

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DAISY REED, *Applicant*

vs.

**ANGELES HOME HEALTH CARE, INC.; CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION For TOWER SELECT INSURANCE NEW YORK/CASTLEPOINT
NATIONAL INSURANCE GROUP, In Liquidation, Administered By SEDGWICK CMS,
*Defendants***

**Adjudication Numbers: ADJ9104277, ADJ9114534
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this case, we granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Amended Joint Findings of Fact and Order of September 30, 2019, wherein it was found that defendant was liable for multiple Labor Code section 5814 penalties for unreasonably delaying the payment of compensation to the applicant, and liable for 5814.5 attorney's fees for enforcing payment of the award. In this matter, in an Amended Joint Findings and Award of November 5, 2018, it was found that while employed on February 22, 2013 (ADJ9104277), and during a cumulative period from November 1989 to February 22, 2013 (ADJ9114534), applicant sustained industrial injury to her tooth, mouth, face, neck, knees, cervical, lumbar and thoracic spine, wrists, shoulders, hips, right ankle, gastrointestinal system, and in the forms of headaches, hypertension, and constipation. It was found that the injuries combined to cause permanent total (100%) disability.

Defendant contends that the WCJ erred in imposing Labor Code section 5814 penalties and attorneys' fees. Alternatively, it contests the extent of the penalties and fees found by the WCJ. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

We will rescind the Amended Joint Findings of Fact and Order of September 30, 2019 and return this matter to the trial level for a complete reanalysis of and decision on the issue of Labor Code section 5814 penalties and Labor Code section 5814.5 attorneys' fees.

The WCJ's decision is not a model of clarity, but it appears that he found defendant liable for multiple \$10,000 penalties for the alleged delay in the payment of compensation. For instance, in one finding (Finding No. 6), the WCJ found defendant liable for "A 25% Labor Code § 5814 penalty, in the maximum amount of \$10,000, for defendant's failure to pay the required interest owed of \$178.20 on the late payment of the attorney fee...." It is unclear if the WCJ was finding that defendant was liable for the full \$10,000.00 or was liable for 25 percent of the \$178.20 delayed.

The underlying matters went to trial on September 5, 2018. Issues listed for determination at trial included body parts injured in the specific injury case, the fact of any industrial injury in the cumulative injury case, and extent of permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence of September 5, 2018 trial at pp. 3-5.) On October 23, 2018, the WCJ issued a Joint Findings and Award finding that applicant's injuries caused permanent total disability "entitling applicant to life-time indemnity payable at the rate of \$542.27 per week, (subject to reduction of attorney's fee as set forth below) **commencing on 11/15/2018**, less any permanent disability paid during the period, less a reasonable attorney's fee of \$81,306.43." (Emphasis added.) No other indemnity was found or awarded.

Applicant's counsel then wrote a letter to the WCJ requesting amendment of the decision, requesting that California Insurance Guarantee Association (CIGA) be identified as the proper defendant, that injury be found to the right hip, and in the form of headaches, and that additional bases for the finding of permanent total disability be included in the Opinion on Decision. In response, on November 5, 2018, the WCJ issued an Amended Joint Findings and Award, which now identified CIGA as the insurer (although the Award was still made against the employer), and now included the right hip and headaches as injured body parts, but still found permanent total disability "commencing on 11/15/2018" less an attorney's fee of \$81,306.43, to be "commuted by commutation [sic] by way of uniformly increasing reduction method of the Applicant's permanent

disability beginning on 11/15/2018, as set forth in the attached commutation by Mery Kazaryan on 10/15/2018.”¹ The Joint Findings and Award was served by mail.

Despite the findings of permanent total disability in the original Joint Findings and Award and the Amended Joint Findings and Award, defendant initially continued paying the applicant periodic indemnity payments at the permanent partial disability rate of \$230.00 per week. Thus, applicant was sent a check issued October 31, 2018 in the amount of \$460.00 corresponding to indemnity from October 18, 2018 to October 31, 2018, was sent another check issued November 14, 2018 in the amount of \$460.00 corresponding to the following two-week period of November 1, 2018 to November 14, 2018, and was sent a final check in the amount of \$460.00 corresponding to the period November 15, 2018 to November 28, 2018, despite the fact that the Amended Joint Findings and Award specified that, as of November 15, 2018, applicant was to be paid at the permanent total disability rate.

On November 19, 2018, two weeks after the issuance of the Amended Joint Findings and Award, before the November 5, 2018 Amended Award was final, given that the parties had until November 30, 2018 to avail themselves of reconsideration from the amended decision (see *Nestlé Ice Cream Co. v. Workers’ Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13]), applicant demanded immediate payment of the award, as well as any additional compensation due under Labor Code section 4650. According to applicant’s verified Petition for Penalties, applicant’s counsel spoke to defense counsel on November 19, 2018 and advised defense counsel that applicant would not seek penalties for delayed payment if the award were paid by December 1, 2018. (Petition for Penalties at p. 3.) On November 29, 2018, applicant’s counsel again demanded payment by December 1, 2018, along with Labor Code section 4650 penalties.

On Thursday, December 6, 2018, four business days after the November 5, 2018 amended decision became final, defendant mailed the applicant and applicant’s counsel seven checks. Applicant was sent a check for \$94,731.58 apparently representing accrued permanent disability, even though the Amended Findings and Award had found that defendant’s permanent disability liability commenced as of November 15, 2018. Applicant also was sent a check for \$9,473.16, an amount of 10% of the accrued retroactive permanent disability indemnity. Applicant was sent a

¹ While this commutation was attached to the original Joint Findings and Award, there was no commutation attached to the Amended Joint Findings and Award of November 5, 2018.

check for \$484.58, representing the purported difference between the \$460.00 previously paid for permanent disability indemnity for the period November 16, 2018 to November 28, 2018 and the permanent total disability actually owed.² Applicant was also sent checks in the amount of \$934.34 and \$45.17 labeled “CIGA Fault SIP.” Applicant’s counsel was sent the attorney’s fee award of \$81,306.43 on December 3, 2018 as well as a check in the amount of \$801.93 labeled “CIGA Fault SIP.”

Commencing December 12, 2018, defendant began paying applicant permanent total disability at the rate of \$455.86 per week, an underpayment of \$32.85 per week compared to the \$488.71 per week that was due. (See note 2, *ante*.)

According to the Petition for Penalties, applicant’s counsel again spoke with defense counsel on December 19, 2018. By December 19, 2018 the only indemnity not paid under the terms of the actual award was \$98.54, representing the \$32.84 underpayment for permanent disability indemnity through November 28, 2018 and the \$65.70 underpayment for permanent disability through December 12, 2018.³ Applicant was also owed about \$1.37 in interest on the underpayment of the periodic indemnity payments. (Lab. Code, § 5800.)⁴ Applicant’s counsel said that “if full and proper payment were not made soon, that applicant’s counsel would have no choice but to file ... a penalty petition.” (Petition for Penalties at p. 5.) It appears that applicant’s counsel demanded a Labor Code section 4650 penalty on the purportedly late attorney’s fees, even though Labor Code section 4650 does not apply to commuted future indemnity payments. (*Rivera v. Workers’ Comp. Appeals Bd.* (2003) 112 Cal.App.4th 1124, 1135 [68 Cal.Comp.Cases 1460].)

On December 24, 2018, defendant issued another periodic permanent disability indemnity payment at the incorrect rate of \$911.72. Defendant had again underpaid in the amount of \$65.70,

² Confusingly, the Commutation Request attached to the original Findings and Award, and referenced in the Amended Findings and Award, but not attached to the decision, states that applicant’s permanent total disability rate in 2018 because of increases in the state average weekly wage was \$613.25 (Lab. Code, § 4659, subd. (c)), while the actual decision states that the rate was \$542.27. In any case, it appears uncontested that the actual amount due after operation of the Amended Joint Decision was \$488.71 per week (\$977.42 every two weeks), representing \$613.25 less an amount commuted to fund the award of attorneys’ fees. We note that the \$460.00 initial payment of permanent disability indemnity and the \$484.58 make-up payment was \$32.84 short of the amount owed for the period November 15, 2018 to November 28, 2018.

³ This does not include a Labor Code section 4650 penalty in the amount of \$51.74 for the underpaid November 28, 2018 periodic indemnity payment or a Labor Code section 4650 penalty in the amount of \$6.57 for the underpaid December 12, 2018 indemnity payment. While these sums were due to the applicant, they were not part of the award.

⁴ By the December 6, 2018 payment of the award of attorney’s fees, about \$690.55 in interest had accrued from the November 5, 2018 Amended Findings and Award. It appears that the \$801.93 paid to applicant’s attorney on December 6, 2018 erroneously labeled CIGA Fault SIP covered the interest on the attorney’s fee award.

subjecting it to another Labor Code section 4650 penalty of \$6.57, and interest began accruing at the rate of 1.8 cents per day.

On January 2, 2019, applicant filed a Petition for Penalties. However, it appears that prior to the filing of the Petition for Penalties, on December 21, 2018, defendant had issued a check for 10 percent of the amount of the attorneys' fees awarded in the Amended Findings and Award pursuant to Labor Code section 5814(b), which states, "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 the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment 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)." It is unclear when the December 21, 2018 check was actually mailed to the applicant.

It appears that by January 9, 2019, applicant's indemnity payments were being paid at the correct rate, and that the \$164.24 in underpayments, along with interest, and Labor Code section 4650 penalties had been paid. Additionally, applicant claimed in her Petition for Penalties that even taking into account the December 6, 2018 payment of \$94,731.58, defendant had still underpaid retroactive permanent disability indemnity in the amount of \$1,476.49. (Petition for Penalties at p. 6.) It appears that by January 9, 2019, defendant cured this underpayment, along with a Labor Code section 4650 penalty and interest.

Defendant made many other payments during this time, which we either cannot decipher or which may or may not be material in any future analysis of the issues in this case. The facts of the instant dispute are very tedious, and we have attempted to give a general picture of the payments and timeframe involved.

The WCJ must do a full reanalysis of the issue of Labor Code section 5814 penalties and Labor Code section 5814.5 attorney's fees. In reanalyzing the issues herein, the WCJ and the parties should keep the following principles in mind.

First, Labor Code section 5814 mandates penalties when compensation has been "*unreasonably* delayed or refused, either prior to or subsequent to the issuance of an award...." (Lab. Code, § 5814, subd. (a) [emphasis added].) Thus, for each benefit applicant alleges has been delayed, there must be an analysis of whether the compensation was *unreasonably* delayed in light of the timelines outlined above and the wording of the Amended Findings and Award.

Second, to the extent any compensation was unreasonably delayed, the WCJ must determine the application of Labor Code section 5814(b), which states, “If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment 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 is subdivision (a).” Thus, for every benefit for which the applicant seeks penalties, the WCJ must analyze whether defendant’s self-imposed penalties predated applicant’s claim for penalties. We note that applicant threatened penalties many times, but defendant paid a self-imposed penalty on the majority of the purportedly delayed compensation prior to the filing of the Petition for Penalties. The WCJ should determine whether applicant’s threats of future action constituted a “claim” for penalties pursuant to Labor Code section 5814(b). (See generally *New United Motors Manufacturing, Inc. v. Workers’ Comp. Appeals Bd. (Gallegos)* (2006) 141 Cal.App.4th 1533 [71 Cal.Comp.Cases 1037].)

Third, as of amendments effective over 17 years ago, Labor Code section 5814 penalties are imposed only on the amount unreasonably delayed. Thus, while before June 1, 2004, a penalty was calculated on the entire amount of a specie of benefit due to the applicant, even if only a small portion was delayed or refused, now a penalty is calculated only on the amounts unreasonably delayed. Only by way of example, if interest was unreasonably delayed, the section 5814 penalty is calculated only on the interest unreasonably delayed, and not on all of the interest due to the applicant, and not on all the interest and the principal. The cases cited by applicant to the contrary in her Answer all predated the amendment of section 5814, effective June 1, 2004. Additionally, multiple penalties may be imposed on the same delayed compensation only if there was a second unreasonable delay after legally significant event such as an award of delayed compensation or a stipulation of liability to delayed compensation. (*Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1445 [70 Cal.Comp.Cases 294].) Thus, regardless of whether under current Labor Code section 5814 delays in the payment of permanent disability, section 4650 penalties and interest are considered the same or separate delays, multiple penalties cannot be assessed on the same delayed compensation unless there was an intervening legally significant event.

Fourth, to the extent that the WCJ determines that applicant is entitled to penalties on any delayed compensation beyond the self-imposed penalty, the WCJ must do a full analysis under

Ramirez v. Drive Financial Services (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc) regarding the amount of penalties awarded. The WCJ did not explain the basis of his imposition of a full 25 percent penalty. Labor Code section 5814(a) permits a penalty of “up to 25 percent.” (Emphasis added.) The amount of the penalty is discretionary, and the full 25 percent penalty should be reserved for the most culpable conduct on the part of a defendant. In *Ramirez*, we emphasized that Labor Code section 5814 affords a WCJ discretion in determining the penalty which should be assessed, with a primary view towards the goals of encouraging the prompt payment of benefits by making delays costly on defendants, and of ameliorating the effects of any delays on the injured worker. To that end, in *Ramirez*, we listed several factors to be considered by the WCJ in assessing a Labor Code section 5814 penalty. The factors listed in *Ramirez* are: (1) evidence of the amount of the payment delayed; (2) evidence of the length of the delay; (3) evidence of whether the delay was inadvertent and promptly corrected; (4) evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error; (5) evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a specified number of days; (6) evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers’ compensation insurance; (7) evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable; (8) evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it; and (9) evidence of the effect of the delay on the injured employee. (*Ramirez, supra*, 73 Cal.Comp.Cases at pp.1329-1330.)

Fifth, an award does not become “due” until it becomes final. “An award becomes final ... when a defendant has exhausted all of its appellate rights or has not pursued them.” (*Leinon v. Fishermen’s Grotto* (2004) 69 Cal.Comp.Cases 995, 1000 [Appeals Bd. en banc.]⁵) A material change in a decision under former WCAB Rule 10858 (current rule 10966, Cal. Code Regs., tit. 8, § 10966), such as adding body parts or changing party, extends the period to seek reconsideration,

⁵ We note that there is some disagreement among members of the Appeals Board regarding when a payment must include a Labor Code section 4650 penalty. (See *Knight v. Marisan Group* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 48 [Appeals Bd. panel].) We need not resolve this issue here because the issue of whether a payment must include a Labor Code section 4650 penalty is distinct from the issue of when the payment is due.

and thus an award does not become final under 20 days after service of the amended decision. *Nestlé Ice Cream Co. v. Workers' Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].)

Sixth, while Labor Code section 5814 applies to compensation that has been unreasonably delayed or refused either prior or subsequent to an award (Lab. Code, § 5814, subd. (a)), section 5814.5 attorneys' fees apply only to compensation included in an award, and fees may only be awarded for enforcing the unreasonably delayed award. (Lab. Code, § 5814.5; *Ramirez, supra*, 73 Cal.Comp.Cases at p. 1336.) Here, the Amended Findings and Award included only permanent total disability indemnity commencing on November 15, 2018 and attorneys' fees. Thus section 5814.5 attorneys' fees are available if they were incurred for the enforcement of that compensation. Thus, in order to award section 5814.5 attorneys' fees, it must be determined that these benefits were unreasonably refused, and that attorneys' fees were incurred in enforcing these benefits.

The above is not intended to be an exhaustive recital of the material facts of this matter, or of the issues for analysis. In the further proceedings, to the extent that the WCJ imposes any penalties or finds an entitlement to Labor Code section 5814.5 attorney's fees, the WCJ should specify the exact penalty imposed and the exact fees due. Additionally, the WCJ must explain the basis of any decision. We take no position on the ultimate resolution of this matter.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Amended Joint Findings of Fact and Order of September 30, 2019 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 5, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**DAISY REED
SHELLEY & GRAFF
KEGEL, TOBIN & TRUCE**

DW/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o