

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **MYRON ABNEY,**

**Case No. GRO 024430**

5 *Applicant,*

6 **vs.**

**OPINION AND DECISION AFTER  
RECONSIDERATION  
(EN BANC)**

7 **AERA ENERGY; and LIBERTY MUTUAL  
INSURANCE COMPANY,**

8 *Defendant(s).*  
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11 The Appeals Board granted reconsideration in this matter to allow time to study the record  
12 and applicable law. Because of the important legal issue presented as to the meaning and  
13 application of Senate Bill (SB) 899 (Stats. 2004, ch. 34) enacted April 19, 2004, to the penalty  
14 issues in this case under Labor Code section 5814,<sup>1</sup> and in order to secure uniformity of decision  
15 in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned  
16 this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)<sup>2</sup>

17 For the reasons discussed below, we hold that section 5814, as enacted by SB 899 and  
18 operative June 1, 2004, applies to unreasonable delays or refusals to pay compensation that occur  
19 prior to the operative date where the finding of unreasonable delay is made on or after June 1,  
20 2004. We also conclude that section 5814(c), involving the conclusive presumption of the  
21 resolution of accrued penalty claims, applies as of the June 1, 2004 operative date of section 5814,  
22 and that the statute of limitations set forth in section 5814(g) applies to actions to recover penalties  
23 brought on or after the June 1, 2004 operative date.

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

<sup>2</sup> The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges (WCJ). (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also, Govt. Code, §11425.60(b).)

1 **BACKGROUND**

2 The relevant facts of this case do not appear to be in dispute. In a Findings and Award  
3 issued on April 14, 2003, it was determined that applicant, while employed as a reliability  
4 specialist from 1996 to September 21, 2000, sustained industrial injury to his hands and wrists,  
5 causing temporary disability from January 16, 2001, to date and continuing, and the need for  
6 further medical treatment. The parties stipulated that applicant's compensation rate for temporary  
7 disability indemnity was maximum.

8 On March 26, 2004, applicant filed a petition for penalty under section 5814, alleging that  
9 defendant unreasonably delayed increasing his temporary disability benefit rate as required by  
10 section 4661.5 and *Hofmeister v. Workers' Comp. Appeals Bd.* (1984) 156 Cal.App.3d 848 [49  
11 Cal.Comp.Cases 438], which provide that payment of temporary disability indemnity two or more  
12 years after the date of injury is to be made at the rate in effect on the date of payment. Following a  
13 July 26, 2004 hearing on the issue, the WCJ issued a Findings and Award on August 5, 2004. The  
14 WCJ determined that defendant unreasonably delayed adjustment of the applicant's temporary  
15 disability indemnity rate from \$490.00 to \$602.00 per week beginning April 15, 2003, and \$602.00  
16 to \$728.00 per week beginning January 1, 2004. In accordance with new section 5814, which  
17 became operative on June 1, 2004, the WCJ found the defendant liable for a penalty in the amount  
18 of \$658.00 (25% of the delayed payment), less credit to defendant for \$263.20 in section 4650(d)  
19 penalty payments, for a net payment of \$394.80.

20 Applicant timely petitioned for reconsideration from the WCJ's decision, contending that it  
21 was error to apply the newly enacted section 5814 to this case because the legislation revising that  
22 section, SB 899, does not contain a retroactivity clause, and there is no evidence that the  
23 Legislature intended the new penalty provision to apply to delays that had occurred prior to June 1,  
24 2004. Therefore, applicant argues that he is entitled to a 10 percent increase on all past, present  
25 and future temporary disability indemnity under section 5814 as it existed prior to the enactment  
26 of SB 899.

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1 DISCUSSION

2 **A. SECTION 5814, AS ENACTED BY SB 899 AND OPERATIVE JUNE 1,**  
3 **2004, APPLIES TO UNREASONABLE DELAYS OR REFUSALS TO PAY**  
4 **COMPENSATION THAT OCCUR PRIOR TO THE OPERATIVE DATE**  
5 **WHERE THE FINDING OF UNREASONABLE DELAY IS MADE ON OR**  
6 **AFTER JUNE 1, 2004.**

7 At the time of the unreasonable delays in this case, section 5814 provided as follows:

8 “When payment of compensation has been unreasonably delayed  
9 or refused, either prior to or subsequent to the issuance of an  
10 award, the full amount of the order, decision, or award shall be  
11 increased by 10 percent. Multiple increases shall not be awarded  
12 for repeated delays in making a series of payments due for the  
13 same type or specie of benefit unless there has been a legally  
14 significant event between the delay and the subsequent delay in  
15 payments of the same type or specie of benefits. The question of  
16 delay and the reasonableness of the cause therefor shall be  
17 determined by the appeals board in accordance with the facts. This  
18 delay or refusal shall constitute good cause under Section 5803 to  
19 rescind, alter, or amend the order, decision, or award for the  
20 purpose of making the increase provided for herein.”

21 Section 5814, as enacted by SB 899, now provides:

22 “(a) When payment of compensation has been unreasonably  
23 delayed or refused, either prior to or subsequent to the issuance of  
24 an award, the amount of the payment unreasonably delayed or  
25 refused shall be increased up to 25 percent or up to ten thousand  
26 dollars (\$10,000), whichever is less. In any proceeding under this  
27 section, the appeals board shall use its discretion to accomplish a  
fair balance and substantial justice between the parties.

“(b) If a potential violation of this section is discovered by the  
employer prior to an employee claiming a penalty under this  
section, the employer, within 90 days of the date of discovery, may  
pay a self-imposed penalty in the amount of 10 percent of the  
amount unreasonably delayed or refused, along with the amount of  
the payment delayed or refused. This self-imposed penalty shall  
be in lieu of the penalty in subdivision (a).

“(c) Upon the approval of a compromise and release, findings and  
awards, or stipulations and orders by the appeals board, it shall be  
conclusively presumed that any accrued claims of penalty have  
been resolved, regardless of whether a petition for penalty has  
been filed, unless the claim for penalty is expressly excluded by  
the terms of the order or award. Upon the submission of any issue

1 for determination at a regular trial hearing, it shall be conclusively  
2 presumed that any accrued claim for penalty in connection with the  
3 benefit at issue has been resolved, regardless of whether a petition  
4 for penalty has been filed, unless the issue of penalty is also  
submitted or is expressly excluded in the statement of issues being  
submitted.

5 “(d) The payment of any increased award pursuant to subdivision  
6 (a) shall be reduced by amount paid under subdivision (d) of  
7 Section 4650 on the same unreasonably delayed or refused benefit  
8 payment.

9 “(e) No unreasonable delay in the provision of medical treatment  
10 shall be found when the treatment has been authorized by the  
11 employer in a timely manner and the only dispute concerns  
12 payment of a billing submitted by a physician or medical provider  
13 as provided in Section 4603.2.

14 “(f) Nothing in this section shall be construed to create a civil  
15 cause of action.

16 “(g) Notwithstanding any other provision of law, no action may be  
17 brought to recover penalties that may be awarded under this  
18 section more than two years from the date the payment of  
19 compensation was due.

20 “(h) This section shall apply to all injuries, without regard to  
21 whether the injury occurs before, on, or after the operative date of  
22 this section.

23 “(i) This section shall become operative on June 1, 2004.”

24 The phrase “the full amount of the order, decision, or award shall be increased by 10  
25 percent” in the pre-SB 899 section 5814 had been interpreted as applying to the entire specie or  
26 class of benefit, e.g., temporary disability indemnity, unreasonably delayed or refused. (See, e.g.,  
27 *Rhiner v. Workers’ Comp. Appeals Bd.* (1993) 4 Cal.4th 1213 [58 Cal.Comp.Cases 172, 175, 183];  
*Gallamore v. Workers’ Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321, 326-  
329].) Thus, if the pre-SB 899 version of section 5814 were applied in this case, as argued by  
applicant, his entire award of temporary disability benefits, past, present and future, would be  
increased by the 10 percent penalty, and would not be reduced by any payments made under

1 section 4650(d).<sup>3</sup> Under the newly enacted section 5814, however, a penalty is assessed only  
2 against the amount of the payment unreasonably delayed or refused (up to 25 percent or  
3 \$10,000.00, whichever is less), and is reduced by any amount paid under section 4650(d) on the  
4 same unreasonably delayed or refused benefit payment. As applied to this case, 25 percent of the  
5 delayed payments amounted to \$658.00, from which the \$263.20 defendant paid under section  
6 4650(d) is deducted, while the ten percent penalty under the “old” section 5814 would be  
7 calculated on almost four years of temporary disability indemnity at maximum rates, and  
8 defendant would not have been allowed credit for the \$263.20 in section 4650(d) payments.

9 For the reasons discussed below, we find that the WCJ properly calculated the penalty  
10 amount under section 5814 as enacted by SB 899 and operative June 1, 2004.

11 In construing a statute, the Appeals Board’s fundamental purpose is to determine and  
12 effectuate the Legislature’s intent. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382,  
13 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d  
14 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10  
15 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657]; *Cal. Ins. Guar. Ass’n v. Workers’ Compensation*  
16 *Appeals Bd. (Karaiskos)* 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183, 185].) Thus, the  
17 WCAB’s first task is to look to the language of the statute itself. (*Ibid.*) The best indicator of  
18 legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois*  
19 *v. Workers’ Comp. Appeals Bd., supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289];  
20 *Gaytan v. Workers’ Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases  
21 693, 702]; *Boehm & Associates v. Workers’ Comp. Appeals Bd. (Lopez)* (1999) 76 Cal.App.4th  
22 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and  
23 unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute  
24 according to its plain terms. (*DuBois v. Workers’ Comp. Appeals Bd., supra*, 5 Cal.4th at p. 387  
25 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers’ Comp. Appeals Bd. (Arvizu)*

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26 <sup>3</sup> Section 4650(d) provides an automatic increase of ten percent for payments of temporary and permanent disability  
27 indemnity not timely made under that section.

1 (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508]; *Cal. Ins. Guar. Ass'n v. Workers'*  
2 *Compensation Appeals Bd. (Karaiskos)*, *supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at  
3 p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases  
4 359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez)*, *supra*, 76 Cal.App.4th at  
5 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74  
6 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

7 When construing any particular statutory provision, however, we may also consider it in  
8 light of the entire statutory scheme of which it is part and harmonize it with related statutes, to the  
9 extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th  
10 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p.  
11 388; *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d at pp. 230-231; *Gee v. Workers'*  
12 *Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236]; *American*  
13 *Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (Hurtado)* (1995) 36 Cal.App.4th  
14 1626, 1639 [60 Cal. Comp. Cases 559].)

15 Subsection (i) of section 5814 provides that the section becomes operative on June 1, 2004.  
16 It therefore indisputably applies to all unreasonable delays or refusals to pay compensation  
17 occurring on or after that date. In this case, however, although the finding of penalty issued after  
18 June 1, 2004, the unreasonable delays in temporary disability payments occurred before the  
19 operative date. We conclude that the language of section 5814 itself, the stated purpose and intent  
20 of SB 899, as well as relevant case law, support our conclusion that the remedy afforded by the  
21 current rather than the prior version of section 5814 applies in cases where the alleged  
22 unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative  
23 date.

24 Subsection (h) of section 5814 specifically provides that “[t]his section shall apply to all  
25 injuries, without regard to whether the injury occurs before, on, or after the operative date of this  
26 section.” This inclusive language is nowhere qualified or limited to unreasonable delays or  
27 refusals occurring only on or after the June 1, 2004 operative date, either in section 5814 itself or

1 elsewhere in SB 899. (To do so would effectively negate its application to “all injuries,” contrary  
2 to the specific intent of the Legislature.) Furthermore, Section 49 of SB 899 provides:

3 “This act is an urgency statute necessary for the immediate preservation of the  
4 public peace, health, or safety within the meaning of Article IV of the Constitution  
and shall go into immediate effect. The facts constituting the necessity are:

5 In order to provide relief to the state from the effects of the current workers’  
6 compensation crisis at the earliest possible time, it is necessary for this act to take  
effect immediately.”

7 This section supports the application of the new section 5814 remedy to cases where the alleged  
8 unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative  
9 date.

10 If we were to interpret the remedy afforded by the newly enacted section 5814 to take  
11 effect only as to alleged unreasonable delays or refusals on or after its operative date, we would  
12 ignore the “clear, unambiguous, and plain meaning” of Section 49 requiring that the act take  
13 effect “immediately” and provide relief “at the earliest possible time.”

14 Moreover, interpreting section 5814, operative June 1, 2004, to apply here, and to those  
15 cases where the alleged unreasonable delays or refusals to pay compensation occurred before the  
16 operative date, is consistent with existing case law regarding the nature of the workers’  
17 compensation system and changes in its remedies. The right to workers’ compensation benefits is  
18 wholly statutory, i.e., not derived from common law. (*DuBois v. Workers’ Comp. Appeals Bd.*,  
19 *supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 290]; *Le Parc Community Ass’n v. Workers’*  
20 *Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1171 [68 Cal.Comp.Cases 1049]; *Northstar at*  
21 *Tahoe v. Workers’ Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1481, 1484 [61 Cal.Comp.Cases  
22 175]; *Graczyk v. Workers’ Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002-1003 [51  
23 Cal.Comp.Cases 408, 411].) It is well settled that where a right or a right of action depending  
24 solely on statute is altered or repealed by the Legislature, in the absence of contrary intent, e.g., a  
25 savings clause, the new statute is applied even where the matter was pending prior to the  
26 enactment of the new statute. (See, e.g., *Younger v. Superior Court of Sacramento* (1978) 21  
27 Cal.3d 102, 109; *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819,

1 829-830; *Southern Service Co., Ltd. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12;  
2 *Penzinger v. West American Finance Co.* (1937) 10 Cal.2d 160, 170-171; *Callet v. Alioto* (1930)  
3 210 Cal. 65, 67-68.) “The justification for this rule is that all statutory remedies are pursued with  
4 the full realization that the Legislature may abolish the right to recover at any time.” (*Governing*  
5 *Bd. of Rialto Unified School Dist. v. Mann, supra*, 18 Cal. 3d at p. 829, quoting *Callet v. Alioto,*  
6 *supra*, 210 Cal. at pp. 267-268.)

7 As stated by the Court in *Graczyk, supra*, concerning the right to workers’ compensation  
8 benefits:

9 “This statutory right is exclusive of all other statutory and common  
10 law remedies, and substitutes a new system of rights and  
11 obligations for the common law rules governing liability of  
12 employers for injuries to their employees. [Citations omitted.]  
13 Rights, remedies and obligations rest on the status of the employer-  
employee relationship, rather than on contract or tort.” [Citations  
omitted.] (184 Cal.App.3d at p. 1003 [51 Cal.Comp.Cases at p.  
411].)

14 Applying this principle to the facts before it, the *Graczyk* Court further explained:

15 “Moreover, applicant’s inchoate right to benefits under the  
16 workers’ compensation law is wholly statutory and had not been  
17 reduced to final judgment before the Legislature’s 1981 addition of  
18 subdivision (k) [of section 3352] further clarifying the employee  
19 status of athletes. Hence, applicant did not have a vested right, and  
20 his constitutional objection has no bearing on the issue. (See  
*Johnson v. Workmen’s Comp. App. Bd.* [1970] 2 Cal.3d [964, 972];  
*Ruiz v. Industrial Acc. Com* [1955] 45 Cal.2d [409, 414]. . .” (184  
Cal.App.3d at p. 1006 [51 Cal.Comp.Cases at p. 414].)

21 In *Pebworth v. Workers’ Comp. Appeals Bd.* (2004) 116 Cal.App. 4th 913, 917-918 [69  
22 Cal.Comp.Cases 199, 202],<sup>4</sup> the Court of Appeal quoted the Appeals Board’s opinion with  
23 approval regarding the distinction between a procedural statute, which may be applied to pending  
24 cases even if the event underlying the cause of action occurred before the statute took effect (see,  
25 e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288; *Kuykendall v. State Bd. of Equalization*

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27 <sup>4</sup> In *Pebworth*, the Court held that the January 1, 2003 amendment to section 4646, allowing parties to settle prospective vocational rehabilitation services for a lump sum not to exceed \$10,000, applied to injuries occurring prior to January 1, 2003.



1 (1994) 22 Cal.App.4th 1194, 1211, fn. 20), and a substantive statute:

2            “[A] statute is ‘procedural where it merely provides a new remedy  
3            for the enforcement of existing rights [citations omitted], where it  
4            neither creates a new cause of action nor deprives defendant of any  
5            defense on the merits [citation omitted].... It has also been said  
6            that a statute is ‘substantive’ when it “ ‘imposes a new or  
          additional liability and substantially affects existing rights and  
          obligations.’ ” [citations omitted.]

7            The Court, however, then took issue with the Appeals Board’s characterization of the  
8            amendments in question as “substantive,” concluding that “whether a statute is procedural or  
9            substantive does not depend on the degree it changes prior law. The test is whether the statute  
10           imposes a new or additional liability or affects existing vested or contractual rights on the one  
11           hand or merely changes the manner in which established rights or liabilities are invoked in the  
12           future.” (116 Cal.App.4th at p. 918 [69 Cal.Comp.Cases at p. 202].)

13           Here, section 5814, as enacted by SB 899, does not alter an injured worker’s existing right  
14           to seek penalties in the form of increased compensation on the basis of an unreasonable delay or  
15           refusal to pay benefits to which he or she are entitled, but simply changes the remedy available,  
16           i.e., the amount or calculation of the penalty, for enforcing those rights. Nor does it create a new  
17           cause of action or deprive the defendant employer or carrier of any defense on the merits.  
18           Moreover, as set forth previously, because the right to workers’ compensation benefits is wholly  
19           statutory, a party does not have vested right in any remedy or cause of action not reduced to a final  
20           judgment.

21           Accordingly, based on the language of the statute itself, the stated intent and purpose of SB  
22           899, the wholly statutory nature of the workers’ compensation system and existing case law, we  
23           find that section 5814, as enacted by SB 899 and operative June 1, 2004, also applies to alleged  
24           unreasonable delays or refusals to pay compensation that occurred prior to the operative date. As  
25           our Decision After Reconsideration, we will therefore affirm the WCJ’s Findings and Award of  
26           August 5, 2004.

27           Finally, in light of our holding that section 5814 applies to unreasonable delays or refusals

1 to pay compensation that occur prior to June 1, 2004, we also address the procedural issues raised  
2 by subsections (c) and (g) of section 5814.

3 **B. SECTION 5814(c), INVOLVING THE CONCLUSIVE PRESUMPTION OF**  
4 **THE RESOLUTION OF ACCRUED PENALTY CLAIMS, APPLIES FROM**  
5 **THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.**

6 Section 5814(c) provides:

7 “(c) *Upon the approval* of a compromise and release, findings and  
8 awards, or stipulations and orders by the appeals board, it shall be  
9 conclusively presumed that any accrued claims of penalty have  
10 been resolved, regardless of whether a petition for penalty has  
11 been filed, unless the claim for penalty is expressly excluded by  
12 the terms of the order or award. *Upon the submission* of any issue  
13 for determination at a regular trial hearing, it shall be conclusively  
presumed that any accrued claim for penalty in connection with the  
benefit at issue has been resolved, regardless of whether a petition  
for penalty has been filed, unless the issue of penalty is also  
submitted or is expressly excluded in the statement of issues being  
submitted” (emphasis added).

14 As set forth previously, the Appeals Board’s fundamental purpose in construing a statute is  
15 to determine and effectuate the Legislature’s intent, and its first task is to look at the language of  
16 the statute itself. The best indicator of legislative intent is the clear, unambiguous, and plain  
17 meaning of the statutory language, and when the statutory language is clear and unambiguous,  
18 there is no room for interpretation and the WCAB must simply enforce the statute according to its  
19 plain terms.

20 Here, section 5814(c) expressly states the conditions under which accrued claims for  
21 penalty shall be conclusively presumed resolved, either “[u]pon the approval of a compromise  
22 and release, findings and awards, or stipulations and orders by the appeals board,” or “[u]pon the  
23 submission of any issue for determination at a regular trial hearing.” As the approval or  
24 submission conditions are the specific “triggers” for the conclusive presumption and those  
25 “triggers” did not become operative until June 1, 2004, we believe that the clear, unambiguous  
26 and plain meaning of this statutory language is that section 5814(c) applies only to the approval  
27 of compromise and releases, the issuance of findings and awards, stipulations and orders, and the

1 submission of any issues at trial, on or after June 1, 2004.<sup>5</sup> (See *Martinez v. Jack Neal & Son,*  
2 *Inc.* (2004) 69 Cal.Comp.Cases 775, 779 (Appeals Board en banc).)

3 **C. THE STATUTE OF LIMITATIONS SET FORTH IN SECTION 5814(g)**  
4 **APPLIES TO ACTIONS TO RECOVER PENALTIES BROUGHT ON OR**  
5 **AFTER THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.**

6 Section 5814(g) provides:

7 “(g) Notwithstanding any other provision of law, no action may be  
8 brought to recover penalties that may be awarded under this  
9 section more than two years from the date the payment of  
10 compensation was due.”

11 As noted previously, SB 899 is urgency legislation, with most of its provisions to take  
12 effect “immediately,” i.e., on its enactment date of April 19, 2004. The Legislature specified,  
13 however, that new section 5814 would not become operative until June 1, 2004. The most  
14 reasonable explanation for this is that section 5814 now contains a statute of limitations.<sup>6</sup>

15 As noted by the California Supreme Court in *Rosefield Packing Co. v. Superior Court*  
16 (1935) 4 Cal.2d 120, 122-123, the Legislature may modify the statute of limitations period and  
17 apply the changed period to pending proceedings if the affected parties are allowed a reasonable  
18 time to pursue their remedy before the statute takes effect:

19 “... The retrospective application of a statute may be  
20 unconstitutional if ... it deprives a person of a vested right; or it  
21 impairs the obligation of a contract. But a statute which merely  
22 effects a change in civil procedure may have a valid retrospective  
23 application. [Citations omitted.] In accordance with this principle  
24 it has been specifically held that the legislature may shorten or  
25 extend the period of the statute of limitations, or similar statutes  
26 relating to procedure, and that the changed period may be made  
27 applicable to pending proceedings. [Citations omitted.] There is,  
of course, one important qualification to the rule: where the change

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25 <sup>5</sup> Of course, a party may avoid the conclusive presumption under the specific exceptions provided in section 5814(c):  
26 having the claim for penalty expressly excluded in the findings and award, etc., and either submitting or expressly  
27 excluding the claim for penalty as an issue at trial.

<sup>6</sup> Until the enactment of SB 899, there was no time limitation in which to bring an action for unreasonable delay or  
refusal to pay compensation. Under new section 5814, such actions must be brought within two years from the date of  
the alleged unreasonable delay or refusal.

1 in remedy, as, for example, the shortening of a time limit  
2 provision, is made retroactive, there must be a reasonable time  
3 permitted for the party affected to avail himself of his remedy  
4 before the statute takes effect. If the statute operates immediately  
5 to cut off the existing remedy, or within so short a time as to give  
6 the party no reasonable opportunity to exercise his remedy, then  
7 the retroactive application of it is unconstitutional as to such party.  
8 (*Coleman v. Superior Court* (1933) 135 Cal.App. 74 ... .)<sup>7</sup>

9 Thus, in order to provide due process to parties who had not yet filed their penalty claims  
10 for alleged unreasonable delays or refusals to pay compensation that would soon be beyond the  
11 reach of the new two-year limitations period, the Legislature allowed them until June 1, 2004 to  
12 bring such actions. For the reasons stated previously, however, effective June 1, 2004, those  
13 newly-brought penalty actions would be subject to the provisions of the new section 5814 enacted  
14 by SB 899.

15 The time period from April 19, 2004 to June 1, 2004, for perfecting soon to be barred  
16 penalty claims is further support for our conclusion that new section 5814 is not limited to  
17 unreasonable delays or refusals to pay compensation occurring on or after June 1, 2004. If it were  
18 so limited, the time period would not be necessary.

19 Accordingly, we are persuaded that the statute of limitations set forth in section 5814(g)  
20 applies to actions to recover penalties brought on or after June 1, 2004, the operative date of  
21 section 5814.

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<sup>7</sup> *Coleman*, in which a retroactive application of a new limitations period was held to deny the plaintiff a reasonable time in which to exercise his remedy, was distinguished by the Court in *Rosefield Packing*, at 4 Cal.2d p. 123, because in *Coleman*, the five-year period from the filing of the complaint had elapsed before the amendment to the law became effective, and thus, the amendment *immediately* cut off the plaintiff's cause of action.

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For the foregoing reasons,

**IT IS ORDERED** that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), the Findings and Award issued by the workers' compensation administrative law judge on August 5, 2004, is **AFFIRMED**.

***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

\_\_\_\_\_  
***MERLE C. RABINE, Chairman***

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***WILLIAM K. O'BRIEN, Commissioner***

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***JAMES C. CUNEO, Commissioner***

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***JANICE JAMISON MURRAY, Commissioner***

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***FRANK M. BRASS, Commissioner***

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***(NOT PARTICIPATING)***  
***RONNIE G. CAPLANE, Commissioner***

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

***12/08/04***

***SERVICE BY MAIL TO ALL PARTIES AS SHOWN ON  
THE OFFICIAL ADDRESS RECORD EFFECTED  
ON ABOVE DATE.***