

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

JOSE DE JESUS LOPEZ PEREZ, *Applicant*

vs.

**SHELDON PALDANIUS, permissibly self-insured;
administered by SEDGWICK, *Defendant***

**Adjudication Number: ADJ16384536
San Jose District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of a Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on July 7, 2023, whereby the WCJ imposed Labor Code section 5814¹ penalties for delayed payment of section 5710 fees to applicant's attorney and section 4650(d) penalties for delayed payment of temporary disability benefits (TD) to applicant.

In its Petition for Reconsideration, defendant contends that: 1) the section 5710 attorney's fees were not subject to unreasonable delay penalties under section 5814, and, in any event, the fees were paid within an appropriate amount of time, and 2) the section 4650(d) penalties for delayed payment of TD were unwarranted, where there was no unreasonable delay in payment and the TD rate was disputed.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, we will deny reconsideration.

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

FACTS

Applicant, while employed on October 30, 2021 as a horse exerciser, sustained an admitted industrial injury to his head, neck, low back, left knee, left ankle, left hip, left shoulder, and right ankle, and claims to have sustained industrial injury to his right eye and psyche.

Applicant was initially paid temporary total disability (TD) benefits beginning on October 30, 2021 at the rate of \$596.27 per week. On August 29, 2022, applicant's attorney served defense counsel with a demand for an increased TD rate. Defense counsel deposed applicant on August 30, 2022, November 16, 2022, and December 27, 2022 regarding the newly requested TD rate, as well as applicant's psyche claims. After each deposition, applicant's attorney served demands for section 5710 attorney's fees. (App. Exhs. 2-5.)

The parties proceeded to trial on the issue of the newly requested TD rate on February 13, 2023. At that time, the parties stipulated to a new TD rate of \$824.78, and a Stipulation and Order was issued reflecting the agreement. (Def. Exh. E, Stipulation and Order, February 13, 2023.) Pursuant to the Stipulation and Order, defendant was required to pay applicant retroactive TD benefits from October 30, 2021 to February 13, 2023 at the differential amount of \$228.51 per week, which represented the difference between the prior TD rate and the new rate stipulated to.

On February 24, 2023, applicant's attorney filed a Petition for Penalties for late payment of attorney's fees and retroactive TD benefits. On June 15, 2023, the parties proceeded to trial to address applicant's petition.

On July 7, 2023, the WCJ issued the disputed F&A, awarding: 1) section 5814 penalties totaling \$377.00 for an unreasonable delay in payment of section 5710 attorney's fees, and 2) section 4650(d) penalties totaling \$1,494.91 for delayed payment of TD benefits.

DISCUSSION

I. Section 5814 Penalties Apply to Unreasonably Delayed Payments of Section 5710 Attorney's Fees

Defendant first contends that section 5710 attorney's fees are not subject to the delayed payment penalty provisions of section 5814. Specifically, defendant claims: "[S]ection 5814 calls for penalties when a benefit is unreasonably delayed. [Section] 5710 Fees are not benefits and therefore are not subject to LC 5814." (Petition, pp. 4-5.) Defendant also argues that the WCJ did not issue an award or order to pay the section 5710 fees, and that, as a result, payment was made

“appropriately and timely.” Lastly, defendant asserts that there were no “bad faith or frivolous actions” taken with regard to payment of the section 5710 fees, and that, as a result, no sanctions were warranted. We will address each argument in turn.

First, section 5814 states, in relevant part:

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.

(Lab. Code, § 5814(a), emphasis added.)

The Appeals Board, as well as the Courts of Appeal, have long held that attorney’s fees constitute “compensation” under section 5814, and, as a result, an unreasonable delay in payment thereof is subject to penalties under the statute. (See, e.g., *Koszdin v. State Comp. Ins. Fund* (2010) 186 Cal.App.4th 480 [75 Cal.Comp.Cases 711, 717]; *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (1981) 117 Cal.App.3d 143, 146 [46 Cal.Comp.Cases 348] [“attorneys’ fees are within the definition of ‘compensation’ of Labor Code section 5814”].) Thus, we reject defendant’s first contention that section 5710 is not subject to section 5814 penalties.

We also reject defendant’s next contention that because the WCJ did not issue an award or order for the attorney’s fees, its payment was “appropriate and timely,” thus precluding section 5814 penalties. Defendant’s statement is in direct conflict with the language of the statute, which, again, provides that when payment “...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....” (Lab. Code, § 5814(a), emphasis added.) Additionally, defendant utilizes the incorrect standard in assessing the grounds for section 5814 penalties; the standard is not whether payment is made “appropriate and timely,” but whether the delay is “unreasonable.” It is also for the WCJ and the Appeals Board, not a party, to decide what constitutes an “unreasonable delay” in payment of attorney’s fees for the purposes of assessing a section 5814 penalty. Here, in assessing the delay in payment, the WCJ explained:

The usual standard, in my experience, is that payment should be made within 30 days. Special circumstances may delay payment somewhat, and payment made within 60 days cannot always be said to be unreasonable in some situations. Overwork, indolence, or inattention on the part of defendant do not generally

excuse prompt payment. In this case, all of the deposition fees were delayed beyond the time usually considered reasonable. The delays which exceeded 60 days were found worthy of a 10% penalty. The third fee, delayed beyond 100 days, more than triple the usual time required, was found sufficient to require a greater penalty, 20%.

(F&A, p. 2.)

We do not see, nor has defendant demonstrated, that the WCJ abused his discretion in finding that the delay in payment was unreasonable and that section 5814 sanctions were therefore warranted.

We also reject defendant's third and final claim that its payment of the section 5710 fees should not be penalized, as they were not "bad-faith or frivolous." As the WCJ notes in his Report, section 5813,² not section 5814, allows for sanctions for bad-faith or frivolous actions, and the WCJ did not impose section 5813 sanctions in this case. We therefore reject defendant's argument, as it lacks any factual or legal basis.

II. The WCJ Properly Applied Section 4650(d) Penalties for Untimely TD Payments

Defendant next argues that the WCJ erred in awarding a penalty for untimely TD payments pursuant to sections 5814 and 4650(d).

As an initial matter, the WCJ did not award a section 5814 penalty for the delay in TD payments. Thus, this argument lacks merit and need not be addressed further.

We also reject defendant's claim that the WCJ erred in awarding a section 4650(d) penalty for untimely paid TD. Defendant's claim is based upon its incorrect impression that section 4650(d) penalties do not apply whenever the TD rate is disputed.

Contrary to defendant's assertion, there is nothing in section 4650(d) that states that penalties for late payment do not apply when the TD rate is disputed. Instead, section 4650(d) applies to "any indemnity payment [that] is not made timely...." (Lab. Code, § 4650(d), emphasis added.) The section 4650 penalty "is a self-executing, strict liability provision...." (*Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 910 [62 Cal.Comp.Cases 891].) Pursuant to section 4650(d), when a TD indemnity payment is untimely, an employer or insurance

² Section 5813 provides, in relevant part: "The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code § 5813(a).)

carrier is required to *automatically* include payment of an extra ten percent. In *Gangwish v. Worker's Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584], the Court of Appeal explained that “the purpose of enacting...section 4650 was to promote prompt payment of benefits and *certainty of timing*.” (*Id.* at p. 1293, emphasis added.) Thus, it is *timing* of the payment of TD benefits, rather than *absolute certainty* over the final amount, that is essential under the statute. As the WCJ notes in his Report, while the state of applicant's records may have made determination of the correct TD rate difficult, there was “no real doubt that at least some TD benefits were underpaid. The only question was the exact amount of the underpayment.” (Report, pp. 4-5.) Pursuant to section 4650(d), it is to this underpaid amount, which was eventually determined in the parties' stipulated agreement, that the automatic ten percent penalty would apply.

We also agree with the WCJ that none of the cases cited by defendant support a finding to the contrary. (F&A, pp. 2-3.) First, defendant relies upon portions of *Mike v. Workers' Comp. Appeals Bd.* (2003) 68 Cal.Comp.Cases 266 (writ den.) discussing the imposition of an unreasonable delay penalty under section 5814 for untimely-paid section 4650(d) penalties; again, section 5814 penalties were not applied with regard to the untimely-paid TD in this case. *Andrews v. Comfort Systems* (April 4, 2012, ADJ7372920) 2012 Cal. Wrk. Comp. P.D. LEXIS 168 does not discuss section 4650(d) at all. Lastly, in *Leinon v. Fishermen's Grotto, Mid-Century Ins. Co.* (2004) 69 Cal.Comp.Cases 995 (Appeals Board en banc) (*Leinon*), the Appeals Board found that section 4650(d) penalties are applicable “only where liability for injury and disability benefits is not in dispute.” (*Id.* at p. 998.) Here, defendant accepted liability for applicant's injury *and* TD benefits – the only dispute was the *amount* of TD owed. (Minutes of Hearing, June 15, 2023, p. 2.) Thus, *Leinon* supports the WCJ's decision that section 4650(d) penalties applied in this case.

For the foregoing reasons, we will deny defendant's Petition for Reconsideration of the WCJ's July 7, 2023 F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 2, 2023

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

**JOSE DE JESUS LOPEZ PEREZ
WIESNER ENGLISH
MICHAEL SULLIVAN & ASSOCIATES**

AH/abs

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