WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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

Applicant employee seeks reconsideration of the Board's En Banc decision filed January 27, 1997, in which the Board majority held that the workers' compensation referee's imposition of a 10% penalty on defendant employer was proper, but that an employee's attorney's fees may only be assessed against an employer pursuant to Labor Code section 4064 where the employer has filed the initial application contesting the opinion of the qualified medical evaluator selected by the employee from a three-member panel. In this case the initial application for adjudication of claim was filed by the employee.

In his petition, applicant contends that where the defendant refuses to comply with express Labor Code procedures and forces an unrepresented worker to file an application, the defendant must be held liable under section 4064 for the attorney's fees incurred by the worker for consequent legal representation. In this connection, applicant asserts that the majority decision allows the defendant to benefit from its wrongdoing because the 10%

penalty assessed against defendant is less than the attorney's fees allowed to applicant's attorney.

To accomplish what applicant considers to be a more equitable result, he would have the Board rewrite section 4064. Under the plain, unambiguous wording of the statute, an employer is liable for an employee's attorney's fees "if an employer files an application." If the employer is not the one who files an application, there is no authority for imposing liability on the employer under that section. However, applicant contends that the Board has a duty "to interpret the statues (sic), often qualifying them contrary to express language found in them, as a check and balance against the legislative branch who can make errors and contradict the intent of their legislation." In his amended petition, applicant asserts that the Board majority "would allow the defective Code Section to stand until the legislature corrects it, but that is the opposite of the process: it is up to the WCAB to correct the Code Section through interpretation, and then it goes back to the legislature for revised drafting, etc."

We agree that it is the duty of the Appeals Board to interpret statutes in such a way as to give true meaning to the legislation. We do not, however, agree we have broad authority to correct "defective" legislation. In any event, in this case, the majority interpretation is giving full effect to the statute and there is nothing which causes us to believe that the law is defective. Because a statute does not extend its benefits to all possible related circumstances does not render the law defective.

This code section provides additional benefits to an injured worker under certain conditions. If the Legislature wishes to extend the benefits to apply to other conditions or circumstances, it may do so. It is not the duty or function of the Appeals Board to do so.

In his petition, applicant argues that because the amount of the 10% penalty imposed on defendant in this case is less than the attorney's fees allowed, defendant has "saved $633.00 on its wrong-doing." However, even if defendant, a non-profit institution, made a deliberate choice to incur a penalty rather than provide benefits or file an application (a supposition that is not apparent from the record), it is not the duty of the Board to insure that the sanction imposed is in the highest possible amount. A penalty is a penalty, and defendant has ended up having to pay out more than its original liability. If the Legislature concludes that the 10% penalty under section 5814 is insufficient to deter unreasonable delay, it has the authority to change the law. It is not the function of the Board to improvise a new statutory interpretation to accomplish that purpose.

In his petition, applicant asserts that "a literal reading [of section 4064] contravenes the legislative intent of the reform act." He contends that the Board has "the obligation to apply a judicial interpretation of an imperfect statutory language," and he exhorts us "to 'do the right thing' and assess the cost of the attorney's fees against the defendant for their wrongful action." However, the Supreme Court has repeatedly indicated that the Board's role is more circumscribed. (See, e.g., Ruiz v.

Industrial Acc. Com. (1955) 45 Cal.2d 409, 413-414, 20 Cal.Comp.Cases 265, 267-268; Kaiser Founda-tion Hospitals Workmen's Comp. Appeals Bd. [Keifer] (1974) 13 Cal.3d 20, 39 Cal.Comp.Cases 857; and Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal.3d 288, 302, 56 Cal.Comp.Cases 476, 487.) Absent specific statutory authority, the Board may not assess applicant's attorney's fees as an additional liability of defendant.

In the Board's earlier En Banc decision in this case, Ford v. Lawrence Berkeley Laboratory (1997) 62 Cal.Comp.Cases 153, we set forth at length the basis for our holding that section 4064 does not apply under the facts existing in this case. We continue to believe that that analysis is correct and that it would be improper for the Board to interpret section 4064 contrary to its express language.

For the foregoing reasons,

IT IS ORDERED THAT applicant's petition for reconsideration be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Arlene N. Heath

/s/ Jane Wiegand

/s/ R. N. Ruggles

/s/ Diana Marshall

We dissent. (See dissenting opinion)

/s/ Colleen S. Casey

/s/ Richard P. Gannon

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DISSENTING OPINION

In our dissent to the Board's earlier En Banc decision in this case, we analyzed the legislative history and purpose of Labor Code section 4064, as well as the prior Board decisions which awarded attorney's fees under that section when the application for adjudi-cation of claim was considered to have been "constructively" filed on the employer's behalf. In that connection, we noted Civil Code section 3529, which states that an act which ought to have been done is regarded as having been done in favor of him to whom performance is due. We also stated that "if the employer follows the procedure mandated by sections 4061 and 4063, there is no need to refer [in section 4064] to applications filed by the employee," and that "in interpreting and applying section 4064, this Board, like the Legis-lature, must proceed as if the employer has followed the law." We also discussed why the existence of additional remedies for employer misconduct, which have significant limitations, should not preclude an assessment of attorney's fees against defendant under the facts presented in this case. For all of those reasons, we

would grant applicant's petition for reconsideration and reinstate the award of attorney's fees made by the workers' compensation referee.

/s/ Colleen S. Casey

/s/ Richard P. Gannon

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