

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

PRISCILLA LUJAN, *Applicant*

vs.

**GOODWILL SERVING THE PEOPLE OF SOUTHERN LOS ANGELES;
U.S. FIRE INSURANCE COMPANY, CRUM FORSTER, *Defendants***

**Adjudication Number: ADJ7932563
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
REMOVAL**

Defendant seeks removal of an order setting this matter for trial (Order) issued on the November 2, 2020 by a workers' compensation administrative law judge (WCJ). The Order was issued following applicant's Declaration of Readiness to Proceed on applicant's issues of penalties for failure to pay permanent disability (Lab. Code, § 4650(d)), and petition for sanctions and penalties for failure to pay temporary disability (penalties and sanctions issues).

Defendant contends that applicant's penalties and sanctions issues were previously raised at trial on September 3, 2019, and thereafter denied by operation of law pursuant to Labor Code¹ section 5815 because the WCJ failed to rule on the issues; that the Appeals Board is barred by section 5804 from rescinding, altering, or amending an award of compensation after five years from the date of injury; and, that the doctrine of collateral estoppel bars applicant from re-litigating these issues because they were already adjudicated.²

Applicant did not file an answer to the Petition for Removal. The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that the petition be denied

¹ All further references are to the Labor Code unless otherwise noted.

² Defendant also requests costs and sanctions against applicant's attorney for his bad faith pursuit of "previously litigated and resolved issue." (Petition for Removal, p. 6.) We decline to do so given our determination that the penalties and sanctions issues were not litigated, adjudicated, or determined, and therefore deferred.

because the penalties and sanctions issues were not litigated in the first instance, and because claims for sanctions are not subject to the five year limitation of section 5804.

We have reviewed the record in this case, the allegations of the Petition for Removal, and the contents of the Report. For the reasons set forth below, we deny defendant's Petition for Removal.³

FACTS

Trial commenced in this matter on September 3, 2019, and was thereafter continued to November 14, 2019 and January 29, 2020. (See Minutes of Hearing and Summary of Evidence (MOH) dated September 3, 2019, November 14, 2019, and January 29, 2020.) The penalties and sanctions issues were raised on the first day of trial: "a) Applicant claims 4650(d) penalties for failure to pay PD and petition for sanctions and penalties per temporary disability." (MOH, September 3, 2019, p. 3, ¶ 8.)

The WCJ issued a Findings and Award on April 21, 2020 (F&A). (F&A, April 21, 2020.) The WCJ did not issue any findings of fact related to the penalties and sanctions issues, nor did the WCJ issue any orders or awards related to those issues. (*Ibid.*) There is no discussion of these issues in the Opinion on Decision. (*Id.*, Opinion on Decision, April 21, 2020.)

On April 24, 2020, applicant requested amendment of the F&A related to the penalties and sanctions issues. (amendment to application_04 24 20 0423.pdf, April 24, 2020 (naming errors in the original).) The record does not reflect that the WCJ responded or acted on applicant's request.

Defendant filed a Petition for Reconsideration on May 14, 2020 wherein it sought reconsideration of the F&A on other grounds. (Petition for Reconsideration, May 14, 2020.) Applicant filed an Answer to Petition for Reconsideration. (Answer to Petition for Reconsideration.) The WCJ filed a Report and Recommendation on Petition for Reconsideration. (Report and Recommendation on Petition for Reconsideration, May 21, 2020.) No one brought up the penalties and sanctions issues, although applicant requested additional penalties for defendant's failure to provide applicant benefits (permanent disability and medical treatment) from the date of the F&A, and sanctions for defendant's bad faith arguments. (Answer to Petition for Reconsideration, pp. 6-7.)

³ We note that applicant has been unable to obtain a hearing date since the filing of this Petition for Removal; proceedings at the trial level are not suspended pending the resolution of a petition for removal, as they are when a petition for reconsideration is filed (Cal. Code Regs., tit. 8, § 10961).

The Appeals Board issued the Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (2020 Decision) on June 18, 2020. (2020 Decision, June 18, 2020.) The Appeals Board affirmed the WCJ's decision, but granted defendant's Petition for Reconsideration to amend the F&A to reflect that attorney's fees would be held in trust pending agreement of the parties or order of the WCJ. (*Ibid.*)

DISCUSSION

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision averse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

Defendant contends that the penalties and sanctions issues were denied by operation of law pursuant to section 5815. (Lab. Code, § 5815.)⁴ The penalty issues raised by applicant at trial were pursuant to section 4650:

(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, as defined in subdivision (g). **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 and advises the employee, in the manner prescribed in rules and regulations adopted pursuant to Section 138.4, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability indemnity payments are owed, and when the employer expects to have the information required to make the decision.** (Lab. Code, § 4650, emphasis added.)

⁴ "Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised." (Lab. Code, § 5815.)

Section 4650 penalties are self-executing, i.e., indemnity payments “shall be increased,” and “shall be paid without application...” (*Ibid.*) In other words, neither the WCJ nor the Appeals Board has the authority to deny section 4650 penalties because the liability against defendant is self-executing. The burden to establish an exception under section 4650 is on the employer or carrier. (See e.g., *Kerley v. Workmen’s Comp. App. Bd.* (1971) 4 Cal.3d 223, 227 [“burden is on the employer or carrier to establish the existence of a genuine doubt, from a medical or legal standpoint, as to its liability for the benefits to be advanced”].)

Next, defendant contends that the penalties and sanctions issues were litigated and adjudicated at trial, and contends that applicant is therefore precluded from re-litigating the issues under the doctrine of issue preclusion.⁵ We disagree. The record of this case indicates that although the penalties and sanctions issues were identified in the initial MOH, neither the parties nor the WCJ intended to adjudicate these issues at trial. For example, in addition to the WCJ not including the issues in the F&A or Opinion on Decision, applicant did not testify regarding any late indemnity checks. Also, and more telling, there is no rebuttal evidence in the record from defendant, i.e., defendant neither called its own witnesses nor cross-examined applicant regarding late indemnity payments.⁶ We therefore disagree that applicant can be precluded from litigating issues that were never litigated, and which were never subject to a final decision on the merits. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652] [“issue preclusion applies...after final adjudication...of an identical issue...actually litigated and necessarily decided in the first suit...”].)

In addition, defendant contends that it was up to applicant to correct the F&A by filing a petition for reconsideration (or be subject to denial under section 5815). First, applicant did request amendment of the F&A to include findings related and necessary to the penalties and sanctions

⁵ “We have sometimes described ‘res judicata’ as synonymous with claim preclusion, while reserving the term ‘collateral estoppel’ for issue preclusion. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 [123 Cal. Rptr. 2d 432, 51 P.3d 297] (*Mycogen*).) ... To avoid future confusion, we will follow the example of other courts and use the terms ‘claim preclusion’ to describe the primary aspect of the res judicata doctrine and ‘issue preclusion’ to encompass the notion of collateral estoppel...” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652] (*DKN*), emphasis added.) We follow the Supreme Court’s direction and refer to res judicata as claim preclusion and collateral estoppel as issue preclusion.

⁶ Defendant’s only exhibit was an insufficient benefits print-out that failed to delineate the dates of each payment of temporary and permanent disability. (Exh. T, pp. 21, 27; see WCAB Rule 10635 (Cal. Code Regs., tit. 8, § 10635).)

issues, but the WCJ did not respond or act on that request.⁷ Moreover, as stated above, the parties did not actually litigate the penalties and sanctions issues at trial.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.) Section 5315 must be viewed in light of the entire statutory scheme, which includes section 5313, whose purpose is “to avoid careless and arbitrary action and to assist the reviewing court in meaningful judicial review by providing the court with the principles relied on by the Board.” (*Twentieth Century-Fox Film Corp. v. Workers’ Comp. Appeals Bd. (Conway)* (1983) 141 Cal.App.3d 778, 784 [48 Cal.Comp.Cases 275], citing *Goytia v. Workmen’s Comp. App. Bd.* (1970) 1 Cal.3d 889, 893 and *Patterson v. Workers’ Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 924.) We note that as a consequence, any decision of the WCJ or the Appeals Board that fails to dispose of all issues raised and necessary for decision constitutes error, which would require remand upon review. (*Toccalino v. Workers’ Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145; see *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 124.)

Under the procedural history presented in this case and given that the penalties and sanctions issues were not actually litigated or adjudicated, we do not agree that the issues were denied by operation of law pursuant to section 5815.

Finally, the adjudication and/or award of penalties and/or sanctions under section 4650 or 5814, are not barred by the 5-year time limit of section 5804. (Lab. Code, § 5804 [“No award of *compensation* shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years...”], emphasis added.)⁸ The “authority [of the WCJ and the Appeals Board] under section 5803 to *enforce* its awards, including

⁷ Arguably, if the Appeals Board had been apprised of applicant’s request, and/or made aware of the WCJ’s error upon reconsideration by the WCJ or either party, it could have at the time of defendant’s prior Petition for Reconsideration, rescinded the F&A and returned this matter to the trial level for further proceedings and new decision by the WCJ. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals Bd. en banc) [filing of a petition for reconsideration gives the Appeals Board the authority to address all issues, including those not specifically raised].)

⁸ The same applies to section 5813 sanctions, which were enacted to punish litigation abuses. (*Duncan v. Workers’ Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 304 [2008 Cal.App. LEXIS 1354]. (*Duncan*).)

ancillary proceedings involving commutation, **penalty assessment and the like...**” is not subject to the 5-year limitation of section 5804. (*Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 297 [56 Cal.Comp.Cases 476], italics in the original, bold added.)⁹ Therefore, and contrary to defendant’s contention, the WCJ and the Appeals Board does have continuing jurisdiction to enforce the award of indemnity in this case, including the assessment of penalties and/or sanctions.

Accordingly, we deny removal as no irreparable harm or severe prejudice will result from the litigation and adjudication of the penalties and sanction issues. Any person aggrieved by any final order in this matter may seek reconsideration of that final order.

⁹ This is consistent with the fact that “[a] penalty or sanction cannot be construed as a workers’ compensation “benefit...” (*Duncan, supra*, 166 Cal.App. at p. 304.) “The purposes of section 5814 are both remedial and penal. (citations) Each of these purposes is ‘equally important.’ (citations) ... The [Supreme] Court also stated that a section 5814 penalty was intended to ‘have an in terrorem effect on employers and their insurance carriers.’ (citations) ... The remedial aspect of section 5814 is to ameliorate the economic hardship on the injured employee that results from the delay in the provision of benefits and, when the employee is unable to work, that results from the interruption of their employment and concomitant loss of income.” (*Ramirez v. Drive Financial Services, et al.* (2008) 73 Cal.Comp.Cases 1324, 1328-1329 (Appeals Bd. en banc) [2008 Cal.Wrk.Comp. LEXIS 278].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the order setting this matter for trial issued on the November 2, 2020 by a workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 17, 2022

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

**PRISCILLA LUJAN C/O DAVID KESTNER & ASSOCIATES
LAW OFFICES OF DAVID KESTNER & ASSOCIATES
LOWER & KESNER, LLP**

AJF/ara

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

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