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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DEE ANNE RAMIREZ,

Applicant,

vs.

**DRIVE FINANCIAL SERVICES; and ONE
BEACON INSURANCE CO.,**

Defendant(s).

**Case No. ADJ4579659
(AHM 0089109)**

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

The Appeals Board granted applicant's petition for reconsideration to allow time to study the record and applicable law. Because of the important legal issues regarding penalties under Labor Code section 5814¹ and attorney's fees under section 5814.5, and to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)²

For the reasons discussed below, we hold: (1) that the amount of the penalty under section 5814(a) is discretionary and should be determined upon consideration of the factors enumerated in this opinion; (2) that although, under new section 5814(a), a successive penalty may still be awarded for an unreasonable delay in making a prior penalty payment, it should not be awarded where the defendant had genuine doubt as to its liability or where there is no legally significant intervening event; (3) that, if an unreasonable delay in payment of an award of compensation occurred after January 1, 2003, section 5814.5 entitles an applicant's attorney to receive fees for enforcing the award, even against a private employer and even when the injury occurred prior to

¹ All further statutory references are to the Labor Code, unless otherwise indicated.

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

1 January 1, 2003, the effective date of the amendment to section 5814.5; and (4) that such fees are
2 to be awarded “in addition to” applicant’s section 5814(a) penalty — not as a percentage of the
3 penalty — and are to be based on the reasonable number of hours expended and a reasonable
4 hourly rate.

5 **BACKGROUND**

6 Applicant was employed by Drive Financial Services as a collections specialist from
7 August 9, 2000 through February 15, 2001. Defendant, One Beacon Insurance Company (One
8 Beacon), had coverage for the employer during some of this period. Applicant filed a claim of
9 cumulative injury to various body parts, which was resolved by a December 7, 2004 order
10 approving compromise and release (OACR). Pursuant to the OACR, One Beacon was to pay
11 applicant \$57,000. In addition, One Beacon agreed to pay \$3,000 to applicant as settlement of
12 prospective vocational rehabilitation services (RU-122), and the agreement was approved by the
13 workers’ compensation administrative law judge (WCJ) in a separate order, also dated December
14 7, 2004.

15 The compromise and release agreement provided that all penalty issues were waived if
16 defendant made payment within 30 days of service of the OACR. Defendant concedes in its
17 Response to Petition for Reconsideration that it was five days late in making its payments of
18 \$57,000 and \$3,000 to applicant.³ Applicant’s attorney notified defendant of the late payments by
19 multiple letters, and requested penalties. Applicant’s Exhibit 1 contains five letters to defendant,
20 requesting a 25 percent penalty on the late payments. They are dated January 12, 2005, January
21 17, 2005, February 2, 2005 (letter confirming a phone conversation), February 4, 2005 (faxed), and
22 March 7, 2005. Defendant, without any penalty award, paid applicant penalties of \$5,700 and
23 \$300 by checks dated February 8, 2005, and February 6, 2005, respectively. (Defendant’s Exhibit
24 A.) Defendant did not withhold any attorney’s fees from the penalty payments.

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27 ³ In defendant’s Opposition to Applicant’s Penalty Petition, defendant stated that its payments were 15 and 17 days late.

1 Applicant then filed a penalty petition, essentially asserting that defendant should have
2 paid the maximum penalties available under section 5814(a) (i.e., the lesser of either 25 percent or
3 \$10,000) for each of the delays, meaning that defendant should have paid \$10,000 against the
4 delayed \$57,000 payment and \$750 against the delayed \$3,000 payment. In addition, applicant
5 asserted that, because defendant underpaid the penalties by \$4,300 and \$450, respectively,
6 defendant now also owes additional 25 percent penalties, plus interest, against those amounts.
7 Finally, applicant requested attorney's fees pursuant to section 5814.5. The issues of applicant's
8 section 5814 penalty and section 5814.5 attorney's fee claims were tried on August 30, 2006.

9 On October 20, 2006, the WCJ issued his Findings and Order, finding that no further
10 penalties were owed for the late payments, but that a ten-percent (\$600) fee for applicant's
11 attorney was warranted.⁴ The WCJ found that, given the circumstances, a ten-percent penalty was
12 sufficient to accomplish a fair balance and substantial justice between the parties and that, while
13 section 5814(a) authorizes a penalty of up to 25 percent, it affords discretion to award a lesser
14 amount. The WCJ denied the claim for a fee pursuant to section 5814.5, reasoning that section
15 5814.5, as amended to apply to all employers except the State (see Lab. Code, §§ 5814.5, 3700),
16 applies only to dates of injury on or after January 1, 2003, the effective date of the amendment. He
17 cited *Khan v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1168 (writ den.) (*Khan*).

18 Applicant petitioned for reconsideration, essentially reiterating the contentions of her
19 penalty petition. Defendant filed a Response. We granted reconsideration on January 2, 2007.

20 On April 23, 2007, we received Applicant's Supplemental Petition for Reconsideration.
21 We received defendant's Response on May 14, 2007. Because we did not request or approve these
22 supplemental pleadings, we have not considered them. (See Cal. Code Regs., tit. 8, § 10848.)

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26 ⁴ The WCJ did not award the fee under section 5814.5. Therefore, because defendant did not withhold any
27 attorney's fees from the \$5,700 and \$300 penalty payments, it appears that the WCJ was ordering that this \$600 fee
was defendant's direct liability. (Cf. *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 380 (Appeals
Board en banc).)

1 **DISCUSSION**

2 **I. LABOR CODE SECTION 5814 ISSUES**

3 **A. Calculation of the Amount of a Section 5814(a) Penalty**

4 Prior to Senate Bill 899, section 5814 provided, “When payment of compensation has been
5 unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full
6 amount of the order, decision, or award shall be increased by 10 percent.” Because former section
7 5814 mandated a “10 percent” increase whenever an unreasonable delay occurred, the WCAB had
8 no discretion to impose a penalty that was greater or lesser than 10 percent. Therefore, there was
9 no basis to consider what factors might be balanced in determining the amount of the penalty. The
10 only balancing that occurred was in determining whether to award a section 5814 penalty at all.
11 (See generally *County of San Luis Obispo v. Workers’ Comp. Appeals Bd. (Barnes)* (2001) 92
12 Cal.App.4th 869, 874-879 [66 Cal.Comp.Cases 1261, 1264-1268] (*Barnes*).)

13 The current version of section 5814 was enacted on April 19, 2004, and became operative
14 on June 1, 2004. (Lab. Code, § 5814(i).) Section 5814(a) now provides:

15 “When payment of compensation has been unreasonably delayed
16 or refused, either prior to or subsequent to the issuance of an
17 award, the amount of the payment unreasonably delayed or refused
18 shall be increased up to 25 percent or up to ten thousand dollars
19 (\$10,000), whichever is less. In any proceeding under this section,
the appeals board shall use its discretion to accomplish a fair
balance and substantial justice between the parties.”

20 In light of the language of current section 5814(a), the WCJ correctly concluded that
21 discretion is now required in setting the amount of a penalty and that an applicant is not
22 necessarily “entitled” to the maximum. Section 5814(a) provides that, when an unreasonable
23 delay is found, the penalty shall be “up to 25 percent or up to ten thousand dollars (\$10,000),
24 whichever is less” and that the Appeals Board “shall use its discretion to accomplish a fair balance
25 and substantial justice between the parties.” However, the WCJ offered no explanation as to why
26 he thought the \$5,700 and \$300 penalties that defendant paid were the appropriate penalty amounts
27 under the “fair balance and substantial justice” test of section 5814(a).

1 In exercising discretion so as “to accomplish a fair balance and substantial justice between
2 the parties,” there are a number of factors that a WCJ might consider.

3 The overriding consideration in determining what penalty amount to assess should be
4 whether the penalty imposed would serve “the purposes sought to be accomplished” by section
5 5814. (*Barnes, supra*, 92 Cal.App.4th at pp. 878-879 [66 Cal.Comp.Cases at p. 1266].) The
6 purposes of section 5814 are both remedial and penal. (*State Comp. Ins. Fund v. Workers’ Comp.*
7 *Appeals Bd. (Stuart)* (1998) 18 Cal.4th 1209, 1214 [63 Cal.Comp.Cases 916, 919] (*Stuart*);
8 *DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 396 [58 Cal.Comp.Cases 286, 297]
9 (*DuBois*.) Each of these purposes is “equally important.” (*Stuart, supra*, 18 Cal.4th at p. 1214 [63
10 Cal.Comp.Cases at p. 919]; *DuBois, supra*, 5 Cal.4th at p. 396 [58 Cal.Comp.Cases at p. 297].)

11 The penal aspect of section 5814 provides an incentive to employers and insurance carriers
12 to pay benefits promptly by making delays costly. (*Stuart, supra*, 18 Cal.4th at p. 1214 [63
13 Cal.Comp.Cases at p. 919]; *Barnes, supra*, 92 Cal.App.4th at p. 874 [66 Cal.Comp.Cases at p.
14 1264].) In discussing former section 5814, the Supreme Court has stated that “section 5814 was
15 enacted as an inducement to prompt payment on the part of private employers and their insurers,
16 which otherwise would have an economic incentive to delay or deny the payment of workers’
17 compensation benefits.” (*DuBois, supra*, 5 Cal.4th at p. 396 [58 Cal.Comp.Cases at p. 297].) The
18 Court also stated that a section 5814 penalty was intended to “have an in terrorem effect on
19 employers and their insurance carriers.” (*Avalon Bay Foods v. Workers’ Comp. Appeals Bd.*
20 *(Moore)* (1998) 18 Cal.4th 1165, 1178 [63 Cal.Comp.Cases 902, 911]; see also *Consani v.*
21 *Workers’ Comp. Appeals Bd.* (1991) 227 Cal.App.3d 12, 23 [56 Cal.Comp.Cases 45, 53] [“Section
22 5814 is the goad for securing timely payment of compensation to injured working men and women
23 without delay.”].)

24 The remedial aspect of section 5814 is to ameliorate the economic hardship on the injured
25 employee that results from the delay in the provision of benefits and, when the employee is unable
26 to work, that results from the interruption of their employment and concomitant loss of income.
27 (*Stuart, supra*, 18 Cal.4th at p. 1214 [63 Cal.Comp.Cases at p. 919]; *DuBois, supra*, 5 Cal.4th at p.

1 396 [58 Cal.Comp.Cases at p. 297].) As stated by the Supreme Court, a section 5814 penalty “is
2 designed to help an employee obtain promptly the cure or relief he is entitled to under the law, and
3 to compel his employer to provide this cure or relief in timely fashion.” (*Adams v. Workers’ Comp.*
4 *Appeals Bd.* (1976) 18 Cal.3d 226, 229 [41 Cal.Comp.Cases 680, 682]; see also, *DuBois, supra*, 5
5 Cal.4th at p. 396 [58 Cal.Comp.Cases at p. 297] [“the remedial aspect [of section 5814] is to
6 facilitate return to work of the injured employee as quickly as possible”].)

7 Although these are the overriding factors in determining the appropriate amount of a
8 section 5814(a) penalty, there are additional factors that also might be considered in determining
9 an appropriate penalty. We recognize that most of these factors are derived from case law
10 regarding whether a delay is or is not unreasonable; and, of course, when a WCJ has reached the
11 point of determining what penalty amount to award, a determination that the delay was
12 unreasonable already has been made. Nevertheless, some factors relevant to the assessment of
13 reasonableness also are relevant to the assessment of the amount of the penalty to be awarded, i.e.,
14 up to 25 percent of the amount delayed or \$10,000, whichever is less. These factors include, but
15 are not necessarily limited to:

- 16 (1) evidence of the amount of the payment delayed;
- 17 (2) evidence of the length of the delay;
- 18 (3) evidence of whether the delay was inadvertent and
19 promptly corrected;
- 20 (4) evidence of whether there was a history of delayed
21 payments or, instead, whether the delay was a solitary instance of
22 human error;
- 23 (5) evidence of whether there was any statutory, regulatory, or
24 other requirement (e.g., an order or a stipulation of the parties)
25 providing that payment was to be made within a specified number
26 of days;
- 27 (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;

1 (7) evidence of whether there was institutional neglect by the
2 defendant, such as whether the defendant provided a sufficient
3 number of adjusters to handle the workload, provided sufficient
4 training to its staff, or otherwise configured its office or business
5 practices in a way that made errors unlikely or improbable;

6 (8) evidence of whether the employee contributed to the delay
7 by failing to promptly notify the defendant of it; and

8 (9) evidence of the effect of the delay on the injured employee.

9 (See generally, e.g., *Stuart, supra*, 18 Cal.4th at pp. 1216-1220 [63 Cal.Comp.Cases at pp. 921-
10 924]; *Barnes, supra*, 92 Cal.App.4th at pp. 874-878 [66 Cal.Comp.Cases at pp. 1264-1268];
11 *County of Sacramento v. Workers' Comp. Appeals Bd. (Souza)* (1999) 69 Cal.App.4th 726, 732-
12 733 [64 Cal.Comp.Cases 30, 34-35]; *Kampner v. Workers' Comp. Appeals Bd.* (1978) 86
13 Cal.App.3d 376, 384 [43 Cal.Comp.Cases 1198, 1204].)

14 Defendant argued in its Opposition to Applicant's Penalty Petition that its delay in this case
15 was not "so unreasonable" as to warrant the maximum penalty. It argued that its "self-imposed"
16 ten-percent penalty was "sufficient to have accomplished a fair balance and substantial justice
17 between the parties." For guidance in determining a reasonable penalty amount, defendant
18 suggested looking to section 5814(b), which allows an employer, who discovers a potential
19 violation of section 5814 prior to the employee claiming a penalty, to pay a self-imposed penalty
20 of ten percent within 90 days of the discovery, in lieu of a section 5814(a) penalty.⁵

21 Because the WCJ in this case offered no explanation as to why he thought the \$5,700 and
22 \$300 penalties paid by defendant were the appropriate penalty amounts, we will rescind the
23 October 20, 2006 decision and return the matter to the WCJ so that he may consider this question

24 ⁵ Defendant has not argued that its voluntary penalty satisfies section 5814(b) and is in lieu of a section
25 5814(a) penalty. Such an argument would be difficult to make in this case, given applicant's five letters requesting a
26 25 percent penalty, four of which pre-date defendant's penalty checks. Unlike the applicant in *New United Motors
27 Manufacturing, Inc. v. Workers' Comp. Appeals Bd. (Gallegos)* (2006) 141 Cal.App.4th 1533 [71 Cal.Comp.Cases
1037], who merely requested a benefit printout and an explanation of why the entire award had not been paid,
applicant in this case expressly and repeatedly requested, i.e. "claimed," a penalty. We do not believe the filing of a
petition for penalty is required to "claim" a penalty. A petition is a request for action by the WCAB. (Cal. Code
Regs., tit. 8, § 10450.) It would be inefficient and inconsistent with the constitutional mandate to "accomplish
substantial justice in all cases expeditiously, inexpensively, and without incumbrance" (Cal. Const., art. XIV, § 4) to
interpret section 5814(b), which does not mention the filing of a petition, as requiring a formal request for
adjudication by the WCAB when the parties, in many instances, will be able to resolve the penalty issue informally.

1 in light of our discussion above. When he issues a new decision, his Opinion on Decision should
2 explain the reasons for his penalty determination. (Lab. Code, § 5313.)

3 **B. Multiple Penalties Under Section 5814**

4 Applicant contends that, under new section 5814(a), he should have been awarded multiple
5 penalties: (1) the statutory maximum of \$10,000 for defendant’s delay in paying the \$57,000 due
6 under the OACR, plus the statutory maximum of \$750 (i.e., 25 percent of the delayed amount) for
7 defendant’s delay in paying the \$3,000 due under the RU-122; and (2) additional section 5814(a)
8 penalties for defendant’s failures to pay the foregoing penalties at their statutory maximums.
9 (Once again, defendant paid ten-percent penalties of \$5,700 for the \$57,000 delay and \$300 for the
10 \$3,000 delay.)

11 We agree that, in principle, a separate section 5814(a) penalty may be awarded for an
12 unreasonable refusal or delay in making a section 5814 penalty payment. New section 5814(a)
13 continues to state that a penalty is payable “[w]hen payment of *compensation* has been
14 unreasonably delayed or refused.” (Emphasis added.) Payment of a section 5814 penalty is
15 “compensation.” (See Lab. Code, § 3207; *DuBois, supra*, 5 Cal.4th at p. 396 [58 Cal.Comp.Cases
16 at p. 297]; *State of California v. Workers’ Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th
17 128, 140 [61 Cal.Comp.Cases 325, 334] (*Ellison*).

18 Nevertheless, without actually deciding the issue, we observe that, on the facts of this case,
19 we have serious questions about the appropriateness of awarding new and separate section 5814(a)
20 penalties against defendant’s penalty payments of \$5,700 and \$300, based on defendant’s failure to
21 voluntarily pay a larger penalty amount.

22 Preliminarily, new section 5814(a) still provides that a penalty is payable only “[w]hen
23 payment of compensation has been *unreasonably* delayed or refused.” (Emphasis added.) A delay
24 or a refusal to pay is not “unreasonable” if the defendant had “genuine doubt from a medical or
25 legal standpoint as to [its] liability.” (*Kerley v. Workers’ Comp. Appeals Bd.* (1971) 4 Cal.3d 223,
26 230 [36 Cal.Comp.Cases 152, 157].) Here, there is a significant possibility that, when defendant
27 made its penalty payments of \$5,700 and \$300 (i.e., ten percent of \$57,000 and \$3,000,

1 respectively), it could have had genuine doubt from a legal standpoint regarding its liability for
2 more than it paid. As of the time defendant voluntarily paid these amounts, there had been no
3 order or award directing it to pay more than ten percent. Therefore, given that section 5814(a)
4 gives the WCAB discretion to award a penalty within a broad range, i.e., up to 25 percent or
5 \$10,000, whichever is less, it appears, without actually deciding, that defendant may well have had
6 genuine doubt as to whether it should have paid more than ten percent.

7 Moreover, in *Christian v. Workers' Comp. Appeals Bd.* (1997) 15 Cal.4th 505, 507 [62
8 Cal.Comp.Cases 576, 577] (*Christian*), the Supreme Court held that former section 5814 permitted
9 multiple penalties to be assessed against a defendant "when the unreasonable delay or refusal of
10 [the] benefits [due] is attributable to separate and distinct acts by an employer or insurance
11 carrier." A separate and distinct act of misconduct occurs where there is an unreasonable delay or
12 refusal to pay after "the same conduct had already been found ... to be unreasonable and a prior
13 penalty imposed, or some analogous, legally significant event such as stipulation of liability by the
14 carrier had intervened between the first act for which a penalty was imposed and the second." (*Id.*,
15 15 Cal.4th at p. 511 [62 Cal.Comp.Cases at p. 580].)

16 The *Christian* rationale is applicable to new section 5814. (*Green v. Workers' Comp.*
17 *Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1443-1445 [70 Cal.Comp.Cases 294, 309-310]
18 (*Green*.) Nevertheless, there is a question as to whether defendant's voluntary ten-percent
19 penalties on its delayed payments, in the absence of a WCAB order, would constitute a legally
20 significant intervening event. Indeed, to so conclude could lead to the anomalous result that a
21 defendant would be in a worse position if, without an order from the WCAB, it pays *some* penalty
22 than if it pays *no* penalty. (See *Moulton v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th
23 837, 844 [65 Cal.Comp.Cases 1259, 1262] (noting that, absent a legally significant intervening
24 event, the imposition of multiple penalties against an employer who pays some benefits, but does
25 not pay them all, would mean that "we would treat the employer who makes a partial payment
26 more harshly than the employer who makes no payment at all."))

27 However, we will remand this issue to the WCJ to decide in the first instance.

1 **II. LABOR CODE SECTION 5814.5 ISSUES**

2 **A. Application of Current Section 5814.5 to Injuries Occurring Before Its January 1, 2003**
3 **Effective Date**

4 Labor Code section 5814.5 currently provides:

5 “When the payment of compensation has been unreasonably
6 delayed or refused subsequent to the issuance of an award by an
7 employer that has secured the payment of compensation pursuant
8 to Section 3700, the appeals board shall, in addition to increasing
9 the order, decision, or award pursuant to Section 5814, award
reasonable attorneys’ fees incurred in enforcing the payment of
compensation awarded.”

10 Section 5814.5 was amended to its present form by Assembly Bill (AB) 749, effective
11 January 1, 2003. Prior to its amendment by AB 749, section 5814.5 applied only to delays “by an
12 employer which has secured the payment of compensation pursuant to subdivision (c) of Section
13 3700.” Section 3700(c) concerns securing the payment of compensation for “any county, city, city
14 and county, municipal corporation, public district, public agency, or any political subdivision of
15 the state....” Therefore, when section 5814.5 was first enacted, it applied only to political
16 subdivisions of the State, although not to the State itself. (*Ellison, supra*, 44 Cal.App.4th at p. 138,
17 fn. 12 [61 Cal.Comp.Cases at p. 332, fn. 12].) As amended, however, section 5814.5 applies to
18 any “employer that has secured the payment of compensation pursuant to section 3700.” Because
19 section 3700 applies to “[e]very employer except the state,” private employers were included in
20 section 5814.5 effective January 1, 2003.

21 The WCJ, relying on *Khan, supra*, 71 Cal.Comp.Cases 1168 (writ den.), concluded that,
22 since applicant’s injury occurred before the effective date of the amendment to section 5814.5,
23 section 5814.5 cannot be applied to her case. “Writ denied” cases are citable authority as to the
24 holding of the Appeals Board panel in its underlying decision. (E.g., *Farmers Ins. Group of*
25 *Companies v. Workers’ Comp. Appeals Bd. (Sanchez)* (2002) 104 Cal.App.4th 684, 689, fn. 4 [67
26 Cal.Comp.Cases 1545]; *Bowen v. Workers’ Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn.
27 10 [64 Cal.Comp.Cases 745].) However, unlike Appeals Board en banc decisions (see Cal. Code

1 Regs., tit. 8, § 10341), Appeals Board panel decisions, even if appellate review is denied, are not
2 binding precedent and have no stare decisis effect. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96
3 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; *MacDonald v. Western Asbestos Co.*
4 (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) In *Khan*, the section 5814.5 issue
5 was not the primary issue being addressed by the Appeals Board's panel decision. Moreover, the
6 issue of whether section 5814.5 could be applied to injuries before January 1, 2003, was not even
7 raised by the parties. Therefore, that issue was not analyzed in depth in *Khan*. Now, upon more
8 comprehensive analysis, we conclude that section 5814.5 does apply to unreasonable delays in the
9 payment of an award occurring after its effective date, regardless of the date of injury.

10 The amendment to section 5814.5 was "substantive," in that it potentially imposes a new or
11 additional liability against private employers. (See *In re Marriage of Buol* (1985) 39 Cal.3d 751,
12 758; *Aetna Cas. & Surety Co. v. Industrial Acc. Com. (Charlesworth)* (1947) 30 Cal.2d 388, 395
13 [12 Cal.Comp.Cases 123, 126] (*Charlesworth*).) When new legislation amends or adds
14 substantive statutory rights, the legislation is applied prospectively unless it is clear that the
15 Legislature intended retrospective application. (*McClung v. Employment Development Dept.*
16 (2004) 34 Cal.4th 467; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840-841
17 (*Myers*); *Green, supra*, 127 Cal.App.4th 1426, 1436 [70 Cal.Comp.Cases 294, 301].) A
18 retrospective law "is one which affects rights, obligations, acts, transactions and conditions which
19 are performed or exist prior to the adoption of the statute" (*Charlesworth, supra*, 30 Cal.2d at p.
20 391 [12 Cal.Comp.Cases at p. 124]; accord, *Myers, supra*, 28 Cal.4th 828, 839; *Evangelatos v.*
21 *Superior Court* (1988) 44 Cal.3d 1188, 1206) or which "substantially changes the legal effect of
22 past events." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.)

23 We conclude that an award of fees, pursuant to section 5814.5, in the circumstances present
24 here, would *not* constitute retrospective application of the amended statute. While applicant's date
25 of injury predated the amendment of section 5814.5, the liability created by amended section
26 5814.5 did not arise by virtue of the injury. It arose because defendant unreasonably delayed
27 payment of an award of compensation — an event that occurred in early 2005. The right to seek

1 attorney's fees under section 5814.5 comes into existence only after applicant has been awarded
2 compensation and defendant has unreasonably delayed payment. The award of compensation in
3 this case occurred on December 7, 2004. The delay occurred in January 2005. Thus, the event
4 that triggered the obligation (and the right) established by section 5814.5, as amended —
5 defendant's unreasonable delay in paying an award of compensation — occurred long after the
6 section was amended.

7 The amendment to section 5814.5 did not affect rights, obligations, acts, transactions, and
8 conditions that were performed or existed prior to the adoption of the statute, and the amendment
9 did not substantially change the legal effect of past events. Instead, the amendment affected only
10 rights and obligations pertaining to acts or events that occurred, or failed to occur, *after* the
11 January 1, 2003 effective date. Private employers have been on notice, since adoption of AB 749,
12 that any future unreasonable delay in paying compensation would expose them to liability for
13 attorney's fees. Because the amendment applies only to conduct (i.e., unreasonable delays in
14 paying an existing award) occurring after the January 1, 2003 effective date of amended section
15 5814.5, the amendment is being applied prospectively, not retrospectively. The amendments do
16 not *retroactively* increase the cost of benefits due from the employer to the employee. (See
17 *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App.4th 913, 919 [69 Cal.Comp.Cases
18 199].)

19 Therefore, the general principle that substantive changes in the law that impose a new or
20 additional liability may be applied only prospectively is not violated by awarding section 5814.5
21 fees to applicant's attorney for enforcing applicant's award, following defendant's unreasonable
22 delay in payment that occurred after the effective date of the amendment of section 5814.5.

23 **B. Calculation of the Amount of a Section 5814.5 Attorney's Fee**

24 Having determined that applicant's attorney is entitled to a fee pursuant to section 5814.5,
25 we now turn to how that fee shall be computed. In *Sparagna, Sparagna, Ferrone & Ferrone v.*
26 *Workers' Comp. Appeals Bd. (Jaramillo)* (1999) 64 Cal.Comp.Cases 706 (writ den.) (*Jaramillo*),
27 we considered the issue of how to determine section 5814.5 attorney's fees. The WCJ in *Jaramillo*

1 stated in her report, adopted and incorporated by the Appeals Board:

2 “Attorneys’ fees paid pursuant to Labor Code Section 5814.5 by
3 defendant are to be ‘reasonable’ and ‘incurred in enforcing the
4 payment of compensation awarded.’ There is no reference to
5 percentage of recovery and the reasonable inference is that fees are
6 to be paid for time reasonably incurred, at a reasonable hourly rate,
7 as is done with attorneys’ fees for service provided for vocational
8 rehabilitation.” (*Id.*, at p. 707.)

9 The method for calculating attorney’s fees for obtaining vocational rehabilitation benefits
10 was set forth in *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 381 (Appeals
11 Board en banc):

12 “The Board agrees that the best method of evaluating the worth of
13 these services is based on the time and effort expended by the
14 attorney as reflected in the hours of work devoted to securing
15 rehabilitation services for the client. The fee, however, may not be
16 entirely disproportionate to the amount of benefits obtained. If, for
17 instance, counsel spends long hours to obtain benefits of small
18 value, the fee should not be strictly based on the number of hours
19 without regard to the benefits obtained. Where there are sufficient
20 benefits involved, however, the fee based on time and effort is
21 appropriate.”

22 In *Town of Hillsborough v. Workers’ Comp. Appeals Bd. (Sommer)* (2003) 68
23 Cal.Comp.Cases 304 (writ den.), as in *Jaramillo*, we affirmed the WCJ’s award of section 5814.5
24 attorney’s fees on an hourly basis.

25 Section 5814.5 states that the award of attorney’s fees shall be “in addition to” the increase
26 in the applicant’s award under section 5814. This language is in contrast to the allowance of an
27 attorney’s fee as a lien against applicant’s recovery, as provided in section 4903. The
“percentage” fee guidelines in section 1.140 of the DWC/WCAB Policy and Procedural Manual
apply to those attorney’s fees intended *as a lien against the employee’s compensation* (Lab. Code,
§ 4903(a)), i.e., the fees that come out of funds that otherwise would have been payable to the
injured employee. Fees under section 5814.5, however, are akin to fees under section 5801 for
responding to an employer’s frivolous petition for writ of review.

In *Johnson v. Marin Tennis Club* (1982) 47 Cal.Comp.Cases 527, 529 (Appeals Board

1 Panel Decision) (*Johnson*), we said, “The award of a reasonable fee under § 5801 should be based
2 upon the reasonable amount of time expended and the hourly value thereof.” Furthermore, in *Lee*
3 *v. Workers’ Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 1082 (writ den.), we considered ““the
4 attorney’s time, effort, care, experience and results,”” for the purpose of determining a “reasonable
5 and appropriate hourly rate” for an award of attorney’s fees under section 5801. In *Johnson*, we
6 cited *Employers Mutual Liability Ins. Co. v. Workmen’s Comp. Appeals Bd. (Rodriguez)* (1975) 46
7 Cal.App.3d 104 [40 Cal.Comp.Cases 820] (*Rodriguez*), in which the Court stated,

8 “Section 5801 provides that attorney’s fees may be awarded *in*
9 *addition to* the amount of compensation otherwise recoverable and
10 shall be paid as part of the award by the party liable to pay such
11 award when the employee prevails upon a petition for writ of
12 review initiated by the employer. This provision appears to be in
13 the nature of a *penalty* assessed against the employer if the
14 reviewing court finds that the petition has no reasonable basis.
15 [Citation.] The provisions of section 5801 differ materially,
16 therefore, from those of section 4903, subdivision (a), which
17 permit the board to determine and allow *as liens against any sum*
18 *to be paid as compensation* a ‘reasonable attorney’s fee for legal
19 services pertaining to any claim for compensation either before the
20 appeals board or before any of the appellate courts, and the
21 reasonable disbursements in connection therewith.’ ” (46
22 Cal.App.3d at p. 108 (emphasis in original).)

23 The reasoning of the Court in *Rodriguez* with regard to section 5801 applies to an even
24 greater extent to section 5814.5, which also states that the fees shall be “in addition to” applicant’s
25 recovery, and which not only “appears to be in the nature of a *penalty*,” but directly involves a
26 penalty. The attorney for an applicant seeking increased compensation under section 5814 is
27 entitled to a reasonable fee under section 5814.5, based on a reasonable number of hours expended
in enforcing the prior award of benefits and a reasonable hourly rate.

We emphasize, however, that a section 5814.5 fee is payable only where there has been a
prior award of benefits, the defendant has unreasonably delayed payment of some or all of that
award, and the applicant has incurred attorney’s fees in enforcing the prior award. If there is no
prior award, or no unreasonable delay, section 5814.5 fees shall not be awarded. Moreover,

1 section 5814.5 fees should be allowed only for legal services rendered in “enforcing” the
2 unreasonably delayed prior award, and not for any other purpose.

3 The WCJ should determine in the first instance the amount of section 5814.5 attorney’s
4 fees payable under the facts presented here.

5 **III. CONCLUSION**

6 In sum, we hold that the amount of the penalty under section 5814(a) is discretionary and
7 should be determined upon consideration of the factors enumerated above, and that a successive
8 section 5814(a) penalty may be awarded for an unreasonable delay in making a prior penalty
9 payment, if the circumstances warrant it. We further hold that, if the unreasonable delay in
10 payment of the award of compensation occurred after January 1, 2003, section 5814.5 entitles an
11 applicant’s attorney to receive fees for enforcement of the award, even against a private employer
12 and even when the injury occurred prior to January 1, 2003, the effective date of the amendment to
13 section 5814.5. Such fees are to be based on a reasonable hourly rate and are to be awarded “in
14 addition to” the increase awarded the applicant under section 5814(a), not as a percentage of
15 applicant’s increase.

16 Accordingly, and without expressing any opinion as to the appropriateness of the amount
17 of the penalty or the attorney’s fee found by the WCJ, we will rescind the Findings and Order and
18 return the matter to the trial level for further proceedings and a new decision on all the issues,
19 consistent with this opinion.

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2 For the foregoing reasons,

3 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
4 Appeals Board (En Banc), that the October 20, 2006 Findings and Order is **RESCINDED** and the
5 matter is **RETURNED** to the trial level for further proceedings and a new decision by the WCJ,
6 consistent with this opinion.

7 ***WORKERS' COMPENSATION APPEALS BOARD***

8
9 */s/ Joseph M. Miller*

JOSEPH M. MILLER, Chairman

10
11 */s/ James C. Cuneo*

JAMES C. CUNEO, Commissioner

12
13 */s/ Frank M. Brass*

FRANK M. BRASS, Commissioner

14
15 */s/ Ronnie G. Caplane*

RONNIE G. CAPLANE, Commissioner

16
17 */s/ Alfonso J. Moresi*

ALFONSO J. MORESI, Commissioner

18
19 */s/ Deidra E. Lowe*

DEIDRA E. LOWE, Commissioner

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21
22 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

23 ***9/9/2008***

24 ***SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT***
25 ***THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:***

26 ***Stephan Gary***

Stockwell, Harris, Widom & Woolverton

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