paid the attorney fees portion on 12/16/2019. The Findings of Fact and Award dated 7/18/2016 defers the issue of attorney fees with jurisdiction reserved. The Opinion on Decision further encourages the parties to adjust the attorney fees, which they in fact did.

. . . [T]he Petition for Reconsideration should be granted in part to remove the findings of penalties pursuant to Labor Code Section 5814 and 5814.5 arising from the payment of the 7/18/2016 Findings of Fact and Award.

...

Applicant is requesting back wages from 3/9/2010 to 7/18/2016 at the rate of \$700.00 per week. The record opened at the trial on 5/11/2016, Applicant credibly testified that she saw Dr. Kattar in 2010 and once he sent her back to work, she did look for work but she couldn't find any. (See Minutes of Hearing and Summary of Evidence date 5/11/2016 page 3 line 19 to 20) She then testified that between her first industrial surgery on 11/17/2009 and her

second surgery in September 2011 she was not offered light or modified work. (See Minutes of Hearing and Summary of Evidence date 5/11/2016 page 4 line 2 to 3) On cross examination she testified that at some point she was released to return to work by Dr. Kattar but she does not recall if it was in 2010 or not. (See Minutes of Hearing and Summary of Evidence date 5/11/2016 page 4 line 14 to 16)

Applicant testified on 11/23/2021 that she looked for jobs during the time she was receiving unemployment benefits. Further, Applicant testified that she did not look for work after her second surgery in September 2011. Finally, Applicant testified that she either applied for Social Security Disability benefits in 2014 or started receiving them in 2014. (See Minutes of Hearing and Summary of Evidence date 11/23/2021 page 5 lines 9 to 10 and lines 16 to 17 and 20 to 25) Exhibit 1 is the only evidence submitted concerning this period Applicant received unemployment benefits. Exhibit 1 consists of an EDD unemployment benefit Notice dated 12/2/2019, which indicates that Applicant received Unemployment benefits from EDD for the period 11/20/2010 to 7/23/2011. Applicant has also testified that at some point after she was terminated she received temporary disability benefits. Additionally, the parties entered into a Stipulation and Award /Order on 7/26/2011 wherein Defendant agreed to pick up temporary disability benefits going forward. There are no documents that were offered into evidence by either party that clarify the temporary disability periods paid.

...

The Applicant in in the instant case was a long time employee who started working in 1992 and was unlawfully terminated on 3/9/2010. Applicant testified that after she was unlawfully terminated that she sought employment during the period she received unemployment benefits. Exhibit 1 shows the period Applicant received unemployment benefits. Applicant also testified that at some point in or around 2014 that she removed herself from the labor market when she applied for Social Security Disability and commenced receiving benefits. Applicant's credible testimony was un rebutted at both trials.

Based on the Applicant's credible and un rebutted testimony and the entire record, Applicant was awarded back wages from 11/21/2010 to 7/23/2011 at the weekly rate of \$700.00, less credit for amounts paid by Defendant, EDD benefits paid and less 15% attorney fees, to be adjusted by the parties with jurisdiction reserved. These wages were awarded as clarification of benefits due to the Applicant under the prior Findings and Award dated 7/18/2016 under her continuing jurisdiction pursuant to Labor Code Section 5803. (Report, pp. 3-12.)

## **DISCUSSION**

We first address defendant's contention that the doctrine of res judicata bars adjudication

of the issue of back wages. Specifically, defendant argues that applicant is precluded from recovering back wages because her section 132a petition did not seek that remedy and because she did not frame the issue for trial of her section 132a claim. (Petition, p. 9:21-27.)

In this regard, we observe that *res judicata* precludes re-litigation of the same cause of action in a subsequent suit between the same parties while collateral estoppel precludes re-litigation of the same issue in a subsequent proceeding between the same parties. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Branson v. Sun-Diamond Growers of California* (1994) 24 Cal.App.4th 327.)

Here, the record shows that the parties raised the issue of applicant's "section 132a petition for trial; and, after hearing the parties' evidence and argument, the WCJ determined that defendant violated section 132, awarded her the benefits sought in section 132a petition, and deferred the issue of attorney's fees. (Minutes of Hearing and Summary of Evidence, May 11, 2016, p. 2:11-13; Findings of Fact and Award, July 18, 2016.) Defendant thereafter sought reconsideration of the WCJ's determination and we affirmed on the grounds that the evidence showed that applicant proved her *prima facie* section 132a claim and defendant failed to establish its business realities defense. (Opinion and Decision After Reconsideration, May 16, 2019, p. 9:19-22.) Our decision was subsequently upheld on appeal. (*St. John Knits v. Workers' Comp. Appeals Bd.*, 84 Cal.Comp.Cases 846 [writ den.; the Court of Appeals found no reasonable grounds to review a WCAB finding of section 132a discrimination based upon substantial evidence of defendant employer's subjection of industrially-injured employee to disadvantages not visited on other employees.]) After the conclusion of the appellate proceedings, the parties adjudicated the issue of attorney's fees at the trial and the issue of entitlement to back wages. (Report, pp. 3-4.)

It is thus clear that, as stated by the WCJ in the Report, the parties have previously litigated the issue of whether or not defendant violated section 132a, but not the issue of whether applicant is entitled to back wages. (Report, pp. 3, 6-7.) Accordingly, we conclude that the WCJ correctly determined that the issue of back wages is not barred by the doctrine of *res judicata* (or collateral estoppel).

We next address defendant's argument that adjudication of the issue of back wages violated its right of due process because applicant failed to identify the back wages remedy in her section 132a a petition and failed to frame the issue for initial trial herein, resulting in a failure of notice.



In this regard, we observe that Code of Civil Procedure section 452 requires that, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Cal. Code Civ. Proc. § 452.) Code of Civil Procedure section 576 provides that "[a]ny judge, at any time before or after commencement of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the amendment of any pleading or pretrial conference order." (Cal. Code Civ. Proc. § 576.)

More particularly, the workers' compensation system "was intended to afford a simple and nontechnical path to relief. (Italics added.)" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624] citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) "[I]t is an often-stated principle that the [Workers' Compensation] Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits. (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal.App.4th 485, 490 [67 Cal.Comp.Cases 1273].) Informality of pleading in proceedings before the Board is thus recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].)

Hence, in workers' compensation proceedings, it is settled law that (1) pleadings may be informal (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Martino v. Workers' Comp. Appeals*, *supra*, 103 Cal.App.4th 485, 491; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 151]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd. (Aprahamian)* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594-595 [40 Cal.Comp.Cases 784]; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207-210 [35 Cal.Comp.Cases 245]); (2) claims should be adjudicated based on substance rather than form (*Martino v. Workers' Comp. Appeals*, *supra*, 103 Cal.App.4th 485, 491; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera*, *supra*, 190 Cal.App.3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]); (3)

pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, at pp. 925-926 [72 Cal.Comp.Cases 778]); *Martino v. Workers' Comp. Appeals, supra*, 103 Cal.App.4th 485, 490; *Rubio v. Workers' Comp. Appeals Bd., supra*, 165 Cal.App.3d 196, 199-201; *Arahamian, supra*, 109 Cal.App.3d at pp.152-153; *Blanchard, supra*, 53 Cal.App.3d at pp. 594-595; *Beaida, supra*, 263 Cal.App.2d at pp. 208-209); and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction. (*Rivera, supra*, 190 Cal.App.3d at p. 1456; *Arahamian, supra*, 109 Cal.App.3d at pp. 152-153; *Blanchard, supra*, 53 Cal.App.3d at pp. 594-595; *Beaida, supra*, 263 Cal.App.2d at pp. 208-210).)

Consistent with these authorities, WCAB Rule 10517 provides that pleadings may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, former § 10492, now §10517.)

Here, defendant argues that applicant's section 132a petition failed to put it on notice that it could be liable for lost wages because it failed to identify the back wages remedy. However, as stated in the Report, section 132a explicitly authorizes the WCJ to impose certain statutory remedies, including "reimbursement for lost wages and work benefits . . . caused by the acts of the employer." (Report, p. 6.) Thus, inasmuch as the Workers' Compensation Act permits informal pleadings and applicant invoked the panoply of her statutory rights by filing her section 132a petition, we are unpersuaded that defendant lacked requisite notice of applicant's claim.

Defendant also argues that applicant failed to identify the back wages issue for trial in 2016, resulting in a separate failure of notice. However, as we explained, the initial trial of applicant's section 132a petition adjudicated the issue of whether defendant violated that statute, rendering undetermined issues subject to development of the record. (Report, p. 8.) In addition, applicant testified at the 2016 trial that she looked for work after her physician released her in 2010 but was unable to find any; and placed defendant on actual notice that it could be liable for lost wages. (See *Id.*) Therefore, we are unable to discern support in the record for defendant's contention and it lacked notice of applicant's back wages remedy or suffered prejudice as a result. Accordingly, we are unable to discern merit to defendant's contention that the WCJ adjudicated the issue of back wages in violation of the right of due process.

Turning to defendant's argument that the evidence fails to prove that applicant lost wages as a result of its conduct, we observe that the WCJ determined that applicant testified credibly as to her efforts to find employment following her medical release—and that her testimony was unrebutted. (Report, pp. 10-12.) We accord the WCJ's determination great weight because she had the opportunity to observe applicant's demeanor at trial and because the record lacks evidence of considerable substantiality that would warrant our rejection of her determination. (*Garza v. Worker's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Accordingly, we are unable to discern merit in defendant's contention that the evidence fails to prove that applicant lost wages.

Turning to defendant's argument that the evidence fails to establish that it unreasonably delayed payment of \$4,000.00 of the July 18, 2016 Award, we observe that section 5814 penalties may be imposed when "payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award," and that where defendant is liable to applicant for an increase of compensation under section 5814, it is separately liable to applicant's attorney under section 5814.5 for attorney's fees accrued while enforcing the award of attorney's fees. (§§ 5814(a), 5814.5.)

In addition, 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., *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 380 (Appeals Board en banc); *Sierra Pacific Industries v. Workers' Comp. Appeals Bd. (Lewis)* (1979) 44 Cal.Comp.Cases 573 (writ den.); *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd. (Chester)* (1971) 36 Cal.Comp.Cases 678 (writ den.).)

In this case, the record shows that the July 18, 2016 Findings of Fact and Award became final on August 15, 2019, when the 4th District Court of Appeals denied defendant's petition for writ of review. (Report, p. 9.) Thereafter, on August 23, 2019, defendant contacted applicant's attorney, requesting information as to applicant's attorney's fee agreement so that attorney's fees could be disbursed. (See Ex D, Letter to Applicant Attorney from Defendant Attorney dated August 23, 2019.) On September 9, 2019, defendant notified applicant's attorney that because his previous requests regarding the fee agreement had been ignored, a check would be issued to applicant in the amount of \$6,000.00, and the remaining \$4,000.00 would be held in trust, pending

receipt of the requested information. (Ex. E, Letter to Applicant Attorney from Defendant Attorney dated September 9, 2019.) On November 6, 2019, defendant sent applicant's attorney a reminder, advising again that the \$4,000.00 would be disbursed upon receipt of the information. (Ex. F, Letter to Applicant Attorney from Defendant Attorney dated November 6, 2019.) Defendant paid the outstanding attorney's fees on December 16, 2019. (Report, p. 9.)

Based upon this record, it is clear that defendant promptly sought the information it needed to issue the attorney's fees and advised applicant's attorney that the fees would be disbursed upon receipt. When applicant's attorney failed to provide the information, defendant advised that the \$4,000.00 would be held in trust until it could be disbursed based upon receipt of the requested information.

This record shows that, unless and until defendant could ascertain the portion of the \$4,000.00 attorney's fee award due to applicant's attorney and the portion due to applicant, defendant was unable to disburse the \$4,000.00 without foreclosing the possibility that it could be liable to either of them in the event that the disbursed amount failed to comply with the fee agreement. In the absence of this information, defendant was not required to speculate as to the portions due applicant and her attorney. Hence, we are unable to discern evidence that defendant unreasonably delayed payment of the \$4,000.00. Accordingly, we will amend the F&A to find that applicant is not entitled to section 5814 and section 5814.5 penalties.

Finally, we observe that defendant filed multiple attachments to the Petition consisting of materials not part of the record—and that each such filing constitutes a violation of WCAB Rule 10945. (Report, p. 5; Cal. Code Regs., tit. 8, § 10842, now § 10945 (eff. Jan. 1, 2020).) We therefore admonish defendant for repeatedly violating WCAB Rule 10945.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that the evidence fails to establish that defendant unreasonably delayed payment of \$4,000.00 of the July 18, 2016 award, applicant is not entitled to a section 5814 penalty, and applicant's attorney is entitled to a section 5814.5 penalty, and to award applicant as provided by the amended findings.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact and Award issued on February 10, 2022 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration, that the Findings of Fact and Award issued on February 10, 2020 is **AFFIRMED**, except that it is **AMENDED** as follows:

**FINDINGS OF FACT**

\* \* \*

5. The evidence fails to establish that defendant unreasonably delayed payment of \$4,000.00 of the July 18, 2016 award; and, therefore, applicant is not entitled to a penalty pursuant to Labor Code Section 5814.

6. The evidence fails to establish that applicant's attorney is entitled to \$1,200.00 in attorney fees pursuant to a Labor Code Section 5814.5 penalty for enforcement of the July 18, 2016 award.

\* \* \*

8. Applicant is entitled to attorney fees as follows: 15 percent of new money awarded for back wages and \$706.50 for Labor Code section 5710 fees for the deposition dated November 5, 2020, less credit for amounts paid, with jurisdiction reserved to the WCJ in the event of a dispute.

**AWARD**

**AWARD IS MADE** in favor of MARIA GARCIA against ST. JOHN KNITS;  
TRAVELERS PROPERTY AND CASUALTY COMPANY OF AMERICA, as follows:

- (a) Back wages as provided in Finding number 3.
- (b) Labor Code Section 5710 fees as provided in Finding number 7.
- (c) Attorney fees as provided in Finding number 8

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

**I CONCUR,**

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 2, 2022**

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

**MARIA GARCIA  
SAMUELSEN GONZALEZ VALENZUELA & BROWN  
WACHTELLAW**

**SRO/pc**

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