

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

ROBERTO AVILA, *Applicant*

vs.

**INLAND VALLEY HUMANE SOCIETY & SPCA; NOVA CASUALTY COMPANY,
administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ12135074
Pomona District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant's attorney, Donald Fair, on his own behalf, seeks reconsideration from the July 26, 2023 Findings, Award, and Order (F&O) issued by the workers' compensation administrative law judge (WCJ), wherein it was found, in relevant part, that defendant was liable for Labor Code section 5814¹ penalties for unreasonably delaying the payment of compensation to applicant, and liable for section 5814.5 attorney's fees for enforcing payment of applicant's award.

In his Petition for Reconsideration (Petition), Mr. Fair contends that the amount of section 5814.5 attorney's fee awarded, totaling \$1,680.00, is unreasonably low.

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

Based on our review of the record, and for the reasons stated below, we will grant reconsideration and affirm the WCJ's findings, except that we will amend Finding of Fact Number 3 and Award (b) to award a reasonable attorney's fee of \$3,180.00, less any amount previously paid by defendant.

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

FACTUAL BACKGROUND

Applicant and defendant settled applicant's case for \$8,772.50, less \$1,315.88 in attorney's fees, via Stipulated Award issued on January 27, 2020. The parties stipulated that defendant would pay applicant's award "forthwith," and that interest was waived if sums were paid within 30 days of award. (Stipulations With Request for Award, January 27, 2020.)

Defendant paid the award five days beyond the 30-day deadline. Defendant did not impose a penalty at the time the late payments were issued. On March 6, 2020, Mr. Fair contacted defense counsel regarding the late payments, requesting a 25% penalty, which was denied. (Def. Exh. A, Correspondence to App. Attorney, March 26, 2020.) On July 21, 2020, Mr. Fair filed a Declaration of Readiness to Proceed, seeking penalties on the late payments, as well as interest and attorney's fees. On July 30, 2020, defendant issued a payment to applicant of \$875.08, characterized as a "fault" payment, and payments of \$31.38 to applicant and \$4.72 to Mr. Fair, characterized as "penalty/interest awards." (Def. Exh. B, Payment Listing.)

On October 5, 2020, Mr. Fair filed a Petition for Penalties, seeking section 5814 penalties, interest, and sanctions for late payment of the stipulated award and attorney's fees.

These issues were litigated for three years and over the course of four trials, resulting in the issuance of three prior decisions by the WCJ, each of which were rescinded for various reasons.

On July 5, 2023, Mr. Fair filed a second petition for penalties, sanctions, and interest for late payment of the stipulated award and attorney's fees, pursuant to sections 5814 and 5814.5. With respect to attorney's fees, Mr. Fair requested a total fee of \$16,986.00, based on 42 hours and 28 minutes of work on applicant's case at a rate of \$400 per hour. In support of his fee request, Mr. Fair attached an itemized bill to the petition, setting forth a brief description, date, and hourly breakdown of his work. (App. Exh. 4, Itemized Bill, pp. 7-8.)

On July 26, 2023, the WCJ issued an F&O, finding that defendant's delayed payment of the stipulated award was unreasonable, and awarded applicant a section 5814 penalty totaling \$1,754.50. The WCJ also awarded Mr. Fair attorney's fees totaling \$1,680.00 for 4.2 hours of work at a rate of \$400 per hour for enforcing the award, pursuant to section 5814.5. (F&O, p. 2.) In the Opinion, the WCJ explained her decision regarding the attorney's fee award as follows:

The court has reviewed the applicant's attorney's itemization which requested close to \$17,000.00 in attorney's fees for 42 hours and 28 minutes worth of work. The court found it difficult to rely on the itemization as there were many issues with the

itemization including...a lack of description of work performed for the listed items....Some charges appeared inflated (4 hours for 2nd Petition for Reconsideration when the version appeared identical to the 11/14/20 petition which was previously charged at 15 minutes)[.] In addition, the majority of the charges appeared to be for clerical function type work and not attorney work.

Therefore, the court has given the itemization its due weight and has applied the factors in CCR 10844. The 20% penalty on the permanent disability award of \$8,772.50 amounts to \$1,754.50 obtained for the applicant, which is one of the factors to consider. Additional, reasonable fee factors to consider are the care exercised, time involved, and responsibility assumed by the attorney. In doing so, the court is mindful that the court could have potentially disallowed any fee for the inconsistencies in the petition above. However, recognizing that applicant's attorney has rendered some valuable service in connection with the penalty claim the court has awarded the following:

4 Trials (14 mins, 31 mins, 15 mins, 10 min and 2 min respectively)	1.20
Petition for Reconsideration 11/14/20, 6/2/21 (same version as 11/4/20)	.25
Preparation of PTC 10/13/2020, 7/10/23	.50
MSC 8/6/2020; status conf 1/9/23	.50
Research	1.0
Declaration of Readiness to Proceed 11/7/19, 7/21/20, 12/6/22	.75

(F&O, pp. 8-9.)

On August 10, 2023, Mr. Fair timely sought reconsideration of the F&O.

DISCUSSION

The sole subject of Mr. Fair's Petition for Reconsideration is the \$1,680.00 in section 5814.5 attorney's fees awarded to him for enforcing the penalty on applicant's stipulated award. Mr. Fair contends that the fee award is unreasonably low and fails to reflect the amount of time expended on applicant's case and the value of the legal services rendered. Specifically, Mr. Fair contends that the fee award does not account for multiple communications with defense counsel, time spent drafting documents, travel time, time spent during in-person and telephonic court appearances, client preparation time, and his participation in four trials. (App. Exh. 4, pp. 7-8.)

Labor Code section 5814.5 provides:

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

The award of attorney's fees under section 5814.5 is "in the nature of a penalty" assessed against defendant (see *Ramirez v. Drive Financial Services (Ramirez)* (2008) 73 Cal.Comp.Cases 1324, 1336 (Appeals Board en banc); *Employers Mutual Liability Ins. Co. v. Workmen's Comp. Appeals Bd. (Rodriguez)* (1975) 46 Cal.App.3d 104 [40 Cal.Comp.Cases 820]), both as an incentive to defendant to timely pay benefits that are owing, and as an incentive to attorneys representing applicants to pursue payment of penalties that might not be of sufficient monetary value to otherwise justify their efforts.

In calculating a reasonable attorney's fee incurred in enforcing applicant's award, which is to be paid by defendant in addition to amounts awarded under section 5814, the Appeals Board in *Ramirez, supra*, noted that the award should be based on a reasonable number of hours expended in enforcing the prior award of benefits and at a reasonable hourly rate. (*Ramirez, supra*, 73 Cal.Comp.Cases at p. 1336.) However, the amount of the section 5814.5 fee must also be proportionate to the amount of the penalty recovered. The Appeals Board in *Ramirez* quoted *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 381 (Appeals Board en banc), which involved the calculation of fees for obtaining vocational rehabilitation benefits, wherein it stated:

The Board agrees that the best method of evaluating the worth of these services is based on the time and effort expended by the attorney as reflected in the hours of work devoted to securing rehabilitation services for the client. *The fee, however, may not be entirely disproportionate to the amount of benefits obtained.* If, for instance, counsel spends long hours to obtain benefits of small value, the fee should not be strictly based on the number of hours without regard to the benefits obtained. Where there are sufficient benefits involved, however, the fee based on time and effort is appropriate. (Emphasis added.)

In this case, Mr. Fair requests \$16,986.00 in section 5814.5 attorney's fees, claiming that he expended 42 hours and 28 minutes in obtaining applicant's award at an hourly rate of \$400. The WCJ rejected the claimed number of hours worked, and we agree with the WCJ to a large extent. Specifically, we agree with the WCJ that the requested attorney's fee of \$16,986.00 is not proportionate to the \$1,754.50 awarded to applicant for the section 5814 violation. We also agree

with the WCJ that the fee itemization submitted by Mr. Fair was excessive, insufficiently detailed, and contained inflated charges for duplicative petitions for reconsideration and witness preparation that did not correspond to any upcoming trials or hearings. (Report, pp. 9-10.)

Even so, we believe that the section 5814.5 fee award is slightly short of reasonable, and fails to account for several hours' worth of work that Mr. Fair reasonably spent in enforcing applicant's award. Enforcement of the award in this case required Mr. Fair to contact defendant on multiple occasions regarding late payment, which included attempts to settle the matter outside of court. (See Def. Exh. A; Declaration of Readiness to Proceed, July 21, 2020, p. 3.) When said efforts failed, Mr. Fair was required to participate in multiple hearings on the issues and filed two petitions for penalties. This work was not compensated by the WCJ's fee award. Additionally, we do not believe that it was reasonable to compensate Mr. Fair for only 1.2 hours of trial time. As the WCJ notes in her fee breakdown, this number reflects only the actual time spent on the record, as provided in the court reporters' Minutes of Hearing for each trial. (Report, p. 2; F&O, p. 8.) Yet, as Mr. Fair points out, he also spent time reviewing files before trial, prepping his client for trial, and participating in off-the-record discussions with applicant, defense counsel, and the WCJ. (Petition, p. 2; App. Exh. 4, p. 7.)

Based upon our review of the record, including Mr. Fair's itemized bill, we conclude that communications with defendant and applicant, trial preparation, and time spent off the record resulted in an additional 3.75 hours of work that were reasonably necessary to enforce applicant's award, resulting in a total of 7.95 hours of compensable work. Using the requested and awarded hourly rate of \$400, the section 5814.5 attorney's fee award amounts to \$3,180.00. We also correct the award to reflect that it is made against the insurer rather than the employer.

For the foregoing reasons,

IT IS ORDERED that applicant's attorney's Petition for Reconsideration of the July 26, 2023 Findings, Award, and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 26, 2023 Findings, Award, and Order is **AMENDED** as to Finding of Fact Number 3 and Award (b), as follows:

FINDINGS OF FACT

1. Roberto Avila, while employed on December 15, 2017, as a manager, Occupational Group Number 491, at Pomona, California, by Inland Valley Humane Society and SPCA, insured by Nova Casualty Insurance Company administered by Tristar sustained injury arising out of and in the course of employment to the left wrist.
2. Defendants did not demonstrate that the late payment was reasonable given the facts of this case and applicant is entitled to a 20% penalty less amounts previously paid toward the penalty issue, subject to proof, with board jurisdiction reserved should a dispute arise.
3. The reasonable value of the services of applicant's attorney on the penalty issue is \$3,180.00 less any amount previously paid in regards to the claimed penalty subject to proof with board jurisdiction reserved should a dispute arise.
4. The defendants' late payment did not arise to sanctionable conduct under Labor Code Section 5813 and CCR 10421.

AWARD

AWARD IS MADE in favor of **ROBERTO AVILA** and against **NOVA CASUALTY INSURANCE COMPANY**, as follows:

1. 20% penalty on the permanent disability award of \$8,772.50 in the amount of \$1,754.50 less credit for any payments previously made.
2. Attorney's fees of \$3,180.00 payable to LAW OFFICES OF DONALD FAIR less credit for any payments previously made.

ORDER

IT IS ORDERED that defendant is entitled to credit for payments previously paid to the applicant of \$875.08 on 5/19/23, \$875.08 on 7/30/20, 7/30/23 interest payment of \$31.38 toward penalty and interest subject to proof with board jurisdiction reserved at the trial level should a dispute arise.

IT IS FURTHER ORDERED that the defendant is entitled to take credit for payments previously made to applicant's attorney with regard to the attorney's fees on the penalty issue of \$1,099.98 subject to proof with board jurisdiction reserved at the trial level should a dispute arise.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 2023

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

**ROBERTO AVILA
LAW OFFICES OF DONALD S. FAIR
LAW OFFICES OF STOODY & MILLS**

AH/cs

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