

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

**JAMES KIRK, *Applicant***

**vs.**

**PENHALL COMPANY;  
ZURICH INSURANCE COMPANY,  
administered by ESIS. *Defendant***

**Adjudication Numbers: ADJ6625120**

**Fresno District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Both applicant and defendant seek reconsideration of the “Findings of Fact, Award, Order and Opinion on Decision” (F&A) issued on October 22, 2020, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that defendant was liable for penalties pursuant to Labor Code<sup>1</sup> section 4650, in the amount of \$23,545.58, penalties pursuant to section 5814 in the amount of \$5,886.40, and that defendant was liable for costs, including attorney’s fees pursuant to section 5813, but deferred the amount of such costs pending development of the record. The WCJ further found that penalties and costs, including attorney’s fees, were appropriate for enforcement of an order of medical treatment, but deferred the amounts.

Defendant argues that the WCJ erred in awarding penalties, costs, and attorney’s fees because defendant was determining whether to appeal the award of permanent total disability that issued. Defendant further argues that it timely authorized medical treatment and thus, the award of penalties, costs, and attorney’s fees was inappropriate.

Applicant argues that the WCJ erred in not finding an additional penalty for defendant’s alleged delay in complying with an August 23, 2018 order to provide prosthetic services.

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<sup>1</sup> All future references are to the Labor Code unless noted.

We have received an answer from both applicant and defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petitions for Reconsideration, the Answers, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After Reconsideration we will affirm the WCJ's October 22, 2020 F&A except that we will amend Finding of Fact number 9 to defer all issues of attorney's fees under section 5814.5 and return this matter to the trial level for further proceeding.

### **FACTS**

Applicant worked as an equipment operator on March 17, 2004, when he sustained industrial injuries to multiple body parts. (Minutes of Hearing and Summary of Evidence, May 9, 2019, p. 2, lines 3-7.) The matter initially proceeded to trial, after which an award of 100% permanent total disability issued on May 7, 2013. (Findings of Fact, Award, and Opinion on Decision, May 7, 2013.) Defendant did not seek reconsideration of the May 7, 2013 F&A. Defendant issued payment of retroactive permanent total disability benefits on May 28, 2013. (Defendant's Petition for Reconsideration, November 11, 2020, p. 2.) This was 21 days after the award issued.

Applicant's condition requires him to use a prosthetic leg. On May 9, 2017, the prosthetic servicer, RGP, requested authorization for various treatments related to the maintenance of the leg. (Applicant's Exhibit 8.) Defendant does not cite any evidence indicating its response to this request. The issue proceeded to a hearing on August 23, 2018, wherein the WCJ issued a minute order, which stated:

#### **ORDER:**

Defendants are ordered to authorize RGP to order replacement socks and liners for applicant's prosthetic needs.

Defendants are ordered to provide authorization to RGP to evaluate / repair / replace prosthetic arm and leg(s) as need (*sic*) subject to OMFS where it applies.

Defendants to arrange travel to/from RGP or agree to reimburse applicant. All other issues deferred w/ jurisdiction reserved.

It is so ordered.

(Exhibit 26, Minutes of Hearing, August 23, 2018.)

According to a September 24, 2018 letter from RGP, defendant authorized the treatment requests described in the August 23, 2018 order on September 5, 2018. (Applicant's Exhibit 30.) In that same letter, RGP requested authorization of additional treatment to the leg prosthesis. RGP requested defendant accept the letter as an RFA, but acknowledged that no RFA form was completed. (*Ibid.*) Nothing in evidence is cited as to how defendant responded to the September 24, 2018 letter.

Applicant seeks reconsideration of the discussion within the body of the opinion wherein the WCJ indicates that no attorneys fees pursuant to Labor Code section 5814.5 should be awarded as to litigation surrounding the September 24, 2018 letter. However, no findings of fact issued to this effect. The Findings of Fact deferred section 5814.5 attorney fees, and implied that such fees may be limited to issues raised in various trial briefs, but did not expressly exclude fees in connection with the September 24, 2018 request for authorization.

### **DISCUSSION**

Pursuant to the en banc decision in *Leinon v. Fishermen's Grotto*:

[W]e hold that the penalty under section 4650(d) applies only to periodic payments, including accrued periodic payments, where liability is accepted or where liability is ultimately imposed and the determination becomes final. An award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights **or has not pursued them**. Thus, an award becomes final after a WCJ issues an award and reconsideration is not sought, or after the Appeals Board makes a determination on reconsideration and review is not sought in the Court of Appeal, or after appellate review of the Appeals Board's decision is denied (or the decision is affirmed). . .

However, **there is no "grace period" for delay in payment provided by the statutory right to reconsideration or appellate review.** (See *Jensen v. Workers' Comp. Appeals Bd.* (1985) 170 Cal. App. 3d 244, 247 [216 Cal. Rptr. 33] [50 Cal. Comp. Cas 369, 371]; *California Highway Patrol v. Workers' Comp. Appeals Bd. (Erebia)* (2003) 68 Cal. Comp. Cas 227, 232 [writ denied].) Thus, if a defendant does not file a petition for reconsideration from an award of disputed benefits but does not pay within 14 days of the award, it must include a section 4650(d) penalty. Likewise, if a defendant does not file a petition for writ of review from an adverse decision after reconsideration but does not pay within 14 days of that decision, it must include a section 4650(d) penalty.

(*Leinon v. Fishermen's Grotto* (2004) 69 Cal.Comp.Cases 995, 1000-1001 (Appeals Board en banc), (emphasis added).)

Defendant's primary argument on reconsideration is that it was permitted to wait until after the time for reconsideration expired (25 days) to pay applicant's accrued award of permanent total disability benefits. As we have clearly stated in *Leinon, supra*, such grace periods do not exist in workers' compensation. Defendant is permitted to seek an appeal; however, if defendant does not seek appeal, defendant must pay that award within 14 days of its issuance. Accordingly, the WCJ correctly found that defendant was liable for penalties under section 4650 for its late payment.

Next, defendant argues that it timely authorized treatment pursuant to the WCJ's August 2018 minute order. Defendant's argument borders on frivolous. The dispute that caused the minute order to issue began in May 2017. Defendant cited no evidence supporting a good-faith denial of treatment in *May 2017*. This is what caused the order of treatment in August 2018. Defendant's argument that it timely authorized treatment after being ordered to authorize treatment is not convincing. Accordingly, the WCJ correctly awarded penalties and sanctions on this delay.

Finally, we address applicant's argument that the Findings of Fact improperly excluded attorney's fees under section 5814.5 as relates to the September 2018 dispute. While the Opinion on Decision indicates that the WCJ did not believe attorney's fees were due, the Findings of Fact are silent on the issue. The record is also silent as to what reasonable actions defendant took to investigate the claim in response to the September 24, 2018 letter. (Cal. Code Regs., tit. 8, § 10109.) As the WCJ deferred all other attorney's fees pending supplemental briefing, we will amend this finding to clarify that all issues regarding section 5814.5 attorney's fees are deferred and return this issue to the parties.

Accordingly, as our Decision After Reconsideration we will affirm the WCJ's October 22, 2020 F&A, except that we will amend Finding of Fact number 9 to defer all issues of attorney's fees under section 5814.5 and return this matter to the trial level for further proceeding.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order and Opinion on Decision issued on October 22, 2020, is **AFFIRMED** except that Finding of Fact number 9 is **AMENDED** as follows:

**FINDINGS OF FACT**

9. All issues regarding attorney's fees pursuant to Labor Code section 5814.5 are deferred.

**IT IS FURTHER ORDERED** that this matter is **RETURNED** to the trial level for further proceedings.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**January 17, 2025**

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

**JAMES KIRK  
MARIANI-PITALO & PITALO LAW OFFICES  
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY.APC**

**EDL/mc**

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