WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LESTER HERSHMAN, ***Applicant,*** **vs.** **JAMES EISENBERG MEDICAL GROUP; CALIFORNIA COMPENSATION INSURANCE COMPANY, In Liquidation; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; and KEMPER EMPLOYERS CLAIMS SERVICE (Servicing Facility)** ***Defendants.***	**Case No. PAS 0023953** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On October 29, 2001, the Board granted reconsideration of the Interim Findings and Award issued by a workers' compensation administrative law judge ("WCJ") on August 7, 2001. In that decision, the WCJ concluded in substance that the California Insurance Guarantee Association ("CIGA") could be liable for Labor Code section 5814 penalties resulting from the pre-liquidation unreasonable delays in paying benefits by the insolvent insurance carrier, California Compensation Insurance Company ("Cal Comp"), i.e., that section 5814 penalties are "covered claims" under Insurance Code section 1063.1 et seq.. The WCJ, however, did not determine CIGA's "precise liability;" rather, she stated she would be "requesting further information and evidence with regard to the matters of [the] reasonableness and/or unreasonableness of the delays and/or refusals."

In its petition for reconsideration (which, alternatively, was also a petition for removal), CIGA contended: (1) that, because Insurance Code section 1063.1(c)(8) excludes "punitive or exemplary damages" from the definition of "covered claims," it is not liable for section 5814 penalties that are awarded against an insolvent insurer, after its liquidation, based on the insurer's

pre-liquidation unreasonable delays in paying benefits; and (2) that, based on various public policy arguments, it is not liable for such section 5814 penalties.

Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an en banc decision. (Lab. Code, §115.)[1] Based on our review of the relevant statutory and case law, we conclude that Labor Code section 5814 penalties imposed based on an insolvent insurer's pre-liquidation unreasonable delays in paying benefits are "covered claims" within the meaning of Insurance Code section 1063.1 et seq., and that CIGA's public policy arguments do not absolve it from liability for such penalties. Accordingly, we will affirm the WCJ's August 7, 2001 decision and remand the matter to her for further proceedings on the issue of what penalties, if any, should actually be awarded.[2]

I. BACKGROUND

The essential facts are not in dispute.

Applicant, Lester Hershman, sustained an industrial injury to various body parts on June 18, 1993, while employed as a physician by the James Eisenberg Medical Group ("employer"). At the time of applicant's injury, Cal Comp insured the employer.

On December 17, 1998, the WCJ issued a Findings and Award determining that applicant's injury caused temporary disability from August 2, 1993 through June 3, 1994, that it caused permanent total disability (100%), and that applicant was entitled to recover on various medical expenses. Additionally, the WCJ found that Cal Comp had unreasonably delayed

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[1] The Board's en banc decisions are binding precedent on all Board panels and WCJs. (*Gee v. Workers' Compensation Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

[2] We recognize that, on evidentiary grounds, the WCJ has not yet actually found CIGA to be liable for any section 5814 penalties. Nevertheless, by determining that any penalties ultimately awarded will constitute "covered claims" for which CIGA is liable, the WCJ made a threshold finding that is subject to a petition for reconsideration. (E.g., *Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1073-1081 [65 Cal.Comp.Cases 650, 653-660]; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 503 [54 Cal.Comp.Cases 160, 162]; *Kosowski v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632, 636 [50 Cal.Comp.Cases 427, 429]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 532-535 [45 Cal.Comp.Cases 410, 411-414].) At a minimum, the issue is an appropriate one for removal. (Lab. Code, §5310; Cal. Code Regs., tit. 8, §10843.)

payment of both temporary disability indemnity and permanent disability indemnity and she awarded 10-percent penalties against both species of benefits under section 5814.

Thereafter, Cal Comp sought both reconsideration and appellate review, but its petitions were denied.

Subsequently, applicant raised additional penalty claims under section 5814 against Cal Comp for its alleged failure to timely and properly pay the December 17, 1998 award.

On September 26, 2000, prior to any trial on applicant's new penalty claims against Cal Comp, the Superior Court found Cal Comp to be insolvent and directed the Insurance Commissioner to liquidate Cal Comp and to wind up its business. At this time, CIGA began defending against applicant's claims (Ins. Code, §1063.2(b)) and became obligated to pay Cal Comp's "covered claims." (See, Ins. Code, §1063.1 et seq.; *Carver v. Workers' Comp. Appeals Bd*. (1990) 217 Cal.App.3d 1539, 1543 [55 Cal.Comp.Cases 36, 38].)

On February 21, 2001, a trial on applicant's new penalty claims took place. Prior to trial, CIGA filed a brief contending that it has no liability for section 5814 penalties relating to the pre-liquidation unreasonable delays of an insolvent carrier, as well as raising other defenses.

On August 7, 2001, the WCJ issued the Interim Findings and Award in question here.

II. DISCUSSION

CIGA's fundamental statutory mandate is that it "shall pay and discharge [the] covered claims" of insolvent insurers. (Ins. Code, §1063.2(a).)

Insurance Code section 1063.1(c)(1) sets forth the general definition of "covered claims," which definition is then qualified and limited by the specific statutory exclusions to "covered claims" set forth in sections 1063.1(c)(3) through (c)(12) and 1063.2. (*American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 920-921; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Garcia*) (1997) 60 Cal.App.4th 548, 557 [62 Cal.Comp.Cases 1661, 1667]; *CIGA v. Workers' Comp. Appeals Bd.* (*Jenkins*) (1992) 10 Cal.App.4th 988, 995 [57 Cal.Comp.Cases 660, 664]; *Interstate Fire & Casualty Co. v. CIGA* (1981) 125 Cal.App.3d 904, 908.)

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A. Labor Code Section 5814 Penalties Fall Within The Insurance Code Section 1063.1(c)(1) General Definition Of "Covered Claims."

We conclude that Labor Code section 5814 penalties, which are imposed based on an insolvent insurance carrier's unreasonable failure to pay (or unreasonable delay in paying) its workers' compensation obligations before the appointment of a liquidator, fall within the general definition of "covered claims."

In relevant part, Insurance Code section 1063.1(c)(1) states:

> " 'Covered claims' means the obligations of an insolvent insurer ... (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer … [and] (vi) in the case of a policy of workers' compensation insurance, *to provide workers' compensation benefits under the workers' compensation law of this state* ... " (Emphasis added.)[3]

The phrase "workers' compensation benefits under the workers' compensation law of this state" is broad enough to include penalties under section 5814. (*CIGA v. Workers' Comp. Appeals Bd*. (*Harris*) (2002) 67 Cal.Comp.Cases 171, 172 (writ den.).) Labor Code section 3207 defines the term "compensation" to include "every benefit or payment conferred by Division 4 [of the Labor Code] upon an injured employee" (Lab. Code, §3207) and, of course, section 5814 is within Division 4. Moreover, although informally denominated as a "penalty" statute, the ten-percent increase under section 5814 actually constitutes an increase in the "compensation" due to an injured employee. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 396 [58 Cal.Comp.Cases 286, 297] ("The 10 percent increase [under section 5814] 'has been

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[3] Section 1063.1(c)(1) sets forth other elements of a "covered claim," but CIGA does not contend these elements are absent here.

characterized as an increase in compensation' ").)[4]

Having concluded that section 5814 penalties are "compensation" that, therefore, fall within the general definition of "covered claims" (Ins. Code, §1063.1(c)(1)), we now consider whether one of the statutory exclusions to the definition of "covered claims" is applicable to section 5814 penalties.

B. Labor Code Section 5814 Penalties Do Not Fall Within The Insurance Code Section 1063.1(c)(8) Exclusion For "Punitive Or Exemplary Damages."

The only statutory exclusion to "covered claims" that CIGA submits is applicable to Labor Code section 5814 penalties is Insurance Code section 1063.1(c)(8). That section provides that " 'covered claims' does not include any amount awarded as punitive or exemplary damages." (Ins. Code, §1063.1(c)(8).)

In *Carver*, s*upra*, 217 Cal.App.3d 1539 [55 Cal.Comp.Cases 36], the Court of Appeal specifically addressed the question of whether section 5814 penalties constitute "punitive or exemplary damages" within the meaning of section 1063.1(c)(8). The Court concluded that "the Labor Code section 5814 increase in compensation cannot be properly characterized as punitive damages." (*Carver*, *supra*, 217 Cal.App.3d at p.1549 [55 Cal.Comp.Cases at pp. 42-43].) In so concluding, the Court cited to *State Department of Corrections v. Workmen's Comp. Appeals Bd*. (*Jensen*) (1971) 5 Cal.3d 885 [36 Cal.Comp.Cases 638], in which the Supreme Court held that the 50-percent "penalty" for serious and willful misconduct of the employer under Labor Code

[4] See also, *State of Cal. v. Workers' Comp. Appeals Bd*. (*Ellison*) (1996) 44 Cal.App.4th 128, 140 [61 Cal.Comp.Cases 325, 334]; *Carver*, *supra*, 217 Cal.App.3d at pp. 1547-1548 [55 Cal.Comp.Cases at p. 41] ("The 10 percent increase imposed by ... section 5814 has been characterized as an increase in the compensation awarded to the injured worker. [Citation omitted.] This characterization seems appropriate in light of the definition of 'compensation' in ... section 3207 as 'every benefit or payment conferred by Division 4 upon an injured employee ... .' [Citation omitted.] Section 5814 is, itself, a benefit located within division 4 of the Labor Code ..."); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (*Brown*) (1982) 130 Cal.App.3d 933, 941 [47 Cal.Comp.Cases 358, 362] ("[E]very payment conferred by division 4 is to be considered compensation. Section 5814 falls in division 4, and the penalty it authorizes must be considered compensation."); *Anderson v. Workers' Comp. Appeals Bd*. (1981) 116 Cal.App.3d 954, 960 [46 Cal.Comp.Cases 342, 346] ("[A] section 5814 penalty is properly characterized as part and parcel of the original compensation awarded. It is an increase in compensation awarded, rather than a separate type of benefit.").)

section 4553 is "increased compensation" and not punitive damages. (*Carver*, *supra*, 217 Cal.App.3d at p. 1549 [55 Cal.Comp.Cases at pp. 42-43].)

CIGA correctly argues that *Carver*'s discussion of the "punitive damages" exclusion of section 1063.1(c)(8) was dictum, because this exclusion became effective after the employee's date of injury in *Carver*. (*Carver*, *supra*, 217 Cal.App.3d pp. 1548-1549 [55 Cal.Comp.Cases at pp. 42-43].)

Nevertheless, the fact that a Court's reasoning is dictum does not mean it is wrong and should not be followed. To the contrary, although dictum is not controlling precedent, it may be considered persuasive precedent, particularly where, as here, the dictum is amply supported by the reasoning of the opinion and by other precedent. (9 Witkin, *Cal. Procedure* (4th ed. 1997) Appeal, §947, pp. 989-991.) Accordingly, since *Carver*, the Board has repeatedly held that section 5814 penalties are *not* "punitive or exemplary damages" under section 1063.1(c)(8). (E.g., *CIGA v. Workers' Comp. Appeals Bd*. (*Novak*) (2002) 67 Cal.Comp.Cases 315, 317 (writ den.), review den. February 4, 2002; *Harris*, *supra*, 67 Cal.Comp.Cases at pp. 173-174.)

There are numerous cases that, although they do not *directly* address the section 1063.1(c)(8) issue, fully support the conclusions of *Carver*, *Novak*, and *Harris* that section 5814 penalties are not "punitive or exemplary damages" or, in fact, damages at all.

First, as discussed above (see pp. 4-5 & fn. 4, *supra*), it is well settled that a penalty under section 5814 constitutes increased "compensation" under section 3207, i.e., a section 5814 penalty is not a separate class or category of benefit, different from the underlying compensation to which it applies, but is instead "part and parcel" of the compensation to which it attaches.

Second, Labor Code section 3209 expressly states that " '[d]amages' means the recovery allowed in an action at law *as contrasted with compensation*." (Lab. Code, §3209 (emphasis added).) Therefore, section 5814 penalties cannot constitute "damages," punitive or otherwise, because the Board can only award "compensation," not damages. (*La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 35-36 [59 Cal.Comp.Cases 1002, 1006-1007] (distinguishing between "compensation" and "damages," noting that "damages" refers to a recovery allowed in a civil action at law, and stating that "the [WCAB] cannot award

damages").)[5]

Finally, one characteristic of punitive or exemplary damages is that they generally are not specifically limited in amount. (6 Witkin, *Summary of Cal. Law* (9th ed. 1988) Torts, §§1327, 1328, 1373, 1374, pp. 785, 786, 839-842.) Section 5814 penalties, however, are limited to 10-percent of the particular specie of benefit delayed. (*Gallamore v. Workers' Comp. Appeals Bd*. (1979) 23 Cal.3d 815, 824, 826, 827 [44 Cal.Comp.Cases 321, 326, 328, 329].)

We recognize that in *DuBois*, *supra*, 5 Cal.4th 382 [58 Cal.Comp.Cases 286], the Supreme Court cited to Government Code section 818, which precludes the imposition of "punitive damages" against a public entity. The Supreme Court then stated that "[i]n light of the partially penal nature of section 5814, we believe that application of the statutory penalty provision to the UEF[6] is not permitted ... ." (*DuBois*, *supra*, 5 Cal.4th at p. 398 [58 Cal.Comp.Cases at p. 299].)

In our view, however, this language of *DuBois* does not compel the conclusion that section 5814 penalties are "punitive damages."

First, the Court in *DuBois* did not expressly state that section 5814 penalties are "damages" (punitive or not). Indeed, as noted in *Ellison*, *supra*, 44 Cal.App.4th at pp.143-145 [61 Cal.Comp.Cases at pp. 337-338], any inference that *DuBois* intended to classify section 5814 penalties as "damages" would be inconsistent with: (1) the Supreme Court's statement elsewhere in *DuBois* that the section 5814 penalty is an "increase in *compensation*" to the injured employee (*DuBois*, *supra*, 5 Cal.4th at p. 396 (emphasis added) [58 Cal.Comp.Cases at p. 297 (emphasis added)]; and (2) the Supreme Court's subsequent statement in *La Jolla Beach and Tennis Club, supra,* that the WCAB cannot award "damages." (*La Jolla Beach and Tennis Club, supra,* 9 Cal.4th at pp. 35-36 [59 Cal.Comp.Cases at pp. 106-1007].)[7]

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[5] See also, *Jensen*, *supra*, 5 Cal.3d 885 [36 Cal.Comp.Cases 638]; *E. Clemens Horst Co. v. Industrial Acc. Com*. (*Hamilton*) (1920) 184 Cal. 180 [7 IAC 180]; *Ellison, supra*, 44 Cal.App.4th at pp.142-145 [61 Cal.Comp.Cases at pp. 337-338]; *Ferguson v. Workers' Comp. Appeals Bd*. (1995) 33 Cal.App.4th 1613, 1621-1625 [60 Cal.Comp.Cases 275, 277-283]; *Leung v. Chinese Six Companies* (1992) 2 Cal.App.4th 801, 806-807 [57 Cal.Comp.Cases 33, 40-41].)

[6] That is, the Uninsured Employers Fund of the State of California, which is a public entity. (Lab. Code, §3716 et. seq..)

[7] See also, our discussion at pp. 6-7 & fn. 5, *supra*.

Second, Government Code section 818 is part of the California Tort Claims Act (Govt. Code, §810 et seq.), which has no application to workers' compensation claims before the Board. Indeed, Government Code section 814.2 states, "[n]othing in this part shall be construed to impliedly repeal any provision of Division 4 … of the Labor Code" and the Legislative Committee Comments to section 814.2 recite, "[t]his section makes clear that the statute relating to the liability of public entities … has *no effect on rights under the Workmen's Compensation Act*." (Emphasis added; see also, *Jensen*, *supra*, 5 Cal.3d at p. 891 [36 Cal.Comp.Cases at p. 643].) Accordingly, in *Jensen*, the Supreme Court stated:

> "Sections 814.2 and 818 of the Government Code would be irreconcilable if we were to interpret the additional award for serious and willful misconduct [under Labor Code section 4553] as punitive in nature. Our conclusion that such an award is merely more adequate compensation rather than punishment avoids that result." (*Jensen*, *supra*, 5 Cal.3d at p. 891 [36 Cal.Comp.Cases at p. 643].)

If Government Code section 818 is inapplicable to penalties under Labor Code section 4553 (which increases *all* elements of the employee's compensation by *50-percent*), then surely Government Code section 818 is inapplicable to penalties under Labor Code section 5814 (which increases the employee's compensation only for the particular specie of benefit delayed and only by 10-percent). (See, *Ellison, supra*, 44 Cal.App.4th at pp.143-145 [61 Cal.Comp.Cases at pp. 336-339].)[8]

C. In The Absence Of An Express Statutory Provision, CIGA's Public Policy Arguments Cannot Relieve It From Liability For Labor Code Section 5814 Penalties.

CIGA's remaining arguments on reconsideration are ones of public policy. For the following reasons, we reject these public policy arguments.

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[8] Also, if section 5814 penalties were construed as "punitive damages" that could not be allowed against a public entity under Government Code section 818, then this would belie innumerable penalty awards made against various public entities, both before and after *DuBois*, that have been approved by the appellate courts.

In any event, although CIGA is a statutorily created entity, it is not a "public" entity within the meaning of Government Code section 818. (Govt. Code, §811.2.)

CIGA points out that there are two entities that provide workers' compensation benefits where an employer has not adequately secured its compensation obligations, i.e., the Uninsured Employer's Fund ("UEF") and the Self-Insurers' Security Fund ("SISF"). CIGA further points out that these two entities are "statutorily exonerated" from paying section 5814 penalties. Specifically, Labor Code section 3716.2 provides that "[t]he Uninsured Employer's Fund shall not be liable for any penalties … ." Similarly, Labor Code section 3743(b) provides that SISF "shall not be liable for the payment of any penalties assessed for any act or omission on the part of any person other than the fund, including, but not limited to, the penalties provided in section ... 5814 … .") CIGA argues that it is an analogous entity to UEF and SISF and, therefore, it is "entitled to the same protection against ... penalties."

There is a fundamental flaw in CIGA's argument, however. As recognized in *Carver*, "CIGA, as a creature of statute, is bound to pay all covered claims in the absence of a statutory exclusion" and "when the Legislature has intended to exclude statutory penalties from coverage by insurance funds, it has expressly done so … ." (*Carver, supra*, 217 Cal.App.3d at p. 1548 & fn. 8 [55 Cal.Comp.Cases at pp. 41-42 & fn. 8].) Although the Legislature *has* expressly exempted UEF and SISF from section 5814 penalties (Lab. Code, §§3716.2, 3743(b); *DuBois, supra*, 5 Cal.4th at pp. 391–395 [58 Cal.Comp.Cases at pp. 292-295]; *Carver, supra*, 217 Cal.App.3d at p. 1548, fn. 8 [55 Cal.Comp.Cases at pp. 41-42, fn. 8]), the Legislature has *not* made any express statutory provision exempting CIGA from liability for such penalties. (*Novak, supra*, 67 Cal.Comp.Cases at p. 317; *Harris, supra*, 67 Cal.Comp.Cases at p. 174.) Thus, CIGA is essentially in the same posture that UEF was before the adoption of section 3716.2, when UEF *was* liable for section 5814 penalties. (Cf., *Flores v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 171 [39 Cal.Comp.Cases 289] (finding UEF liable for the 10-percent penalty imposed based on an employer's willful failure to secure its workers' compensation liability); *Carver, supra*, 217 Cal.App.3d at p. 1548, fn. 8 [55 Cal.Comp.Cases at pp. 41-42, fn. 8].) Accordingly, if

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CIGA is to have any relief, it must obtain it from the Legislature.[9]

CIGA also cites to its limited ability to generate funds to pay "covered claims" (Ins. Code, § 1063.5) and it alleges that, in the face of the recent wave of insolvencies of workers' compensation insurance carriers, "[t]he funds available to [it] are being consumed at an incredible rate." Thus, CIGA is implicitly arguing it should be insulated from liability for section 5814 penalties in order to conserve its funds, thereby enabling it to continue its purpose of providing a limited form of protection to workers' compensation claimants.

Yet, the impact that section 5814 penalties would have on CIGA's "limited resources" was expressly considered in *Carver*. (217 Cal.App.3d at pp. 1549-1550 [55 Cal.Comp.Cases at p. 43].) The Court, however, rejected this "limited resources" argument, stating that such a "public policy justification fails in the absence of any supporting legislation or purpose." (*Carver, supra*, 217 Cal.App.3d at p. 1550 [55 Cal.Comp.Cases at p. 44]; *Harris, supra*, 67 Cal.Comp.Cases at p. 174.)[10]

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[9] The mere fact that CIGA is similar to UEF and SISF does not mean that CIGA should be judicially immunized from section 5814 penalties. There are undoubtedly many instances where the Legislature has specifically excluded certain types of claims from the definition of "covered claims" and where reasonable arguments can be made that analogous types of claims should therefore also be deemed excluded. Nevertheless, the Courts refused to extend any "covered claims" exclusions beyond the specific claims expressly mentioned by statute. (E.g., *County of Orange v. FST Sand & Gravel, Inc*. (1998) 63 Cal.App.4th 353 (concluding that although an insolvent insurer's obligations to "any state or to the federal government" are excluded under section 1063.1(c)(4), obligations to local governmental bodies are not excluded).)

[10] See also, *County of Orange supra,* 63 Cal.App.4th 353. There, CIGA similarly argued "that the Legislature intended, in order to ration CIGA's limited resources, to exclude *all* government entities from making claims upon it," even though the key language from section 1063.1(c)(4) provided only that " '[c]overed claims' shall not include ... any obligations to any *state* or to the *federal government*." (63 Cal.App.4th at p. 355 (emphasis added.) The Court, however, rejected CIGA's argument. (63 Cal.App.4th at pp. 356-361.) In particular, the Court stated:

> "While CIGA offers a *reason* the Legislature *might* want to restrict covered claims to all levels of government (i.e., to save its limited resources), it offers no *explanation* as to why the Legislature should suddenly discontinue its practice of assuming that local governmental bodies are not necessarily subsumed in the word *state.* If, for example, the Legislature had really wanted to adopt a policy that CIGA had no obligation to pay any entity even remotely resembling a government it could have … at the very least, used a phrase like "no government entity." (63 Cal.App.4th at p. 359 (emphasis in original).)

Moreover, before the enactment of Labor Code section 3716.2, UEF similarly argued "that, as a matter of policy, the limited money available to [it] should be reserved for the payment of basic compensation awards rather than statutory 'penalties.' " (*Flores, supra*, 11 Cal.3d at p. 177 [39 Cal.Comp.Cases at p. 293].) The Supreme Court rejected this argument, stating:

> "[O]ur response must be simply that that is not what the present statutory provisions dictate. As A. P. Herbert so unforgettably quipped: 'If Parliament does not mean what it says it must say so.'" (*Flores, supra*, 11 Cal.3d at p. 177 [39 Cal.Comp.Cases at p. 293].)[11]

Therefore, again, CIGA must look to the Legislature.

CIGA's remaining public policy arguments are similarly insufficient.

CIGA's petition emphasizes that it is not an insurance company, it is not in the "business" of insurance, it makes no profits, its duties are not co-extensive with the obligations the insolvent insurer had under its policies, and it does not "stand in the shoes" of the insolvent insurer for all purposes. All of these points are correct. (See, e.g., *Isaacson v. CIGA* (1988) 44 Cal.3d 775, 786-787; *Baxter Healthcare Corp. v. CIGA* (2000) 85 Cal.App.4th 306, 309-310; *Low, supra*, 84 Cal.App.4th at p. 920; *Mercury Ins. Co. v. Enterprise Rent-A-Car Co. of Los Angeles* (2000) 80 Cal.App.4th 41, 51.) However, these points merely explain why CIGA's liability is limited solely to "covered claims." They are not a basis to immunize CIGA from liability for "covered claims," such as section 5814 penalties, in the absence of an express statutory provision.

Finally, CIGA argues that it should not be liable for section 5814 penalties resulting from an insolvent insurer's pre-liquidation unreasonable delays in paying benefits: (1) because CIGA is "blameless" and not "culpable" for these delays; (2) because section 5814 penalties are intended to punish the insurance carriers and to deter them from delaying compensation payments, but CIGA (not being an insurance carrier) has no economic incentive to delay; and (3) because the

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[11] See also, *DuBois, supra*, 5 Cal.4th at p. 391 [58 Cal.Comp.Cases at p. 292].

cost of section 5814 penalties that CIGA pays are borne by innocent policyholders.[12]

Again, before the enactment of Labor Code section 3716.2, similar arguments were made by UEF that it should not be liable for section 5814 penalties because it was not at "fault" for the delays in paying benefits; however, these arguments were not accepted by the Supreme Court. (*Flores, supra,* 11 Cal.3d at pp. 177-178 [39 Cal.Comp.Cases at pp. 293-294].) Therefore, CIGA must make this public policy argument to the Legislature.

Finally, while we are cognizant that CIGA lacks the economic incentive to delay payments of benefits (*DuBois, supra*, 5 Cal.4th at p. 397 [58 Cal.Comp.Cases at p. 297]; *Isaacson, supra,* 44 Cal.3d at p. 786), we observe this argument relates to CIGA's liability for *its own* delays in paying workers' compensation benefits, a question that is not now before us.

Therefore, for all the reasons above, we conclude that CIGA is liable for section 5814 penalties that are founded on an insolvent insurer's pre-liquidation unreasonable delays in paying (or failures to pay) workers' compensation benefits.

III. CIGA'S LIABILITY FOR LABOR CODE SECTION 5800 INTEREST.

As a supplement to our discussion, we briefly note that, in her August 7, 2001 decision, the WCJ stated that CIGA "can be held liable for the payment of … interest," although the WCJ did not actually award any interest.

Interest is a benefit conferred by Division 4 of the Labor Code (Lab. Code, §5800) that is no different than the underlying benefit to which it attaches. (*Cal. Highway Patrol v. Workers' Comp. Appeals Bd*. (*Erebia*) 89 Cal.App.4th 1201, 1205 [66 Cal.Comp.Cases 687, 689]; *Gellie v. Workers' Comp. Appeals Bd.* (1985) 171 Cal.App.3d 917, 922 [50 Cal.Comp.Cases 470, 474].) Therefore, interest is "compensation." (Lab. Code, §3207; *Soto v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 1356, 1361 [61 Cal.Comp.Cases 578, 582].) Nevertheless, although CIGA must generally pay "compensation" benefits (Ins. Code, §1063.1(c)(1)(vi)), Insurance Code section 1063.2(h) specifically provides that "[c]overed claims shall not include … interest …

[12] CIGA's funding comes from payments made by member insurers (Ins. Code, §1063.5) and its member insurers recoup these payments through a surcharge on premiums paid by the policyholders. (Ins. Code, §1063.14.)

incurred prior to the appointment of a liquidator." (Ins. Code, §1063.2(h).) Accordingly, on remand, the WCJ may not hold CIGA liable for any interest incurred before a liquidator was appointed.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that the Interim Findings and Award issued by the workers' compensation administrative law judge on August 7, 2001 be, and it is hereby, **AFFIRMED** and that this matter be, and it is hereby, **REMANDED** to the workers' compensation administrative law judge for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

COLLEEN S. CASEY, Commissioner

WILLIAM K. O'BRIEN, Commissioner

JAMES C. CUNEO, Commissioner

FRANK M. BRASS, Commissioner

JANICE J. MURRAY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
6/11/02

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