

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

TRISEENA CARTER, *Applicant*

vs.

**COUNTY OF ALAMEDA,
*Permissibly Self-Insured, Defendant***

**Adjudication Number: ADJ8200135
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant County of Alameda, permissibly self-insured, seeks reconsideration of the January 25, 2021 Findings, Award and Order, wherein the workers' compensation administrative law judge (WCJ) ordered defendant to pay to applicant Triseena Carter, a penalty of \$51,257.15, pursuant to Labor Code section 4650(d), and a \$10,000.00 penalty pursuant to Labor Code section 5814, less 20% of the sums awarded payable to applicant's attorney. The WCJ also awarded attorney fees to applicant's attorney for enforcement of the permanent disability award, pursuant to Labor Code section 5814.5, in an amount to be adjusted by the parties with jurisdiction reserved.

Defendant contests the award of penalties, contending first that the penalty imposed pursuant to Labor Code section 4650(d) is not applicable because the matter was not final. Defendant argues that it had not yet exhausted its right to appeal after the Court of Appeal denied its Petition for Writ of Review, as defendant was still within the statutory period to seek review before the California Supreme Court. Defendant further argues that the statutory penalty was inapplicable because there was an ongoing dispute regarding the amount of outstanding permanent disability benefits and corresponding COLA adjustments. Second, defendant contests the \$10,000.00 penalty imposed pursuant to Labor Code section 5814, arguing that it is unreasonable under all of the relevant circumstances, including defendant's pursuit of its right to appeal. Defendant further argues that the penalty fails to provide for an offset for the amount paid pursuant to Labor Code section 4650(d). Finally, defendant contests the award of attorney fees incurred in

enforcing the award of benefits pursuant to Labor Code section 5814.5, on the basis that the penalty imposed under section 5814 was unreasonable.

We have reviewed the Answer filed by applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of March 4, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the Findings, Award and Order, and deny the Petition for Reconsideration.

Additionally, the Appeals Board has 60 days from the filing of a Petition for Reconsideration to act on that petition. (Lab. Code, §5909.) Here, however, through no fault of defendant, the timely-filed petition did not come to the attention of the Appeals Board until April 22, 2021, after expiration of the statutory time period. Consistent with fundamental principles of due process, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a timely filed Petition for Reconsideration begins no earlier than the Board's actual notice of the petition. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [146 Cal.Comp.Cases 622, 624].) Therefore, we have considered the Petition for Reconsideration on its merits.

We further note that the \$10,000 penalty under Labor Code section 5814 was imposed due to the defendant's failure to increase its payment of benefits by 10%, as required by Labor Code section 4650, and not for its delay in making the payments mandated by the September 11, 2019 Findings and Award. A section 4650 10% penalty is mandatory when payments are delayed, and must be issued with the delayed payment. Defendant stipulated that the payments were due by May 11, 2020, and were paid after that date without the self-imposed penalty, which was calculated to be \$51,257.15. While section 5814(d) allows an offset when both section 5814 and section 4650 penalties are imposed, such offset applies only when the section 4650 self-imposed penalty is timely paid. Had defendant made a timely self-imposed penalty payment of \$51,257.15, no section

5814 penalty would have been imposed. The \$10,000 penalty was the maximum allowed under section 5814.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the January 25, 2021 Findings, Award and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 18, 2021

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

**TRISEENA CARTER
BOXER & GERSON
FINNEGAN, MARKS, THEOFEL & DIAMOND**

SV/pc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Date of Injury/Body Parts: entire spine; bilateral shoulders, hands and wrists; psyche; urological system; and sleep disorder

Occupation: juvenile institution officer

Petitioner: Defendant Alameda County Probation Department and Sedgwick CMS

Timeliness: The petition is timely

Verification: The petition is verified

Petitioner's Contention: Defendant seeks reconsideration of the decision dated 01-25-2021 awarding applicant \$51,257.15 under Labor Code section 4650(d) plus \$10,000 under Labor Code section 5814 less attorney fees on these amounts, plus additional attorney fees under Labor Code section 5814.5 in an amount to be determined after an accounting by applicant's attorney.

II. FACTS AND PROCEDURAL HISTORY

There is no dispute with the facts and procedural history of this case. On 09-11-2019, Judge Stanley Shields (now retired) issued Findings and Award awarding applicant 100% permanent disability based on ratings combining to 118% for injury to multiple body parts and systems. Subsequently, defendant Alameda County Probation Department/Sedgwick CMS filed a Petition for Reconsideration that was denied. Defendant then filed a Petition for Writ of Review. On 04-27-2020, the writ was denied.

On 05-07-2020 Blair McGowan issue Cost of Living (COLA) calculations covering all permanent disability indemnity that was due retroactive to 2013, as well as the attorney fee to provide the basis for payment to applicant and her attorney. (Ex. CC.)

The parties stipulated that **05-11-2020** was the 14th day from the denial of the writ and that no appeal was taken from the writ. Therefore, 05-11-2020 was the due date for payment of all retroactive permanent disability indemnity based on 100% permanent disability of the Findings and Award of 09-11-2019. By 05-11-2020, defendant made no payment of retroactive permanent disability indemnity.

In mitigation, defendant maintains that a letter of 05-12-2020 notified applicant's attorney that defendant has obtained the necessary Cost of Living (COLA) calculations from Blair McGowan and set forth a payment schedule. (Ex. AA.) In essence, defendant's letter stated that

the payments would be broken down in five separate payments and the payments would be sent on May 13, May 14, May 15, May 18 and May 19. Defendant alleges that applicant's attorney did not respond to this letter. In fact, the payments were sent as scheduled. (Ex. BB.) Meanwhile, defendant continued to issue checks for biweekly permanent disability indemnity and, on 05-11-2020, the biweekly checks were increased to reflect the 100% award by Judge Shields and the subsequent decision of the WCAB.

On 06-16-2020, applicant filed a Petition for Penalties alleging penalties for late payment of retroactive indemnity under Labor Code section 4650(d), Labor Code section 5814, Labor Code section 5813 and Labor Code section 5814.5. The parties were unable to resolve the penalty petition at hearing. By the time the penalty petition was set for trial, Judge Shields had retired and the case was reassigned to the undersigned as trial judge. My Findings and Award issued on 01-25-2021 and defendant now files for reconsideration of the decision to award applicant \$51,257.15 under Labor Code section 4650(d) plus \$10,000 under Labor Code section 5814 less attorney fees on these amounts, plus additional attorney fees under Labor Code section 5814.5 in an amount to be determined after an accounting by applicant's attorney.

No answer has been filed.

III. DISCUSSION

The parties stipulated that 05-11-2020 was the 14th day from the denial of the writ and this was the due date for payment of all retroactive set forth in the Findings and Award of 09-11-2019. Defendant paid no retroactive indemnity as of 05-11-2020. Late is late, meaning that the payments were not timely. That is, all of the payments due to applicant after defendant's last appeal were late.

A. Applicability of Self-Imposed Penalty pursuant to Labor Code section 4650(d)

Labor Code section 4650(d) provides:

“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).” (Emphasis added.)

This section applies to “any” indemnity payment. There no doubt that retroactive permanent disability indemnity is exactly a type of payment contemplated by section 4650(d). The statute is mandatory meaning that employers must pay a 4650(d) penalty on late payments without

an order from the Board. The statute prescribes the amount that must be paid as the penalty: 10% of the late payment. The grand total of late payments made to applicant and applicant's attorney is \$512,571.46 and the 10% penalty on this amount is \$51,257.15.

Petitioner's argument that the award was not final as petitioner had not exhausted its rights of appeal is a red herring. No further appeal was filed and the record is devoid of any intention to file with the state Supreme Court. As stated above, at trial, the parties agreed that the last day to file an appeal was 05-11-2020.

Defendant contends that the continuation of weekly permanent disability indemnity payments should be considered as a mitigating factor. However, there is no showing that based on the ratings set forth in Judge Shield's opinion, applicant was not entitled to ongoing permanent disability *advances* for a rating at or above life pension and which are separate and apart from *retroactive* permanent disability indemnity.

Defendant contends that the penalties in the amount of \$51,257.00 is excessive in light of the fact that a commutation was required because Judge Shields did not include amounts of the COLA increase to be paid on the retroactive award. There is no dispute, however, as to the sum total of the late payments: \$512,571.46. According to section 4650(d), that penalty is 10% of this amount.

It is true that under the Findings and Award dated 09-11-2019, permanent disability benefits at an increased rate were due and payable from 09-13-2013 and the award of 100% triggered defendant's liability for yearly COLA adjustments. From 09-11-2019, the date of Judge Shields' decision, defendant was on notice of the potential liability and had many months to calculate retroactive sums due. Reduction of the 10% penalty was solely within defendant's power: defendant could have issued some payment on retroactive permanent disability indemnity with or without the COLA calculation. Any payment would have reduced the applicable penalty. However, defendant chose to make no timely payment at all.

Labor Code section 4650(d) is mandatory and the Petition for Reconsideration does not cite any authority to the contrary. Because of the mandatory language, neither defense counsel's notice of the payment schedule in Exhibit AA nor any implied waiver by applicant's counsel may be construed an exception to Labor Code section 4650(d). Likewise, the WCAB cannot exercise discretion to reduce the 10% penalty. Based on the late payment, applicant is entitled to a 10% penalty under Labor Code section 4650(d) in the amount of \$51,257.00.

B. Applicability of Maximum Penalty Under Labor Code Section 5814

Labor Code section 5814(a) provides:

“When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars (\$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.”

As set forth above, all parties were placed on notice of the high value of the retroactive amount at the time the Findings and Award issued on 09-11-2019.

Labor Code section 5956 states:

“The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the appeals board, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, decision, or award of the appeals board subject to review. . .”

Defendant contends that as a general practice, parties do not petition the WCAB for a stay of execution and accuses the undersigned of holding this defendant to a “higher standard” outside of the general practice. Perhaps the parties had an understanding or general practice with the trial judge but that judge has retired and the case was reassigned. At any time, defendant could have sought a stay at any time but did not, despite the retirement of the trial judge. The standard is clearly set forth in Labor Code section 5956: there is no automatic stay during appeal. The bar has not been raised for defendant.

Several factors support a penalty for defendant’s unreasonable delay under Labor Code section 5814. The amount due was sizeable: six years of retroactive payments plus a COLA. Defendant had some eight months, from the date of the award on 09-11-2020 to the exhaustion of its final appeal on 05-11-2020, to begin calculating its liability but did nothing before 05-12-2020. Not a single dollar of the retroactive payments was paid in a timely fashion. As such, a penalty under Labor Code 5814 is warranted. That applicant’s permanent disability indemnity continued is not a mitigating factor as Judge Shield’s final rating string is 118% and versus defendant’s vocational expert whose alternative rating was 81% diminished future earnings capacity.

In its Petition for Reconsideration, defendant raises an argument not presented at trial that the COVID pandemic adversely affected the payments in this case. That argument must fail. The

COLA calculations by Blair McGowan issued on 05-07-2020. Once defendant decided upon its payment plan set forth in defense counsel's letter of 05-12-2020, the payments started just two days later and successive payments issued day after day, on schedule, until the amounts due were paid. The argument that COVID-19 played any role is unconvincing.

There is no evidence to mitigate against an award of the maximum penalty of \$10,000.00 under Labor Code section 5814 penalty. Defendant contends pursuant to section 5814(d), the penalty "shall be reduced by any amount paid under subdivision (d) of Section 4650 on the same unreasonably delayed or refused amount." Defendant contends that no penalty under section 5814 is due as it is subsumed in the SIP calculations. As set forth in the opinion, Labor Code 4650(d) by definition is "self-imposed" for a defendant, no order is required, and the section is intended as a deterrent for making late payment. Therefore, by definition, a penalty under Labor Code section 5814 can be offset or reduced only as the result of "self-imposed" payment that has been rendered. Here, no payment under section 4650(d) has been made. There is nothing to offset. Applicant is entitled to the maximum award of \$10,000.00 under Labor Code section 5814.

C. Applicability of Attorney Fees to Enforce Award Under Labor Code Section 5814.5

Labor Code section 5814.5 provides that when the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award, the appeals board must award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded. Enforcement of the award in this case and the assessment of applicable penalties required efforts not usually required even after appeal of an award including demands, a petition, a hearing, and a trial. An award of attorney fees is appropriate under Labor Code section 5814.5.

IV. RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration is **DENIED**.

DATE: 03-04-2021

Therese Da Silva

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE