

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

MICHAEL FILL, *Applicant*

vs.

**CITY OF FULLERTON, Permissibly Self-Insured, administered by ADMINSURE, INC.,
*Defendants***

**Adjudication Number: ADJ8855276
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to study the factual and legal issues in this case.¹ This is our opinion and decision after reconsideration.

Defendant seeks reconsideration of the December 14, 2020 Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ). The WCJ found that while employed as a firefighter during the period of November 16, 1978 to March 14, 2013 by defendant, applicant sustained injury arising out of and in the course of employment in the form of skin cancer, coronary artery disease, arrhythmia, umbilical hernia, hearing loss, and hypertensive cardiovascular disease. The WCJ also found that defendant unreasonably delayed providing medical care for skin cancer, and that applicant is entitled to additional compensation in the amount of \$10,000.00 per Labor Code section 5814² and attorney fees in an amount to be determined under section 5814.5.

Defendant contends that it did not unreasonably delay providing applicant with medical treatment for the melanoma so that no penalty and attorney's fees should be imposed and that the penalty awarded is incorrect because it was based on the amount of the bills rather than on the amount of payments.

We received an Answer from applicant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be granted to find that applicant is entitled to additional compensation of \$3,853.12 and not \$10,000.00 (Finding of Fact 4) and that the Petition be denied on all other grounds.

¹ Commissioners Sweeney and Lowe were on the panel that issued the order. Commissioners Sweeney and Lowe no longer serve on the Appeals Board, and other panel members have been assigned in their place.

² All further statutory references are to the Labor Code.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, and in the Report, which we adopt and incorporate, we will affirm the F&A, except that we will amend it to find that the amount of the penalty shall be \$3,853.12 (Finding of Fact 4).

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice ...” (*Shiple v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Shiple*, supra, 7 Cal.App.4th at p. 1108.) Like the Court in *Shiple*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shiple*, supra, 7 Cal.App.4th at p. 1108.)

Here, on January 8, 2021, defendant filed a timely petition for reconsideration of the December 14, 2020, Findings and Award. The Appeals Board failed to act on defendant’s petition within 60 days of its filing on January 8, 2021, through no fault of defendant. Therefore, considering that the Appeals Board’s failure to act on the petition was in error, we find that our time to act was tolled.

Accordingly, we affirm the F&A, except that we amend it to find that the amount of the penalty is \$3,853.12 (Finding of Fact 4).

For the foregoing reasons,

IT IS ORDERED that Defendant’s Petition for Reconsideration of the Findings and Award and Orders of December 14, 2020 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of December 14, 2020 is **AMENDED** as follows:

FINDINGS OF FACT

4. Applicant is entitled to a penalty pursuant to Labor Code section 5814 in the amount of \$3,853.12.

AWARD

AWARD IS MADE in favor of MICHAEL FILL against CITY OF FULLERTON, permissibly self-insured of:

Additional compensation in the amount of \$3,853.12 payable in one lump sum to applicant, Michael Fill and attorney's fees in an amount to be adjusted by the parties, with jurisdiction to the trial level in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2023

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

**MICHAEL FILL
WHITING, COTTER & HURLIMANN
WALL, MCCORMICK, BAROLDI & DUGAN**

DLM/oo

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

STATE OF CALIFORNIA
Division of Workers' Compensation Workers'
Compensation Appeals Board

CASE NUMBER: ADJ8855276

MICHAEL FILL

-vs.-

CITY OF FULLERTON P S I;
ADMINSURE;

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE: Richard Brennen

DATE: January 25, 2021

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON
PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Petitioner, City of Fullerton, filed a timely, verified Petition for Reconsideration dated January 7, 2021. Petitioner appeals the December 14, 2020 Findings and Order on the ground that by the order, decision, or award, the Appeals Board acted in excess of its power, that the evidence does not justify the Findings of Fact, and that the Findings of Fact do not support the order, decision, or award. Petitioner objects to the finding that Defendant unreasonably delayed medical treatment to the Applicant and is liable for additional compensation and attorney fees under Labor Code §§ 5814 and 5814.5. The Applicant, Michael Fill, filed a timely, verified Answer to Petition for Reconsideration on January 18, 2021.

II.

FACTS

1. Michael Fill sustained an injury arising out of and in the course of his employment to various parts of body, including skin cancer, while employed as a firefighter for the City of Fullerton from November 16, 1978 to March 14, 2013.
2. Dr. Cindy Chen was the Agreed Medical Examiner in dermatology. Her report dated February 13, 2014, noted the Applicant had a history of industrially related basal cell carcinomas in the forearms and the right nose. The Applicant had basal cell carcinoma on his abdomen, and right chest wall that she indicated was not industrially related. (report of Cindy Chen, M.D., dated February 13, 2014, pg. 8, EAMS Document Number 61136797, submitted with Stipulations with Request for Award.) On August 16, 2016, the WCJ approved an Award based on Stipulations with Request for Award at 87% permanent disability for injury to various body parts, including a future medical award for multiple areas, including skin cancer.
3. The parties stipulated that the Applicant's primary treating physician is Melvin Akazawa, M.D. (Minutes of Hearing/ Summary of Evidence (MOH/SOE, September 15, 2020, 2: 8 – 9). On April 8, 2019, a skin biopsy revealed the Applicant had a malignant melanoma on his mid-back (Melvin Akazawa, M.D., April 8, 2019 [Applicant's Exh. 3]). On April 12, 2019, Dr. Melvin Akazawa submitted a Request for Authorization to excise the malignant melanoma (Melvin Akazawa, MD, April 12, 2019 [Applicant's Exh. 4]).
4. There is no evidence showing that Defendant ever sent the RFA to Utilization Review. Instead, Defendant's claims manager sent a letter to Dr. Akazawa on April 17, 2019, asking whether the skin cancer treatment was industrially related. The claims manager wrote that the cancer treatment must be performed on a non-industrial basis, pending clarification. "The above referenced body part may not be part of this claim and clarification is needed. Treatment must be sought with the personal medial provider/insurance carrier on a non-industrial basis pending clarification."

(Correspondence from Adminsure dated April 17, 2019 [Joint Exh. Y])

5. Applicant's Attorney faxed a transmittal to the claims manager stating that the Stipulated Award covered "skin cancer." It contained no limiting language concerning the region of the body where the skin cancer manifested. (Correspondence from Applicant Attorney dated April 17, 2019 [Applicant's Exh. 2]).

6. On April 30, 2019, the claims manager sent another correspondence to Dr. Akazawa stating, "Mr. Fill has an accepted skin cancer claim to sun exposed body parts like his neck, forehead, left eyebrow and nose." (Correspondence from Adminsure dated April 30, 2019 [Joint Exh. Y]).

7. The Stipulations with Request for Award and Award contain no language limiting future medical care for skin cancer.

8. Applicant Attorney requested an Expedited Hearing. At the hearing on May 14, 2019, Defendant maintained its position that it was not liable for the treatment. The Court issued an amended Findings and Order on July 2, 2019, stating that the medical treatment for the melanoma was related to the industrial injury and covered by the Stipulated Award of future medical care. The Court deferred reimbursement issues for out-of-pocket expenses, self-procedure treatment, costs, penalties, sanctions, and attorney fees.

9. The matter came up for trial on additional compensation for the unreasonable delay of treatment under Labor Code § 5814 and attorney fees under Labor Code § 5814.5. The WCJ determined that Defendant unreasonably delayed medical care to the Applicant. The Applicant was entitled to a \$10,000.00 penalty under Labor Code § 5814. The Applicant's Attorney was entitled to attorney fees under Labor Code § 5814.5, the amount to be determined through subsequent

proceedings. The WCJ denied the Applicant's request for a second penalty for unreasonable delay in reimbursing the Applicant for self-procured medical treatment.

III.

DISCUSSION

UNREASONABLE DELAY OF MEDICAL CARE

There was approximately an 80-day delay between the time the doctor submitted the Request for Authorization on April 12, 2019, until the Findings and Order dated July 2, 2019, that the skin cancer treatment was industrially related. Defendant's claims manager informed Dr. Akazawa that the requested medical procedure "must" be done on a non-industrial basis pending clarification. Dr. Akazawa performed the excision of the malignant melanoma using Applicant's private health insurance.

Despite the 80-day delay, Petitioner contends it is not liable for a penalty because it had a genuine doubt about its liability for skin cancer treatment based on Dr. Cindy Chen's report. What is problematic about the argument is that Dr. Chen reported well before the parties settled via Stipulations with Request for Award and Award. The WCJ approved the Stipulations with Request for Award on August 16, 2016. The Stipulated Award includes future medical care for skin cancer, without any limiting language.

The Court's December 14, 2020 Findings and Order notes, "The facts here, however, demonstrate that there was no ambiguity concerning the language of the Stipulations with Request for Award. There was no ambiguity that the treatment in question was for skin cancer and that the Applicant received an Award for future medical care for skin cancer. Consequently, Defendant was obligated to authorize the medical treatment promptly. [In the alternative, Defendant could have sent

the RFA proposal to Utilization Review on the issue of medical necessity.]

"In Mr. Fill's case, however, there was no ambiguity that the treatment requested was for a part of the body (skin cancer) for which the Applicant sustained an industrial injury. The parties already stipulated that the skin cancer was industrial, and he was entitled to future medical care. The medical treatment the Applicant requested was the excision of melanoma. Since the Stipulated Award clearly and unambiguously listed skin cancer as industrial, there was no genuine medical or legal doubt to delay authorization of the treatment." (F&O, December 14, 2020, pg. 5)

The medical reports and records in evidence since August 16, 2016, Stipulated Award state that Applicant's skin cancer is industrially related. Applicant's primary treating physician, Dr. Akazawa, does not refer to non-industrial causation. Given the plain and unambiguous language of the Stipulated Award, there was no reasonable basis to delay medical treatment based on the earlier reporting of Dr. Chen. Defendant did not comply with the Stipulated Award providing future medical care for skin cancer.

AMOUNT OF PENALTY

The Court may impose a penalty under Labor Code Section 5814 for unreasonable medical treatment delay. The statute was enacted to induce the prompt payment of benefits and curb an economic incentive to delay or deny workers' compensation benefits. Labor Code § 5814(a) states, "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."

The penalty applies to "payment" that is unreasonably delayed or denied. If there is a penalty,

the amount should be based on the amount paid for the medical treatment rather than the amount the medical provider billed. Although the provider billed \$48,460.20, Defendant paid \$15,412.46 (Demand for Reimbursement dated August 21, 2019 [Applicant's Exh. 4]). Thus, the amount of a penalty would be 25% of the latter figure, or \$3,853.12, rather than the \$10,000.00. Given the language of the Labor Code § 5814 stating the amount of penalty is based on the amount of the delayed payment, the delayed payment was \$15,412.46 rather than \$48,460.20. Therefore, the penalty under Labor Code 5814 should be \$3,853.12 rather than \$10,000.00.

IV.

RECOMMENDATION

Because of the foregoing, it is respectfully requested that the Petition for Reconsideration filed by Wall, McCormick, Baroldi & Dugan on behalf of City of Fullerton, permissibly self-insured and administered by Adminsure, be granted to amend Findings of Fact #4, that the Applicant is entitled to additional compensation of \$3,853.12 under Labor Code § 5814. It is recommended the Petition for Reconsideration be denied on all other grounds.



DATE: January 25, 2021

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE