On March 28, 2002, the Workers’ Compensation Appeals Board (Board) granted reconsideration of decisions issued by workers’ compensation administrative law judges (WCJs) in *Rivera v. Tower Staffing Solutions* (POM 240908) and *Crump v. Los Angeles Unified School District* (LAO 712097). In *Rivera*, the WCJ imposed two penalties under Labor Code section 5814, one for the late payment of a commuted award and one for failure to correctly calculate a

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1 All further statutory references are to the Labor Code, unless otherwise indicated.
section 4650(d) penalty on the commuted award. In *Crump*, the WCJ found that although a section 4650(d) penalty may apply to a Compromise and Release (C&R) of death benefits, applicant waived his right to assert the penalty.

Because of the important legal issues presented, as well as to assure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, consolidated these two cases and reassigned them to the Board as a whole for an en banc decision. (Labor Code, §115.) Based on our review of the relevant statutory and case law, we conclude that section 4650(d) applies only to periodic indemnity payments, and not to the proceeds of commutations or C&R agreements, both of which reduce the underlying benefits to a lump sum, taking them outside the scope of the periodic indemnity payments set forth in section 4650.

**BACKGROUND**

*Rivera v. Tower Staffing Solutions* (POM 240908)

On December 12, 2000, the applicant and defendant, State Compensation Insurance Fund (“SCIF”), submitted for the WCJ’s approval Stipulations With Request for Award and a Petition for Commutation of Future Payments of the Award with regard to applicant’s industrial injury to his left hand and psyche of March 4, 1999. The parties stipulated to 75% permanent disability payable at $153.33 per week beginning May 1, 2000, in the total sum of $72,295.09, followed by a life pension of $51.75 per week. The Petition for Commutation requested commutation of all future payments, including the life pension. The WCJ approved the Stipulated Award and simultaneously issued an Order of Commutation. The WCJ added to the Order of Commutation a notation allowing SCIF 15 days to object to the commutation (hereinafter, “commuted award.”) No objection was filed. Subsequently, applicant filed a Declaration of Readiness to Proceed (DOR) to request a hearing on SCIF’s alleged late payment of the commuted award. At the Mandatory Settlement Conference (MSC) applicant claimed: “1) Penalties (5814 & 4650(d))

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2 The Board’s en banc decisions are binding precedent on all Board panels and WCJs. (*Gee v. Workers’ Comp. 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.)
Interest & *Gellie* penalty – *Moulton* penalty” and “2) Underpayment of Order [of Commutation].”³

The parties filed briefs and attachments, and the matter was submitted on the record.

On January 4, 2002, the WCJ issued the Amended Findings and Award disputed here. The WCJ imposed two penalties under section 5814 for unreasonable delay in paying the commuted award: one penalty for the delay itself, and one penalty because SCIF, when it did pay the commuted award, miscalculated the self-imposed penalty under section 4650(d). SCIF filed a petition for reconsideration, conceding liability for one section 5814 penalty for delaying payment of the commuted award, but contending in substance that the miscalculation of the section 4650(d) penalty was one course of conduct justifying a single penalty under section 5814.

In his Report on SCIF’s petition, the WCJ provided the following rationale for imposing two section 5814 penalties:

“The fifteen days to object [to the Order of Commutation] expired on December 27, 2000…

“SCIF failed to object… On [January 26, 2001], defendant paid $18,088.62 in attorneys fees and paid applicant $22.13. The defendant identifies the extra $88.62 added to the attorney’s fees as interest but the evidence is insufficient to state why the applicant was only paid $22.13 at that point in time. The undersigned found that this was an unreasonable delay and subject to a penalty under § 5814. SCIF does not object to that finding.

“With respect to interest and penalties under…§ 4650(d), applicant received $10,424.84 in §4650(d) penalties and $1,535.93 in interest. The interest amount was calculated correctly but the §4650(d) penalty was not. Between the Award and the Order of Commutation, $109,659.08 in benefits should have been paid the applicant and applicant’s attorney by January 2, 2001. This would mean that the proper amount of the §4650(d) penalty should have been $10,965.91, not $10,424.84 as alleged by SCIF. The undersigned found that this was a separate and distinct legal act and subjected SCIF to a second §5814 penalty in the amount of $12,685.16 pursuant to *Christian v. WCAB* (1997) 15 Cal.4th 505, 62 CCC 576.”

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As noted at the outset, SCIF’s petition for reconsideration was granted to allow sufficient opportunity to further study the factual and legal issues. It was subsequently determined that an en banc decision would be appropriate to address the issue of whether a section 4650(d) penalty applies to the proceeds of commutations.

*Crump v. Los Angeles Unified School District (LAO 712097)*

This case involves an underlying claim for death benefits, which was found compensable by the WCJ in a Findings and Award issued March 19, 1999. On May 5, 1999, the Board denied defendant’s petition for reconsideration. On August 24, 1999, the Court of Appeal denied defendant’s petition for writ of review. Thereafter, the parties entered into a C&R settling the matter for the lump sum of $140,000.00, less attorney’s fees of $20,000.00. On May 25, 2000, the WCJ issued an Order Approving Compromise and Release (OACR). On July 24, 2000, applicant’s attorney filed a Petition for Multiple Penalties under section 5814, alleging that defendant failed to make timely payment of the C&R proceeds, interest on the proceeds, applicant’s attorney’s fees, and interest on the attorney’s fees. After trial, the WCJ issued a decision dated May 15, 2001, finding defendant liable for two section 5814 penalties on the entire amount of the C&R. Both parties filed petitions for reconsideration.4

In a decision issued July 18, 2001, the panel of the Appeals Board then assigned to the matter reversed one of the section 5814 penalties, concluding in essence that defendant’s late payment of the C&R and its failure to pay interest was a single course of conduct, justifying a single penalty under section 5814. The panel also concluded in relevant part, “section 4650(d) is being raised for the first time upon reconsideration, and…is not properly before the Board at this time. The applicant may raise the issue at the trial level, and the WCJ may proceed as necessary or appropriate.”5 Upon return of the case to the trial level, applicant filed a DOR and an “Amended Petition for Multiple Penalties Pursuant to…sections 5814 and 4650(d) and Interest

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4 Applicant’s letter-answer to defendant’s petition was treated as a petition for reconsideration because it raised objections to the WCJ’s decision in reference to attorney’s fees and section 4650(d).

5 The panel noted that section 4650(d) was not raised in the penalty petition filed by applicant at the trial level, it was not raised at the MSC, and it was not raised at trial.
Pursuant to...section 5800.” On January 3, 2002, the matter was submitted on the record without further evidence or testimony. In the Findings and Order of January 17, 2002 disputed here, the WCJ issued a take-nothing order, finding that applicant waived the issue of penalty under section 4650(d). But in his Opinion on Decision, the WCJ offered an alternative analysis:

“If in fact the WCALJ is not upheld on [the waiver] issue, the WCALJ would impose a Labor Code section 4650(d) penalty under the facts of this case...[T]he case of Vince Phillips (Deceased) v. Sacramento Municipal Utilities District, PSI, 63 CCC 585...stands for the proposition that death benefits are to be paid in the same manner and at the same rate as temporary disability benefits pursuant to Labor Code section 4661.5.”

Applicant filed a petition for reconsideration, contending that he was not required to raise section 4650(d) in a penalty petition or at the MSC because the penalty is supposed to be self-executing, without application by the employee. Applicant also contended that he did not waive any penalty under section 5814 because the penalty under section 4650(d) does not arise until there is a determination that an indemnity payment was paid late and without the self-imposed penalty. The defendant, Los Angeles Unified School District (“LAUSD”) filed an answer. Reconsideration was granted to allow sufficient opportunity to further study the factual and legal issues. It was subsequently determined that an en banc decision would be appropriate to address the issue of whether a section 4650(d) penalty applies to the proceeds of a C&R for death benefits.
DISCUSSION

Section 4650 provides in relevant part:

“(a) If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability…

“(b) If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity…

“(c) Payment of temporary or permanent disability indemnity subsequent to the first payment shall be made as due every two weeks on the day designated with the first payment.

“(d) If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan… No increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether temporary disability indemnity payments are owed…” (Lab. Code, § 4650, emphasis added.)

By its own wording, section 4650 applies to periodic payments of temporary and permanent disability indemnity. Subdivision (d) provides that if any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee.

In State Compensation Insurance Fund v. Worker's Comp. Appeals Bd. (Stuart) (1998) 18 Cal.4th 1209, 1213 [63 Cal.Comp.Cases 916, 918], the Supreme Court again noted that “if a payment is late, that individual payment is automatically increased by 10 percent, and this penalty [under section 4650(d)] applies irrespective of the reason for the delay.” (Emphasis added, citing Ellison, supra at 44 Cal.App.4th 128, 139 [61 Cal.Comp.Cases 325, 333].)

In Gangwish v. Worker's Comp. Appeals Bd. (2001) 89 Cal.App.4th 1284, 1293 [66 Cal. Comp. Cases 584, 590], the Court of Appeal explained that “the purpose of enacting the changes to section 4650 was to promote prompt payment of benefits and certainty of timing.” The Court also stated that “former section 4651 provided that payments of TD or PD were to be made not less frequently than twice each month, except by order of the WCAB. This chronology of benefits was essentially recodified in section 4650, subdivision (c)... [This provision] is further substantiation of the Legislature's purpose, since it provides for payment of continuing TD or PD at regular intervals.” (89 Cal.App.4th 1284, 1294 [66 Cal. Comp. Cases 584, 591], emphasis added.)

In Farris v. Workers' Comp. Appeals Bd. (2000) 65 Cal. Comp. Cases 824, 828 (en banc), the Appeals Board held that the section 4650(d) penalty is not a separate class or category of benefit, explaining that the penalty “has no ‘separate existence,’ independent of the late disability indemnity to which it attaches...the section 4650(d) penalty is clearly ‘derivative of’ and ‘dependent on and ancillary to’ the underlying disability indemnity.” (Emphasis added.)

Based on the language of the statute, and consistent with the foregoing authorities, we conclude that the section 4650(d) penalty applies only to periodic indemnity payments and not to the lump sum proceeds of C&Rs and commutations. Once it is ordered that indemnity payments should be commuted to a lump sum, or reduced to a lump sum by reason of a settlement agreement, the commutation or agreement takes the proceeds outside the scope of section 4650(d).6 In other words, the proceeds of a commutation or a settlement agreement are no longer

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6 By definition, C&R agreements and commutations change the character of the underlying benefits from periodic, installment-type payments to a one-time, lump sum payment. (See 2 California Workers' Compensation Practice (4th ed., Cont. Ed. Bar 2000) §§ 16.2 et seq. and §§ 23.61 et seq.)
periodic, installment indemnity payments as described in section 4650, subdivisions (a) through (c). Nor is payment governed by the time requirements of that section. Rather, the proceeds become a single lump sum payment. If a delay occurs, it is not a delay in the timing of payments “as required by this section[.]” Thus, the commutation or settlement proceeds are not subject to the provisions of subdivision (d).

In Crump, the WCJ opined that death benefits are subject to the section 4650(d) penalty, and we agree with that conclusion, but for different reasons. The section 4650(d) penalty does not apply in Crump because the death benefits were settled by C&R and paid in a lump sum, which we now hold is not subject to the penalty.

With regard to death benefits, section 4702(b) provides in relevant part that “[t]he death benefit in all cases shall be paid in installments in the same manner and amounts as temporary total disability indemnity would have to be made to the employee, unless the appeals board otherwise orders...” (Emphasis added.) In its en banc decision Phillips v. Sacramento Municipal Utilities District (1998) 63 Cal. Comp. Cases 585 at 588, the Board explained:

“[B]ecause the statutes specifically require that death benefits are to be paid in the same manner and amount as temporary disability indemnity, the provisions of not only sections 4453, 4650(d) and 4653, but also the provisions of Labor Code section 4661.5 are applicable and result in the increase in the indemnity rate. We see no basis for applying only the provisions of the first three sections and not the provisions of Labor Code section 4661.5, nor has such a distinguishing basis been provided. Moreover, the Legislature could have amended Labor Code sections 4702(b) and 4703.5 to make death benefits payable in the same manner and amount as permanent total disability and thus, make the provisions of section 4661.5 inapplicable pursuant to the rationale of [Duncan v. The Singer Company (1978) 43 Cal.Comp.Cases 467 (en banc)] but it did not do so. Or the Legislature could have amended those sections to specifically exclude the application of the provisions of section 4661.5. No such amendments have been made. Therefore, while death benefits and temporary disability benefits may be a different species, those benefits under the provisions of the Labor Code are to be paid in the same manner and amount.”

Based on section 4702(b) and the Phillips case, we conclude that death benefits are installment payments which are subject to the provisions of section 4650. Therefore, if death
benefits are not commuted, or if they are not paid in a lump sum under a C&R, they are subject to the ten percent increase on untimely payments set forth in section 4650(d).

Finally, while the application of section 4650(d) to vocational rehabilitation maintenance allowance (VRMA) is not being raised in these two cases, we wish to observe that statutory and case law support the conclusion that VRMA is the functional equivalent of temporary disability indemnity, and therefore the section 4650(d) penalty would apply to periodic payments of VRMA.

Section 139.5, subdivisions (c) and (d) provide in relevant part that an employee who participates in vocational rehabilitation is entitled to receive a maintenance allowance payable in “[t]he amount the employee would have received as continuing temporary disability indemnity,...” (§139.5(d)(1), emphasis added.) These provisions also state that the VRMA may be supplemented from future permanent disability indemnity to provide a weekly amount up to the employee’s temporary disability indemnity rate.

In Ritchie v. Workers’ Comp. Appeals Bd. (1994) 24 Cal.App.4th 1174, 1185 [59 Cal.Comp.Cases 243, 250], the Court of Appeal reviewed the legislative history of section 139.5 and found “an unmistakable expression of legislative intent that VRMA be treated as a form of TD…”

We further note that Administrative Director (AD) Rule 10125.1(a) provides that VRMA payments shall be made every 14 days on the day designated with the first payment. (Cal. Code Regs., tit. 8, § 10125.1(a).) The language of the rule mirrors that of section 4650(c) with respect to periodic payments. Therefore, VRMA is comprised of installment or periodic payments which are tied to, and constitute the functional equivalent of, temporary disability indemnity. Thus, the nature and timing of VRMA payments fall within the scope of section 4650, and periodic payments in the form of VRMA are subject to the increase imposed under subdivision (d) for failure to comply with the statute.

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CONCLUSION

In *Rivera v. Tower Staffing Solutions* (POM 240908), the parties resolved the case by Stipulations with Request for Award together with a request that the entire Award be commuted and paid in a lump sum to the applicant. For the reasons discussed above, the commutation proceeds are not subject to section 4650(d). Therefore, the defendant, SCIF, is not liable for a section 5814 penalty for failure to correctly calculate the section 4650(d) penalty. We will rescind the WCJ’s decision and replace it with our findings that section 4650(d) does not apply, and that SCIF is liable for only one section 5814 penalty for unreasonable delay in paying the commutation proceeds.

In *Crump v. Los Angeles Unified School District* (LAO 712097), we disagree with the WCJ’s finding that applicant waived the penalty under section 4650(d). While it is good practice to raise the issue as early as possible, the panel concluded in its prior opinion that “the applicant may raise the issue at the trial level, and the WCJ may proceed as necessary or appropriate.” Under the circumstances, we conclude that there was no waiver of section 4650(d). Nevertheless, as we have explained, the section 4650(d) penalty does not apply. Therefore, we will rescind the WCJ’s decision and replace it with our findings that while applicant did not waive section 4650(d), there is no basis for any further penalties under sections 4650(d) or 5814 in connection with LAUSD’s late payment of the C&R for death benefits. In view of the reduction in penalties, we will proportionately reduce the fee of applicant’s attorney.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Board (En Banc) in *Rivera v. Tower Staffing Solutions* (POM 240908), that the Amended Findings and Award of January 4, 2002 is **RESCINDED**, and the following Findings and Award is **SUBSTITUTED** in its place:

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FINDINGS

1. Defendant, State Compensation Insurance Company, unreasonably delayed the payment of benefits pursuant to an Award and Order of Commutation dated December 12, 2000, justifying one penalty under Labor Code section 5814.

2. Labor Code section 4650(d) does not apply to the proceeds of the commutation.

3. There is no basis for any penalty under section 5814 for failure to comply with section 4650(d).

4. The reasonable value of services and disbursements of applicant’s attorney is $1,738.28, calculated from 15% of the penalty in Finding 1.

AWARD

Award is made in favor of Juan Rivera against Tower Staffing, Inc. and State Compensation Insurance Fund as follows:

a) One 10% penalty under section 5814 in the amount of $11,588.57.

b) Attorney’s fees in the amount of $1,738.28, to be deducted from the above penalty.

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IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Board (En Banc) in Crump v. Los Angeles Unified School District (LAO 712097), that the Finding and Order of January 17, 2002 is RESCINDED, and the following Findings and Order is SUBSTITUTED in its place:

FINDINGS

1. Applicant did not waive the issue of penalty under Labor Code section 4650(d).

2. Section 4650(d) does not apply to the proceeds of the C&R for death benefits.

3. There is no basis for any penalty under section 5814 for failure to comply with section 4650(d).

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RIVERA/CRUMP, EN BANC
ORDER

It is ordered that applicant take nothing further by reason of his request for penalties under sections 4650(d) and 5814.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERRLE C. RABINE, Chairman

JAMES C. CUNEO, Commissioner

WILLIAM K. O'BRIEN, Commissioner

FRANK M. BRASS, Commissioner

JANICE J. MURRAY, Commissioner

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT THE LIEN CLAIMANTS.

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