WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDREW STAMPER, *Applicant*

vs.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT;
YORK RISK SERVICES, *Defendants*

Adjudication Number: ADJ12735361
Oakland District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendants seek reconsideration of the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on March 15, 2022, wherein the WCJ found in pertinent part that defendants' August 19, 2021 payment to the Employment Development Department (EDD) was unreasonably delayed following the entities' May 12, 2021 agreement in violation of Labor Code[1] section 5814; and, that a reasonable penalty is the statutory maximum of $10,000.00. Based on these findings, the WCJ awarded the sum of $10,000.00 to be paid to applicant.

Defendants contend that its payment to EDD was not unreasonably delayed because it was timely made under Unemployment Insurance Code section 2629.1, subdivision (f), within 60 days (plus 5 days for mailing) after the June 21, 2021 service of the WCJ's Order Approving Compromise and Release (C&R Order). In the alternative, if a penalty is owing, the WCJ's award of the maximum $10,000.00 is not properly balanced pursuant to *Ramirez v. Drive Financial Services, et al.* (2008) 73 Cal.Comp.Cases 1324 [2008 Cal.Wrk.Comp. LEXIS 278] (*Ramirez*).

Applicant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the petition.

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

We have reviewed the record in this matter, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on the Report, which we adopt and incorporate herein, and for the reasons set forth below, we deny defendants' Petition for Reconsideration.

I.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits. (*Shipley, supra,* 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant's petition because, through no fault of the parties, it had misplaced the file. (*Ibid.*)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities." (*Id.*, at p. 1108.)[2]

Defendants' Petition for Reconsideration was filed on April 4, 2022, and the Appeals Board failed to act within 60 days pursuant to Labor Code section 5909. This failure to act was due to an internal procedural error that was not the fault of either party. Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Thus, the time within which the Appeals Board was to act on defendants' petition was tolled.

[2] The Court also stated that the fundamental principles of substantial justice (Cal. Const., art. XIV, § 4), and the policies enunciated by Labor Code section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment,'" compelled its finding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.*, at p. 1107.)

II.

As an initial matter, we agree with the WCJ that section 5814 applies, and not Unemployment Insurance Code section 2629.1 for the reasons set forth in the Report, i.e., that defendants never voluntarily accepted liability for workers' compensation disability benefits in this case, and there was no adjudication on the issue of whether defendants were liable for any such benefits. (Unemp. Ins. Code, § 2629.2(e)-(f).)[3] (Original Report, pp. 5-6.) As stated in the Report, defendants reached an agreement to compromise the lien for less than the lien amount filed by EDD, and applicant expressly sought enforcement of that agreement in the C&R. (*Ibid.*)

We also agree with the WCJ that applicant's agreement to a compromise and release was conditioned from the start on defendants resolving the EDD lien in full prior to any such agreement. (Original Report, p. 4.) Thus, applicant made it known to defendants that time was of the essence in payment on the EDD lien, because that payment would trigger resumption of payments to applicant by EDD. (*Ibid.*) It was defendants' burden to establish "'genuine doubt, from a medical or legal standpoint,' as to the employer's liability for the compensation in question. *Kerley v. Wkrs. Comp. Appeals Bd*. (1971) 4 Cal.3d 273 [36Cal.Comp.Cases 152]." (F&A, Opinion on Decision, p. 5.) We agree with the WCJ that defendants failed to meet this burden.

> At trial, defendant contended, first, that because the compromise and release does not provide a time for its payment to the EDD there is no deadline, pointing out that the terms of the settlement include penalty and interest "if paid within 30 days of service of approval of C&R on defendant." I believe this argument is unavailing, for the simple reason that the omission of a particular period of interest or non-accrual of penalty – whose inclusion would create an inference, at most, of a reasonable time to make payment – does not infer anything. It surely cannot mean that the payment is never due. The clause simply means that, if payment of the settlement proceeds is effected within the time stated, it brings no liability for penalty or interest on those proceeds.
>
> Defendant further contends that the EDD was itself not responsive to the July 27 and August 18 emails regarding the written stipulation. It is true that the EDD has at times been short-staffed, and this may have been one of those times.

[3] The relevant sections of Unemployment Insurance Code section 2629.1 state: "(e) An employer or insurance carrier who subsequently *assumes liability or is determined to be liable for reimbursement to the department for unemployment compensation disability benefits which the department has paid in lieu of other benefits* shall be assessed for this liability by the department. ... (f) The employer shall reimburse the department in accordance with subdivision (e) within 60 days of *either voluntarily accepting liability for other benefits or after a final award, order, or decision of the Workers' Compensation Appeals Board*. (Unemp. Ins. Code, § 2629.1(e)-(f), emphasis added.)

> However, the earlier dates are at least as noteworthy, in my opinion. That is, the EDD explicitly accepted defendant's offer to resolve the lien for a precise sum, on May 12, 2021. That, without more, would appear to impose a contractual obligation. While the EDD often requests the completion of a specific form (unique to that department, I have been told), it does not always do so; most liens are resolved without the need to execute a formal stipulation or obtain a judge's signature. In this case, the EDD representative, on May 12, 2021, did offer to either provide such a form or sign the compromise and release; that went 76 days without a response. In fact, when, 22 days after it finally did write again to the EDD, it followed up again, instead of waiting further it issued payment the following day, on August 19, 2021. The final tally is 99 days from agreement to payment. I do not believe that to be a reasonable time. (*Id.*, pp. 5-6.)

In addition, and as applicant points out in the Answer, the WCJ did in fact consider the *Ramirez* factors in assessing the penalty against defendants.

> The overriding consideration in determining what penalty amount to assess should be whether the penalty imposed would serve "the purposes sought to be accomplished" by section 5814. (citation)... 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, supra*, 73 Cal.Comp.Cases at pp. 1328-1329.)

In addition to these "overriding factors," the *Ramirez* Court also identified nine factors to assess the reasonableness of a penalty assessment under section 5814:

> (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.)

We agree with applicant that the WCJ sufficiently considered the overriding factors of punishment and remediation, as well as the other relevant factors identified in *Ramirez*.

> In Judge Miller's decision, he clearly considered multiple factors, including 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, 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, 8) evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it, and 9) evidence of the delay on the injured employee. Defendant provided no evidence at trial that the delay was a solitary instance of human error (*Ramirez* factor #4), no evidence that the delay was due to the realities of the business of processing claims for benefits or the needs of administering insurance (*Ramirez* factor #6) and no evidence of institutional neglect by Defendant (*Ramirez* factor #7). Labor Code § 5814 also states that "the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties."
>
> Having considered the relevant factors as indicated in *Ramirez*, Workers Compensation Judge Miller used his discretion and determined that the penalty of $10,000 was reasonable.

We agree with the WCJ that the delay between defendants' May 12, 2021 agreement with EDD to pay the lien, and the payment to EDD on August 19, 2021 was unreasonable pursuant to section 5814. (See original Report, p. 5.)[4]

[4] Our decision would not change if the May 26, 2021 date was considered instead of May 12, 2021, i.e., the date applicant signed the C&R with apparent knowledge that defendants had not yet paid EDD. (See original Report, p. 5.)

For the foregoing reasons,

IT IS ORDERED that defendants' Petition for Reconsideration of the Findings and Award issued by a workers' compensation administrative law judge on March 15, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 3, 2022

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

ANDREW STAMPER
RATTO LAW FIRM
LENAHAN, SLATER, PEARSE, & MAJERNIK LLP

AJF/abs

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

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board
JUDGE CHRISTOPHER MILLER

Andrew Stamper v. Bay Area Air Quality Management District
WCAB No. ADJ12735361

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on April 4, 2022, defendant seeks reconsideration of the decision filed herein on March 14, 2022, and served the following day, in this case, which arises out of an admitted injury, on February 5, 2019, to the psyche of an air quality instrument specialist. Petitioner, hereinafter defendant, contends in substance that it was error to find that it impermissibly delayed payment of retroactive temporary disability indemnity – more accurately, repayment of unemployment compensation disability (UCD) benefits paid by the Employment Development Department (EDD) – to the EDD under an agreement to do so, in violation of section 5814[1], that if it did unreasonably delay such payment the amount of the penalty under that section was impermissibly high, that any penalty should be payable to the EDD, rather than the employee, and that Unemployment Insurance Code section 2629.1 both extends the employer's time to pay and limits the penalty for delay. Applicant has filed an answer, providing reasons to uphold the decision. I will recommend that reconsideration be denied.

FACTS

The factual background[2] is summarized in the opinion on decision:

> The salient facts are few and undisputed. Applicant's job involved various instruments used to monitor air quality, including, as is relevant here, weather vanes mounted on towers. On the day in question, he was sent to Point Richmond to work on a weather vane on a 30-foot-tall tower, which he climbed while a coworker on the ground used a computer. While Mr. Stamper was up on

[1] Statutory references not otherwise identified are to the Labor Code.

[2] As sometimes happens, the statements of facts contained in both the petition for reconsideration and the answer thereto are peppered with commentary that would more properly be construed as argument

the tower, gunshots were fired that appeared to be aimed at that tower. Frightened and angry, he descended and went to a nearby firing range to report the renegade shooting. He missed just a few days from work immediately after the incident. Thereafter, he developed several psychological symptoms that he related to the shooting and his reaction to it. Applicant sought mental-health care through the Veterans Administration (VA), and in July, 2019, he filed a workers' compensation claim and saw an occupational physician and then a psychologist through that clinic. Around that time, he resigned from his job and, with his family, left the state.

Although he worked for a time in Arizona as a flood warning specialist, Mr. Stamper was taken off work in January, 2020. Reportedly, that interim employment formed at least part of the reason this defendant did not pay temporary disability indemnity.

The parties engaged a qualified medical evaluator (QME), Dr. Mark Kimmel, whose two reports are dated May 4 and November 23, 2020. In the first, Dr. Kimmel concluded that applicant was temporarily, totally disabled, predominantly because of the work incident in 2019, and in need of medical care. In the second, the QME expresses much the same opinion. Dr. Kimmel was deposed on February 24, 2021. In that testimony, he tried to put a somewhat finer point on the extent of temporary disability; as well, he confirmed his assignment, in his first evaluation, of a GAF[3] score, despite his opinion that Mr. Stamper's condition had not fully stabilized.

The parties then negotiated the above-mentioned settlement. With the compromise and release, on June 9, 2021, were filed the two reports by the QME and the transcript of his deposition, a copy of the email exchange between defense counsel and the EDD representative memorializing their agreement to resolve the EDD lien for $54,989.97, and a letter explaining that the case was being resolved without a report of permanent disability; the letter states, "I am also enclosing an email dated 5/12/2021 outlining the EDD settlement, which is also noted on the Compromise and Release." The compromise and release was approved by order of June 17, 2021, and the order was served on all parties on that date. It was served again by defense counsel on June 24, 2021.

Defense Exhibits B, C and D comprise correspondence between defense counsel and the EDD representative over the terms of their agreement. In essence, on April 23, 2021, defendant suggested a compromise in the weekly rate at which to reimburse the EDD, based on the temporary disability rate (theoretical, in the sense that no such benefits had been paid) being lower than the rate at which the EDD had paid; the EDD's agreement, on May 12, 2021, to accept the proposed total of $54,989.97 (adding, "Let me know if you want me to send an EDD stipulation or sign the C&R."); defendant's email of July 27, 2021 ("Sorry for the long delay. Here is a Stip to resolve your lien as discussed below."); and one further email to the EDD representative on August 18, 2021 ("Just following up on this. Can I get a signature on the attached?"). The

[3] Global Assessment of Functioning. See, Schedule For Rating Permanent Disability, pgs. 1-13 through 1-16.

attachment referred to in the last message was a stipulation-and-order form that evidently was never signed by any party. On August 19, 2021, defendant issued the payment to the EDD.

Applicant had applied to the EDD for additional UCD benefits, which the EDD delayed, reportedly because applicant's account had not yet been replenished, and he sought a penalty under section 5814. That issue was tried and submitted for decision, and the result was the award of $10,000 that is now challenged.

DISCUSSION

Defendant first contends that nothing prior to the order approving compromise and release obligated it to pay the EDD.

The EDD lien was filed in April, 2020. (Exh. 3) The parties to the case in chief began negotiating over settlement value (as defendant observes, this was before applicant's condition was found to be maximally improved) at least as early as March 9, 2021. (Exh. 6) At that point, the EDD had ceased UCD payments (one's entitlement to such benefits is capped), and applicant's agreement to a compromise and release was premised from the start on defendant's resolving the EDD lien. On March 10, 2021, the outlines of the eventual settlement were set out in defendant's tentative offer, contemplating "the EDD getting about $54K." (*Id*.) That day, applicant suggested agreement, but with the caveat that EDD be paid, rather than allowing defendant to "negotiate EDD down…" The following day, defendant suggests, "What if we resolve the EDD lien before your client signs the C&R?" and points out that the EDD's UCD rate was slightly higher than the temporary disability indemnity rate being contemplated. On March 26, 2021, applicant furnished contact information for an EDD representative. (*Id*.) On April 23, defendant made its offer to the EDD and, as mentioned above, the EDD accepted that offer on May 12, 2021. (Exh. 7)

Defendant argues that the EDD's acceptance of its settlement proposal on May 12, 2021, was "premised on an additional act," referring to "Let me know if you want me to send an EDD stipulation or sign the C&R." I do not regard that as a contingency, as it is not phrased as one. Rather, the EDD representative expressed an unequivocal acceptance of a proposal to settle the EDD lien for a sum certain. That applicant did not, evidently, focus on that exchange at the time is explained by the fact that he was not privy to it; the exchange in April and May, 2021, was solely between defendant and EDD. More importantly, that neither defendant nor EDD required any further documentation of their agreement is evidenced by the fact that none was ever executed:

Defendant, eventually, paid the EDD without any exchange other than the above-documented emails.

Defendant further contends that, pursuant to section 5814, at subdivision (c), any penalties accruing prior to the compromise and release and its approval "would have been waived." This has merit. The settlement document recites that "applicant is owed roughly a year of TD (defendant has agreed to pay back EDD)," also evincing that the employee likely believed the EDD had not yet been repaid. Applicant and his attorney signed the compromise and release on May 26, 2021; defense counsel signed it on June 3, 2021; it was filed on June 9, 2021 and approved on June 21, 2021. The fact that defendant had not yet made good on its agreement with the EDD – a fact evidently known or believed by applicant at least as of May 26, 2021, may, at that time, have come without penalty. That does not, however, extinguish any such liability thenceforth.

Defendant next contends that Unemployment Insurance Code section 2629.1 controls the time within which it was obligated to make payment.

The compromise and release states, in the section on liens, "defendant to pay the EDD $54,989.97 to resolve their lien (agreement with Mathew Humphreys-Martin with the EDD on 5/12/21)." Elsewhere, it states, "Penalties and interest included if paid within 30 days of service of approval of C&R on defendant." The statute cited by defendant addresses the interplay between UCD benefits and workers' compensation. It provides that payment of UCD may be delayed "where the claimant is currently in receipt of other benefits or where the department has received notice that the claimant's employer or insurer has agreed to commence the payment of other benefits." The cited subdivision (f) states: "The employer shall reimburse the department in accordance with subdivision (e) within 60 days of either voluntarily accepting liability for other benefits or after a final award, order, or decision of the Workers' Compensation Appeals Board." Obviously, if we use the dates of the execution and approval of the compromise and release, rather than earlier dates, by which to measure delay, this statute, if it applies, provides a more generous deadline than that in the settlement document.

As applicant points out in his answer, the subdivision, (e), referred to in the one, (f), quoted above applies to an employer or insurer "who subsequently assumes liability or is determined to be liable for reimbursement to the department…" and that is not what happened here. Rather, the EDD and defendant reached an agreement representing a slight compromise by the department,

and applicant sought further enforcement of that agreement by the terms of the compromise and release.

Moreover, as applicant further points out, were Unemployment Code section 2029.1 were to apply to this matter, that would attach, if ever, to the agreement reached on May 12, 2021, after which 99 days passed before the payment was made.

Defendant argues that the amount of the penalty imposed, $10,000, does not reflect an appropriate balance between the right of the employee to prompt payment of compensation and the avoidance of unreasonable penalties.

One ground given is that the deadline to make payment "was ambiguous at best." I disagree, for reasons I believe are explained above. Another is that it made the payment just two days after applicant protested the delay. However, because applicant was not privy to the original agreement between defendant and the EDD (i.e., the department's acceptance, on May 12, 2021, of defendant's offer), nor to the actual payment (as it was to the EDD rather than to him directly), his ability to provide further prompts was curtailed: The fact that the EDD had not resumed payments to him, and the reason for that failure, had to be ascertained in order for him to nag. Another ground is that the actual impact of the delay on the employee is not discussed beyond an offer of proof that he had been subjected to a hardship. The problem with this point is that defendant was aware from the outset of the impact on Mr. Stamper of its failure to reimburse the EDD: As early as May 10, 2021, defendant was telling applicant's counsel "I'm sure your client would like to start getting EDD benefits again." (Exh. 6)

In sum, I believe a penalty of 18% of the amount delayed reflects an appropriate balance of the interests of both parties.

Finally, defendant contends that any penalty should be payable to the EDD and capped at 10% under the above-cited Unemployment Insurance Code section. This of course depends first of all on that statute being applicable to this case, and as I have indicated I believe the applicable statute is section 5814. As pointed out in the answer and in the decision, the delay at issue is of payment of compensation. The decision states: "Because the statute imposes a penalty for unreasonable delay in payment of compensation, and because compensation, as I have held, includes the payment in question, the payment ordered herein must be made to applicant. See, *Ferguson v. Wkrs. Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613 [60 Cal.Comp.Cases 275]."

RECOMMENDATION

I recommend that reconsideration be denied.

Dated: May 2, 2022

Christopher Miller
Workers' Compensation Judge