WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHARLES FORD, ***Applicant,*** **vs.** **LAWRENCE BERKELEY LABORATORY,** ***Defendant.***	**Case No. WCK 13904** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On July 29, 1996, the Board granted defendant's petition for reconsideration of a decision dated May 3, 1996, in which a workers' compensation referee (WCR) found (1) that applicant was entitled to a 10% penalty based on defendant's failure to pay further permanent disability advances after receipt of the summary disability rating, and (2) that defendant was liable for appli-cant's attorney's fee pursuant to Labor Code section 4064.

Because of the important legal issues presented, and in order to secure uniformity of decision, the Chairman of the Appeals Board, pursuant to majority vote of the Board, has reassigned this case to the Appeals Board as a whole for En Banc decision. Based upon review of the record and analysis of the applicable statutory provisions, the Board concludes that the WCR's imposition of a 10% penalty was correct, but that a worker's attorney's fee may only be assessed against his employer pursuant to Labor Code section 4064 where it is the employer who files the initial application for adjudication contesting the

formal medical evaluation from a qualified medical evaluator selected from a three-member panel.

STATEMENT OF THE CASE

On January 15, 1991, applicant, a 58 year old sheet metal worker, sustained an industrial injury when he twisted his back while pulling on a metal sheet. He received initial treatment in the emergency room at John Muir Hospital and then was referred to an orthopedist, Dr. George Tischenko, for follow-up treatment. Defendant employer, through its adjusting agent, provided medical treatment and paid temporary disability benefits through March 19, 1991, when applicant returned to work.

On July 10, 1992, Dr. Tischenko reported that applicant's condition was permanent and stationary. The doctor stated:

> "... He occasionally has some left leg calf tingling but does not have any permanent symptoms. He has rare back pain. He is now in a more sedentary position where he has minimal symptoms. The patient's neurological examination is unremarkable. ..."

Following Dr. Tischenko's report, applicant requested further examination by a qualified medical evaluator (QME). The physician applicant selected from a panel of three was Dr. Charles Barnes. At some point during this period, defendant advanced $4,235.00 in permanent disability indemnity. It is not clear from the record whether those advances were made before or after receipt of Dr. Barnes' report.

On March 30, 1993, Dr. Barnes submitted a report which stated:

> "The patient is permanent and stationary. Referring to the Guidelines for Work Capacity the patient fits into that category mid-way between E and F. His disability rating is a sum of loss of range of motion, neurological deficit and an established disc lesion."

Following Dr. Barnes' report, a summary disability rating was obtained based on that doctor's report. The rating, as corrected, was 55-3/4 percent. Defendant objected to both Barnes' report and the summary rating.

On July 12, 1993, defendant wrote to the Industrial Medical Council (IMC) requesting "an additional consultation with another QME physician specializing in orthopedics." The IMC apparently took no action on this request. Thereafter, defendant attempted to schedule a medical examination by another orthopedist, under purported authority of Labor Code section 4050.

On November 29, 1993, applicant, then unrepresented, filed an Application for Adjudication of Claim because of the disagreement regarding defendant's liability for permanent disability benefits. On December 13, 1993, defendant filed an answer to applicant's application, along with a Petition for Pre-Application Discovery Order requiring applicant to appear for medical evaluation by Dr. Robert Blasier.

On March 11, 1994, the case came on for hearing before WCR Sauban-Chapla. At that hearing, the WCR expressed the opinion that applicant had been forced to file an application because of defendant's refusal to pay permanent disability benefits based on the QME's report. She therefore "interpret[ed] applicant's filing of the application as being done constructively on the

part of the defendant." The WCR then went on to state that "while defendant's failure to continue to pay permanent disability advances may be in error in view of 4061(k), that is a question of penalty and I do not believe that it abrogates the rights [of defendant] under 4050 to an evaluation." Therefore, the WCR ordered applicant to appear for medical-legal evaluation by Dr. Blazier on April 22, 1994.

On March 31, 1994, applicant, represented for the first time by an attorney, filed a petition for reconsideration of the WCR's order or, alternatively, removal of the case to the Board. On May 31, 1994, the Board granted applicant's petition in order to study the legal issue involved. Thereafter, the Board filed a decision which concluded that Labor Code section 4050 was not intended to apply under the procedures set forth in Labor Code sections 4061 et seq. The Board decision left open the possibility that further evaluation might be proper under Labor Code section 5703.5(a).

On November 29, 1995, the Court of Appeal, First Appellate District, Division One, denied defendant's petition for review of the Board's decision. (See 60 Cal. Comp. Cases 1246.) The Court also denied applicant's request for appellate attorney's fees. However, in doing so, the Court cited Labor Code section 5814, which deals with the penalty for unreasonable delay or refusal of payment of compensation.

As of November 30, 1995, defendant resumed payment of permanent disability indemnity advances at a rate of $148.00 per week. However, no retroactive payments were made for the period between

the date when permanent disability advances were terminated, and November 30, 1995, when such payments resumed.

On January 4, 1996, applicant requested further hearing on issues including permanent disability, penalty and attorney's fee. On March 6, 1996, applicant filed a Petition for Enhanced Compen-sation seeking three 10% penalties on his permanent disability benefits. On March 28, 1996, defendant filed a petition for Board appointment of a new QME under Labor Code section 5703.5. In its petition, defendant alleged that the prior QME, Dr. Barnes, was no longer in practice and unavailable to perform a re-evaluation of applicant.

On April 29, 1996, the case came on for trial before the same WCR. Issues included permanent disability, applicant's request for penalties, and applicant's request for an award of attorney's fees payable by defendant pursuant to Labor Code section 4064. Several medical reports were received into evidence, along with testimony of applicant, and the matter was submitted for decision.

On May 3, 1996, the WCR filed a decision finding, among other things, (1) that applicant's injury caused permanent disability of 45-1/2 percent, (2) that applicant was entitled to a single 10% penalty based on defendant's failure to pay permanent disability advances after the summary rating issued on Dr. Barnes' report, and (3) that defendant was liable for applicant's attorney's fee pursuant to Labor Code section 4064.

On May 28, 1996, defendant filed a petition for reconsidera-tion of the WCR's decision. In that petition, defendant

contended (1) that the WCR's award of a 10% penalty was not justified, and (2) that the WCR had no authority to award attorney's fees against defendant under Labor Code section 4064 because the application for adjudication of claim had been filed by applicant, not by the employer. Initially, no verification was attached to defendant's petition. However, a verification dated May 28, 1996, was filed with the Board a few days thereafter.

On July 29, 1996, the Board granted defendant's petition for reconsideration in order to further study the facts and legal issues presented.

THE PENALTY ISSUE

At the time of applicant's injury, Labor Code section 4061 set forth detailed mandatory procedures for determining the extent of permanent disability and the need for continuing medical care. In the case of unrepresented workers, this procedure involved the worker's selection of a QME from a three-doctor panel assigned by the IMC. The chosen QME was required to perform a formal medical evaluation according to the procedures promulgated by the IMC. In addition, the QME was obligated to serve the formal medical evalu-ation on the Office of Benefit Determination who, in turn, was required to calculate the permanent disability rating and serve it on both the injured worker and the employer.

Following these provisions, section 4061(k) (now amended in substantially similar form as part of section 4061(l)) included a further statutory obligation:

> "If a formal medical evaluation from ... a qualified medical evaluator selected from a three-member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or file an application for adjudication of claim. ..."

Likewise, Labor Code section 4063 states:

> "If a formal medical evaluation from ... a qualified medical evaluator selected from a three-member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or file an application for adjudication of claim."

In this connection, Labor Code section 5814 states, in part:

> "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision or award shall be increased by 10 percent. ..."

Defendant in this case did not pay the compensation indicated by Dr. Barnes' report and the summary disability rating, nor did it file an application for adjudication of claim. Consequently, it did not comply with the requirements of sections 4061 and 4063. Defendant sought to obtain an additional medical evaluation which was not authorized under section 4061. The refusal to pay further permanent disability benefits pending applicant's acquiescence in another medical evaluation, ostensibly under another code section, was highly questionable. The Court of Appeal mentioned Labor Code section 5814 in its order denying defendant's petition for writ. Defendant's continued refusal to abide by sections 4061 and 4063 after appellate review had been denied was unreasonable conduct,

entitling applicant to a 10% increase in permanent disability benefits as provide in section 5814.

Upon review of the record, it is recognized that defendant had some original medical basis for disputing Dr. Barnes' opinion and the summary disability rating. However, it rejected the stat-utory procedure for properly resolving that dispute, i.e., filing an application for adjudication of claim. Had defendant filed an application initially, it could have presented Dr. Tischenko's reports, questioned applicant concerning Dr. Barnes' statements, and brought the permanent disability issue to a prompt and equitable decision. Instead, by failing to file an application, defendant was obliged under sections 4061 and 4063 to pay in accordance with Dr. Barnes' report and the disability rating. The refusal to pay applicant the benefits mandated was unreasonable, requiring that applicant's permanent disability award be increased pursuant to section 5814.

In this regard, the WCR observed as follows in her report on defendant's petition for reconsideration:

> "Ironically, if defendant had filed the application, they probably could have avoided the penalty. This is because the language of the statute states the way to avoid payment is to file an application. Having failed to comply with the statute, they should not now be heard to complain."

The Board agrees. Accordingly, the WCR's finding on the penalty issue will be affirmed.

THE ATTORNEY'S FEE ISSUE

The question presented in this section is whether Labor Code section 4064(b) allows payment of attorney's fees to be assessed

against the employer if the employer does not file an application for adjudication of claim.

Labor Code section 4064(b)[1] provides, in pertinent part, as follows:

> "Subject to Section 4906, if an employer files an application for adjudication and the employee is unrepresented at the time the application is filed, the employer shall be liable for any attorney's fees incurred by the employee in connection with the application for adjudication..." (Emphasis added.)

As noted previously, in this case it was the employee, not the employer, who filed the application for adjudication of claim commencing litigation. Nonetheless, the Dissent contends that the employer should have to pay for the employee's attorney's fees.

Although the Appeals Board is not bound by the statutory rules of evidence and procedure (see Labor Code section 5708), we feel a review of statutory law and judicial precedent would be helpful toward a resolution of this matter.

Code of Civil Procedure section 1858 states that "[i]n the construction of a statue..., the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted."

"To determine what a statute means, 'we first consult the

---

[1] At the time this case arose this code section was 4064(d). In 1993, this provision was moved to section 4064, subdivision (b).

words themselves, giving them their usual and ordinary meaning.' [Citation.]" (Smith v. Fair Employment and Housing Commission (1996) 12 Cal.4th 1143, 1155.) "It is a settled principle in California law that 'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.]" (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d. 339, 348.)

Thus, if a "fair reading of the statute reveals the language in question is unambiguous and leaves no legitimate doubt as to its...scope," it is "unnecessary to resort to extrinsic aids to ascertain the purpose behind the statute." (Wells Fargo Bank v. Bank of America (1995) 32 Cal.App.4th 424, 433-434.) (See also Russ v. Unemployment Ins. Appeals Bd. (1981) 125 Cal.App.3d 834, 845; Hernandez v. Imperial Irr. Dist. (1967) 248 Cal.App.2d 625, 626.)

"The Legislature is presumed to have meant what it said and the plain meaning of the language governs." (Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 227, 240, 58 Cal. Comp. Cases 323.)

In this case, the language of Labor Code section 4064(b) is clear. There is no ambiguity and no reason why the Board should not accept the plain meaning of the statute. The employer is liable for the employee's attorney's fees "if an employer files an application for adjudication." If the employer does not file the application, there is no legal authority for imposing liability on the employer under section 4064(b).

The Dissent argues that the attorney's fee provision of

section 4064 should be applied in circumstances other than that expressly provided in that section. The Dissent would create a judicial fiction called "constructive filing" to be applied when an employer either does not pay compensation that is due or does not file an application.

There is no need to create a judicial fiction in order to ensure that the employer promptly pays benefits to the injured worker. The Legislature has created statutory remedies which serve to punish the employer's failure to fulfill its obligation of prompt payment. For example, Labor Code section 5814 requires the entire permanent disability award to be increased by 10% when the employer unreasonably delays or refuses to pay benefits. In addition, Labor Code section 4650 provides that payments of temporary disability indemnity and permanent disability indemnity shall be automatically increased by 10% if payment is not made timely as required by that section. In light of these provisions, the employee and his or her attorney have adequate remedies should the employer refuse to take required action when he has a duty to do so.

The Dissent relies on an earlier panel decision in Ferguson v. Kemper Ins. Co., WCK 10961, (1994) 22 Cal. Workers' Comp. Rptr. 83. Initially, we note that because it is a panel decision, Ferguson has no binding authority. In that case, as here, the defendant received a compensable QME report and failed to either commence payment of compensation or file an application for adjudication. Thereafter, the injured worker filed an application himself and then retained an attorney, who contended

that his fee should be paid by the carrier. In its opinion in Ferguson, the panel, without citing precedential authority, stated that "[w]e agree with applicant's attorney that, under the circumstances of the present case, it should be found that the application was 'constructively' filed on defendant under Labor Code section 4064(d)."

In this present En Banc review of the issue, we reject the Ferguson rationale. We believe that the Ferguson interpretation is improper under either the specific provisions of section 4064 or the Board's general adjudicatory authority.

The earlier Workers' Compensation Appeals Board En Banc Decision of Peterson v. Employment Development Department, SAL 062739, (1995) 60 Cal. Comp. Cases 1206 supports the majority position in the instant case. In Peterson, the Board interpreted Labor Code section 4066, a statute similar to the one in the instant case. Section 4066 reads as follows:

> "When the employer files an application for adjudication of claim contesting the formal medical evaluation prepared by an agreed medical evaluator under this article, regardless of outcome, the workers' compensation judge or the appeals board shall assess the employee's attorney's fees against the employer, subject to Section 4906." (Emphasis added.)

In Peterson, the worker's attorney filed the initial application for adjudication after the employer had refused to either pay benefits based on the agreed medical examiner's (AME) report or file an application itself. The Board held that an attorney's fee may only be assessed pursuant to Labor Code

section 4066 where the employer files an application. Thereafter, the Court of Appeal denied the worker's petition for a writ of review of the Board's decision. (See 61 Cal. Comp. Cases 1081.) There is no reason for the Board or the courts to interpret Section 4064 in a manner not consistent with the interpretation given to Section 4066. The operative language in both cases is virtually identical. There is no basis to distinguish the two sections with respect to liability for attorney's fees.

Courts may not expand the application of statutory sanctions beyond what is expressly provided for by statute. (See, e.g., Stress Care, Inc. v. Workers' Comp. Appeals Bd. (1994) 26 Cal.App.4th 909, 917, 59 Cal. Comp. Cases 388, 393-394.) The section 4064 requirement that the employer pay the worker's attorney's fee if the employer files an initial application is in the nature of a civil penalty and should be applied according to its plain language.

The proposed concept of "constructive filing" is an unnecessary fiction. It is without support in the Labor Code itself or workers' compensation case authorities. Neither Ferguson (which was settled by a compromise and release) nor the other panel decisions cited by the Dissent have been upheld on appellate court review.

As the Dissent points out, the Margolin-Bill Greene Workers' Compensation Reform Act of 1989 produced significant changes in the workers' compensation system. One such change involves the employer's liability for attorney's fees. These changes are

reflected in Labor Code sections 4064 and 4066. Peterson, supra, dealt with an applicant who was represented by an attorney before the application was filed. The identical logic applies in interpreting Labor Code section 4064, i.e., where the applicant had not previously been represented. The Legislature, in drafting the 1989 legislation, used virtually identical terminology to create the employer's liability in both sections. This identical language cannot be viewed as an oversight. The legislature was consciously involved in drafting a fundamental revision of the law. It had the entire statutory scheme before it. There is no basis for assuming that the omission of a provision for attorney's fees when the employee filed an application, in either sections 4064 or 4066, was due to careless legislative drafting.

Nor is there any basis to distinguish Peterson, as the Concurring Opinion attempts to do, by stating that it would "make sense" to require the employer to pay fees to a previously unrepresented applicant. There is no logical or other basis to distinguish the two situations. What "makes sense" is a policy issue for the Legislature to determine, and they have so determined by the clear wording of the statute. In coming to its conclusion, the Board notes that the fee payable to the applicant's attorney, which is fixed by the Board, is done in the first instance by the WCR. In setting the fee, the WCR is bound by Labor Code section 4906(d) which states: "In establishing a reasonable attorney's fee, consideration shall be given to the responsibility assumed by the attorney, the care exercised in

representing the applicant, the time involved, and the results obtained." It is noteworthy that determining the stage in the proceedings at which the attorney commenced his representation of the applicant, e.g., whether before or after an application is filed, is not enumerated as a factor to be considered. The law recognizes that an injured worker may represent himself throughout the proceedings, or he may chose to be represented throughout, or may obtain representation at any point in the proceeding. Section 4064 contains nothing which runs counter to this generally recognized practice.

Our duty is to apply the law as enacted by the Legislature unless there is doubt as to the meaning of the statutory language, in which case an attempt to determine legislative intent may be appropriate. In the instant case, the statutory language is clear and unambiguous. No examination of legislative intent is necessary.

As Justice Oliver Wendell Holmes said, "One of the most sacred duties of a judge is not to read his personal convictions into the Constitution." The same is true of statutes.

For the foregoing reasons, as the decision after reconsideration of the Workers' Compensation Appeals Board En Banc,

IT IS ORDERED that the Findings and Award dated May 3, 1996, be, and it is hereby, AMENDED as follows:

Finding of Fact number 9 is amended to state as follows:

> "9. Applicant's attorney has rendered legal services in the reasonable value of $3,796 in connection with permanent disability.

> Applicant's attorney is entitled to a fee in connection with the award of 10% penalty in the amount of $380. These fees are not the liability of defendant, but rather are allowed as a lien against the permanent disability indemnity awarded."

AMENDED AWARD

AWARD IS MADE in favor of CHARLES FORD against LAWRENCE BERKELEY LABORATORY as follows:

(a) Permanent disability indemnity in accordance with Finding of Fact number 5, less attorney's fees in accordance with Finding of Fact number 9,

/////

/////

/////

/////

/////

/////

/////

(b) Future medical treatment in accordance with Finding of Fact number 6,

(c) Increased compensation (10% penalty) in accordance with Finding of Fact number 7.

In all other respects, the decision is affirmed and adopted.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Arlene N. Heath

/s/ Jane Wiegand

/s/ Robert N. Ruggles

I concur. (See concurring opinion.)

/s/ Diana Marshall

We concur and dissent. (See concurring and dissenting opinion.)

/s/ Colleen S. Casey

/s/ Richard P. Gannon

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

JANUARY 27, 1997

SERVICE BY MAIL ON SAID DATE ON ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD.

CONCURRING OPINION

Although I concur in the result reached by the majority, I think when discussing section 4064(d), the case for "legislative intent" that the dissent makes here is much stronger than in the Peterson case. When an injured worker is unrepresented, he does not pay a portion of his permanent disability benefits to an attorney as a fee. If, because of intransigence or unlawful delay of defendant, the injured worker must seek the assistance of an attorney, it would make sense to make the defendant

employer pay the attorney's fee. The Legislature may well have intended just such an additional penalty under these circumstances. But the language of the statute is clear on its face, and not subject to two possible interpretations which would allow for an analysis of legislative intent. (Cf. Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 231-232, 38 Cal. Comp. Cases 652, 657-658; Sand v. Superior Court (1983) 34 Cal.3d 567, 570; Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal.3d 736, 743.) Under these circumstances, I find myself unable to rewrite the legislation.

/s/ Diana Marshall

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

JANUARY 27, 1997

SERVICE BY MAIL ON SAID DATE ON ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD.

CONCURRING AND DISSENTING OPINION

For the reasons stated in the majority opinion, we concur in the finding that defendant employer unreasonably delayed payment of permanent disability indemnity following receipt of Dr. Barnes' QME report, entitling applicant to increased benefits pursuant to Labor Code section 5814. However, we respectfully dissent from the majority's conclusion that defendant employer should not be liable for payment of applicant's attorney's fee pursuant to Labor Code section 4064.

After consideration of the legislative purpose and intent of the Margolin-Bill Greene Workers' Compensation Reform Act of 1989, particularly those sections which set forth the procedures for determining medical issues, we believe that where an employer has refused to carry out his statutory duty to commence the payment of compensation or file an application for adjudication of claim, and it is necessary for the injured employee to file the application, section 4064 should be interpreted to hold that the application is "constructively" filed on the employer's behalf, thus making the employer liable for any reasonable attorney's fees incurred by the employee in connection with the application.

STATUTORY CONSTRUCTION

In workers' compensation law, as in other areas of the law, statutory construction involves consideration of both the language of the statute and the legislative intent. In Du Bois v. Workers' Comp. Appeals Bd. (1993) 5 Cal.4th 382, 387-388, 58 Cal. Comp. Cases 286, the state Supreme Court set forth the following general guidelines for statutory construction:

> "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.]
>
> "Additionally, however, we must consider the above quoted sentence in the context of the

> entire statute [citation] and the statutory scheme of which it is a part. ... '"When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." [Citations.] Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]' ..."

In this connection, "[t]he courts resist blind obedience to the putative 'plain meaning' of a statutory phrase where literal interpretation would defeat the Legislature's central objective." (Leslie Salt Co. v. San Francisco Bay Conservation etc Com. (1984) 153 Cal.App.3d 605, 614.) As the Supreme Court stated in Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735:

> "... [T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result should be followed. ..."

With these principles of statutory construction in mind, we

turn to the history and provisions of the 1989 Reform Act in order to ascertain the Legislature's intent.

LEGISLATIVE HISTORY

In the Spring of 1988, the Legislative Conference Committee considering SB 323 called on employers, carriers, labor and claims attorneys to begin negotiations on an omnibus bill to reform the entire workers' compensation system. In the months that followed, a series of negotiating sessions took place in which representa-tives of business, insurance and labor (the "Parties") ultimately reached a consensus for reform and improvement of the system. The result of these efforts was the "Proposed Workers' Compensation Improvement Act of 1989" which was completed and submitted to the Governor and legislative leadership on April 18, 1989. In their proposed legislation, the Parties recommended a number of changes to expedite the adjudication and benefit delivery process.

The outgrowth of their proposal was the Margolin-Bill Greene Workers' Compensation Reform Act of 1989. (Stats. 1989, Chapters 892 and 893.) The changes enacted were global in nature, covering substantive, procedural and structural aspects of every area of the workers' compensation system. Most of the consensus proposals were adopted by the Legislature, with some modifications.

A two-track system was established for evaluation of medical issues. One track was created for employees represented by an attorney. The other track was for unrepresented employees.

Labor Code section 4061 provides that where the employee is

represented by an attorney, the employee and employer shall seek agreement on a physician to prepare a formal medical evaluation of the employee's permanent impairment and limitations. There are provisions for separate medical evaluations if an agreed medical evaluator (AME) is not selected.

If the employee is not represented, the employee follows the procedures for unrepresented employees and selects a qualified medical evaluator (QME) from a three-member panel furnished by the Industrial Medical Council.

Except for the adaption to the two track system, Labor Code sections 4061(l) and 4063 are taken directly from the legislation originally proposed. Section 4063, like section 4061(l), provides:

> "If a formal medical evaluation from an agreed medical evaluator or a qualified medical evaluator selected from a three-member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or file an application for adjudication of claim." (Emphasis added)

It is apparent that the options specified in this legislation simply do not include inaction by the employer. On receipt of the AME/QME report, the employer must either provide benefits or file an application. However, where the employer exercises the latter option, he is obligated to pay reasonable attorney's fees incurred by the injured worker in connection with the application.

This additional provision, obviously designed to discourage

employer delay and unnecessary litigation, also was part of the package of proposed legislation submitted to the Legislature by the Parties. However, keeping with the two-track system adopted, separate sections were enacted for represented and unrepresented employees.

Where the employee is represented by an attorney, Labor Code section 4066 provides:

> "When the employer files an application for adjudication of claim contesting the formal medical evaluation prepared by an agreed medi-cal evaluator under this article, regardless of outcome, the workers' compensation judge or the appeals board shall assess the employee's attorney's fees against the employer, subject to Section 4906."

Where the employee is not represented by an attorney, Labor Code section 4064(b) (originally enacted as section 4064(*d*)) provides:

> "Subject to Section 4906, if an employer files an application for adjudication and the employee is unrepresented at the time the application is filed, the employer shall be liable for any attorney's fees incurred by the employee in connection with the application for adjudication."

These provisions, together with Labor Code sections 4061 and 4063, are part of an integrated legislative enactment intended to simplify the resolution of medical issues and expedite the benefit delivery process. By requiring the employer to pay the employee's attorney's fee if the employer contests the AME/QME's opinion, the incentive for the employer to provide benefits and avoid wasteful litigation is maintained.

WCAB DECISIONS INTERPRETING SECTIONS 4064 AND 4066

The first reported case in which the Board faced the issue of employer noncompliance with sections 4061 and 4063 was Ferguson v. Kemper Ins. Co. (1994) 22 Cal. Workers' Comp. Rptr. 83. In that case, the employee sustained an admitted industrial injury and was initially provided medical care and temporary disability benefits. When the treating physician opined that the employee's condition was permanent and stationary, the employee selected a panel QME who determined that the employee continued to be temporarily disabled and in need of further medical treatment. However, the employer refused to authorize continued benefits pursuant to the QME's report and advised the employee that an application needed to be filed. After waiting more than a month for the employer to either provide benefits or file an application, the employee filed an application for adjudication of claim. Among the issues raised was employer liability for the employee's attorney's fees.

In the Board's decision in Ferguson, the panel observed that Labor Code sections 4061 and 4063 impose a mandate on employers. On receipt of a panel QME report, the employer must either provide benefits or file an application. Those are the only two options. If the employer does neither, and the employee is forced to file the application, "it should be found that the application was 'constructively' filed on [employer's] behalf, so as to warrant an award of attorney's fees payable by the [employer] under Labor Code §4064(d)." (Ferguson, supra.)

The editor's note following the Reporter's summary of the

Ferguson decision, stated, in part:

> "... [T]he panel's rationale that the application was 'constructively' filed on the insurer's behalf finds support in Civil Code §3529, which provides that an act that ought to have been done is regarded as having been done in favor of him to whom performance is due."

The decision in Ferguson was widely accepted in the workers' compensation community and was followed in later decisions which held that while section 4064 provides for payment of attorney's fee when the employer files the application, there may be circumstances where an application filed by the worker is considered to have been "constructively" filed on the employer's behalf. (See, e.g., Reese v. City of Sacramento (1994) 22 Cal. Workers' Comp. Rptr. 232; Ricker v. Butte County (1995) 23 Cal. Workers' Comp. Rptr. 259.) In this connection, we would note that a Board panel decision reported in California Workers' Compensation Reporter is regarded as properly citable authority, particularly on issues of contemporaneous administrative construction of statutory language. (See Rodriguez v. Workers' Comp. Appeals Bd. (1994) 30 Cal.App.4th 1425, 1433 fn. 4, 59 Cal. Comp. Cases 857; State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. [Welcher] (1995) 37 Cal.App.4th 675, 683 fn. 4, 60 Cal. Comp. Cases 717.)

The only reported decision which might be considered contrary is Peterson v. Employment Development Department (1995) 60 Cal. Comp. Cases 1206. However, as the majority opinion in that case pointed out, at page 1208, Peterson dealt with distinguishable facts from Ferguson and Reese and it involved a different statute, section 4066. While we think that similar

statutory construction should be applicable in cases involving section 4066, we believe that there are additional, even more compelling reasons why the doctrine of "constructive" filing should be applied in cases where the injured worker is seeking attorney's fees from the employer under section 4064.

FULFILLING THE LEGISLATIVE PURPOSE OF SECTION 4064

As the majority herein have stated in their discussion of the penalty issue, Labor Code sections 4061 and 4063 provide detailed mandatory procedures for determining the extent of permanent disability and the need for continuing medical care. Section 4064 is an essential instrument for giving effect to those procedures.

The object of the workers' compensation law is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State." (Calif. Const., Art. XIV, Sec. 4.) One premise of the 1989 reform legislation is that in the great majority of cases injured workers should be able to have their compensation benefits determined and provided without delay, without litigation and without the expense of obtaining an attorney.

The legislative purpose of section 4064 is to insure that if the employer chooses not to provide the benefits determined, thus forcing the issue into litigation and requiring the injured worker to go out and hire an attorney, the worker will at least not have his or her benefits reduced to pay the attorney's fee.

(Cf. Labor Code section 4903(a).) That is why the statute mandates that "the employer shall be liable for any attorney's fees incurred by the employee in connection with the application for adjudication."

The concurring opinion concedes that "it would make sense to make the defendant employer pay the attorney's fee," and that the "Legislature may well have intended just such an additional penalty under these circumstances." However, the concurring member does not believe that section 4064 is open to such an interpretation because it refers only to cases where the application is filed by the employer.

We would respectfully submit that the Legislature correctly presumed that that was the only reference required, because if the employer follows the procedure mandated by sections 4061 and 4063, there is no need to refer to applications filed by the employee. In interpreting and applying section 4064, this Board, like the Legislature, must proceed as if the employer has followed the law. If it becomes necessary for the injured employee to perform the employer's duty, then the employee's action should be deemed to be the "constructive" action of the employer for purposes of the statute.

THE EXISTENCE OF ADDITIONAL REMEDIES

In their opinion, the majority state that Labor Code sections 5814 and 4650 are existing statutory remedies which would serve to punish any employer failure to obey sections 4061(l) and 4063, and that, in light of those provisions, the employee "ha[s] adequate remedies should the employer refuse to

take required action when he has a duty to do so." However, both sections have limitations, and neither section precludes an additional award of attorney's fees under section 4064 to promote the prompt resolution of claims and deter unnecessary litigation.

One limitation of section 5814 is that the injured worker must litigate and prove that benefits were "unreasonably" delayed or refused in order to receive any increased award. In Peterson, supra, no section 5814 penalty was awarded, even though benefits to the injured worker were delayed for more than a year. Further, the penalty award in section 5814 is limited to 10 percent of the class of benefits delayed. In a system where attorney's fees are often 12 percent or more of the benefits obtained, it is cheaper, under the majority view, for an employer who wishes to contest the QME's opinion to delay benefits and take the penalty, rather than file an application as sections 4061(l) and 4063 require him to do.

Similarly, under section 4650, it is only "the amount of the late payment" that is increased by 10 percent. This again, under the majority position, would often make it cheaper for an employer to disregard sections 4061(l) and 4063, rather than obey them. Liability under section 4650 clearly was not a deterrent to delay of benefits in the Ferguson and Peterson cases.

Furthermore, there is nothing in the Labor Code which limits the injured worker's remedies for employer delay to sections 5814 and 4650. If anything, our application of section 4064 harmonizes with the legislative purpose of sections 5814 and 4650. In Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal.4th

1213, 1227, 58 Cal. Comp. Cases 172, the Supreme Court discussed the objective of the 1989 reform legislation in connection with those sections:

> "By shortening time limits for compensation payments, expediting legal proceedings, and adding new penalties for delay in benefit payments, the Legislature has indicated its continuing concern with the problem of delay or refusal by employers to timely pay compensation benefits to injured employees. The new section 4650 penalty does not duplicate or supesede the section 5814 penalty. ..." (Emphasis added.)

Concerning what are considered "adequate" remedies for the injured worker, the court in Ferguson v. Workers' Comp. Appeals Bd. (1995) 33 Cal.App.4th 1613, 1622, 60 Cal. Comp. Cases 275, observed as follows in discussing another (50 percent) penalty provision:

> "Because conventional workers' compensation benefits do not fully compensate an employee for his or her injuries and other detriment, the increase allowed under section 4553 may only provide full or more nearly full compensation than would be available in the absence of the employer's serious and willful misconduct. [Citations.]"

Further, in Rhiner, supra, at page 1226, the Supreme Court stated:

> "... [A]n unreasonable delay or refusal in payment that is monetarily of little consequence to an employer or carrier may be disastrous to an injured worker struggling to obtain medical treatment and to pay basic household expenses. ..."

Permitting constructive filing under section 4064 limits

such calamities and helps to keep the injured worker more nearly whole.

For these reasons, we would affirm the WCR's decision.

/s/ Colleen S. Casey

/s/ Richard P. Gannon

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
JANUARY 27, 1997

SERVICE BY MAIL ON SAID DATE ON ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD.