WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROGER LIBRON, *Applicant*

vs.

**OTSUKA AMERICA/PHARMAVITE, LLC;
SOMPO AMERICA FIRE & MARINE INSURANCE COMPANY, administered by BROADSPIRE and SOMPO AMERICA FIRE & MARINE INSURANCE COMPANY, administered by SOMPO INTERNATIONAL through GALLAGHER BASSETT**
Defendants

Adjudication Numbers: ADJ16907320, ADJ16908084
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings and Order (F&O) issued on August 20, 2025. The workers' compensation administrative law judge (WCJ) found in pertinent part that applicant and his attorney were not entitled to penalties or fees pursuant to Labor Code sections 5814[1] or 5813, or fees pursuant to section 5814.5 for late payment of a compromise and release (C&R).

Applicant argues that failure to comply with a court order, here the Order Approving Compromise and Release (OACR), is enough to satisfy a showing of bad faith for the purposes of awarding sanctions or penalties under section 5813. Applicant also argues that defendant failed to show that a check was timely issued and mailed, thereby justifying a finding that payment of the C&R was delayed and subject to penalties pursuant to section 5814.

Defendant filed an answer. The WCJ issued a Report and Recommendation (Report) recommending denial of the petition.

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the decision and return the matter to the trial level for further proceedings consistent with this opinion.

FACTS

Applicant has filed two claims for the same date of cumulative injury from December 15, 2005 through January 25, 2023 while employed by Pharmavite[2]. Both claims were resolved by a C&R signed by applicant on May 9, 2023 and fully executed by all the parties on January 13, 2024. The C&R is modified at page 5 to shorten the time for interest to accrue from 30 days to 20 days after the date of approval of the agreement. An addendum is also attached which also includes shortened period of 20 days for the commencement of interest accrual from service of the OACR.

It appears that on January 16, 2024, the C&R in the amount of $90,000.00 walked through for approval at the WCAB, and the C&R was approved on the same date. The OACR does not indicate upon whom the order was served. Applicant's counsel's office apparently served defendant via email on January 16, 2024. (Exhibit 8.) However, defendant filed the proof of service for service of the actual OACR and fully executed C&R on January 16, 2024.

On February 16, 2024, applicant's counsel emailed a letter to defendant to advise that applicant had not received the entirety of the settlement proceeds. (Exhibit 3 and C.) Defendant responded on the morning of February 19, 2024 to confirm which checks were received or missing, to which applicant's counsel advised that the payment from Gallagher was missing. (Exhibit C.) On February 20, 2024, defendant inquired whether they would like a stop payment on the check as it had not been cashed. Applicant agreed. (Exhibit D.)

On April 26, 2024, applicant filed a petition for penalties alleging that as of the date of the petition, $36,000.00 of the settlement had not been paid or received by applicant. The matter was set for trial and continued a number of times before being submitted on July 1, 2025.

At trial, the parties stipulated that, "all allegations of late payments and violation of Labor Code §5813 pertain only to payments made by Gallagher Bassett." (Minutes of Hearing and

[2] The stipulations also refer to the employer as Otsuka America/Pharmavite, LLC, but the C&R lists only Pharmavite as the employer.

Summary of Evidence (MOH/SOE), 05/28/2025, 2:16 & MOH/SOE, 07/10/2025, 2:21-23.)[3] Exhibit A is a copy of a check from Gallagher Bassett dated January 18, 2024 in the amount of $36,000.00 addressed to applicant at the address listed on the C&R. (Exhibit A.) There is no post mark, proof of service, or copy of a stamped envelope in evidence. Exhibit B is a copy of an endorsed check from Gallagher in the amount of $36,000.00. (Exhibit B.) A benefit printout was provided showing a payment of $36,000.00 to applicant on January 18, 2024 and February 27, 2024. (Exhibit E.)

Defendant called the only witness at trial. Defendant's witness is a senior resolution manager for Gallagher Bassett. Applicant objected to the witness being called as she was not listed by name on the pre-trial conference statement. The witness was allowed to tentatively testify to lay a foundation for the testimony. (MOH/SOE, 07/10/2025, 6:6-6:17.) The witness testified that she was not the person who handled applicant's payment and had no personal knowledge of the claim. (MOH/SOE, 07/10/2025, 8:10-11.) She testified based on her review of the system notes. (MOH/SOE, 07/10/2025, 8:11.) She testified that upon receiving an OACR, a task is generated to another department located in Chicago who ensure that the check is placed in an envelope and mailed. (MOH/SOE, 07/10/2025, 7:4-9.)

The WCJ issued the F&O, finding that defendant had not unreasonably delayed payment of the C&R so that applicant was not entitled to penalties under sections 5814 and 5814.5 and defendant did not violate section 5813. In his opinion, he noted that the court would be disregarding the testimony of defendant's witness. (F&O, p. 2.) The WCJ opined that the evidence supported defendant's contention that they had timely issued the initial check and replaced the missing check promptly, therefore applicant did not meet his burden of proving unreasonable delay or bad faith tactics. (F&O, p. 3.)

DISCUSSION

I

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

[3] The OACR is against "Pharmavite Sompo America Fire and Marine Insurance" not Gallagher Bassett. The C&R itself notes that Gallagher Bassett is to pay Applicant directly in the amount of $36,000.00. Broadspire paid the remainder of the settlement subject to permanent disability advances and less attorney's fees.

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 30, 2025 and 60 days from the date of transmission is Saturday, November 29, 2025. The next business day that is 60 days from the date of transmission is Monday, December 1, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[4] This decision is issued by or on Monday, December 1, 2025 so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 30, 2025, and the case was transmitted to the Appeals Board on September 30, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that

[4] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 30, 2025.

II

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton*, *supra*, 66 Cal.Comp.Cases at p. 475.) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton*, *supra*, 66 Cal.Comp.Cases at p. 475.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) The law has long recognized that where the WCAB cannot reach a just and reasoned decision on the existing record because the evidence is insufficient, unclear or conflicting, the WCAB has the power and even the duty to further develop the record under sections 5701 and 5906. When the record is inadequate to address the issues framed by the parties, "the WCJ has a duty to develop an *adequate* record." (*Kuykendall v Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases

264], italics added; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) The duty arises out of the Board's obligation to completely adjudicate the issues submitted for decision by the parties, consistent with principles of due process. (*Telles Transport v. Workers' Comp. Appeals Bd.* (*Zuniga*) (2001) 92 Cal.App.4th 1159, 1165 [66 Cal.Comp.Cases 1290].)

The initial burden of proof to demonstrate delay in the provision of benefits rests with applicant. However, once "an injured worker has shown a delay in the payment of compensation, the burden is on the employer to show good reason for the delay." (*Kamel v. West Cliff Med., Superior Nat'l Ins. Co.*, 66 Cal.Comp.Cases 1521, 1523 [2001 Cal. Wrk. Comp. LEXIS 5320] (Appeals Bd. en banc).) Here, applicant demonstrated that he did not receive the first check and that the first check was not cashed.

Defendant argues as its defense that the initial check was mailed timely and any delay is not due to any error by the defendant. As such, defendant bears the burden of proving that it mailed the payment timely. (Lab. Code, §§ 3202.5, 5705.) Under the so-called "mailbox rule," "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641; see also *Hagner v. United States* (1932) 285 U.S. 427, 430 [76 L. Ed. 861, 52 S. Ct. 417] ["[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"]; *Minniear v. Mt. San Antonio Community College District* (1996) 61 Cal.Comp.Cases 1055, 1059 (Appeals Board en banc) [typical presumption affecting the burden of producing evidence "is the presumption that a mailed letter was received"].)

Application of this rule was also discussed in an en banc decision by the Appeals Board:

> If the opposing party alleges that the information was not received, the WCJ may separately consider lack of receipt of the information by the opposing party in evaluating whether equitable relief is warranted [. . .]. The presumption that a letter mailed was received is rebuttable. (*People v. Smith* (2004) 32 Cal. 4th 792, 799 [11 Cal. Rptr. 3d 290, 86 P.3d 348].) However, the trier of fact is obligated to "assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence." (*Craig v. Brown & Root* (2000) 84 Cal. App. 4th 416, 421 [100 Cal. Rptr. 2d 818].) A mere allegation that the recipient did not receive the mailed document has been found to be insufficient to rebut the presumption. (See *Alvarado v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal. Comp. Cases 370 (writ den.) and *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal. Comp. Cases 1460 (writ den.).) If the sending

> party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce "believable contrary evidence" that it was not received. (Craig, supra, at pp. 421–422, citing Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 832, fn. 12 [113 Cal. Rptr. 790].) Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (*Id.*)

(*Suon v. California Dairies (Suon)* (2018) 83 Cal.Comp.Cases 1803, 1817 (Appeals Board en banc).)

Here, the WCJ found that the evidence supported defendant's contention that it had mailed the settlement payment timely initially and therefore any delay in the payment of the award was not due to an error by the defendant. We do not agree that the record is developed on this point. The evidence admitted is not enough to prove that the check was properly directed *and* placed in the mail on the date alleged. Therefore, there is no presumption that it was received by applicant, and the burden does not shift to applicant to disprove that it was properly mailed.

Additionally, the testimony of defendant's witness as to how the payments were issued and mailed was excluded by the WCJ. Even if the testimony were not excluded, the witness did not have personal knowledge that the payment was placed into an envelope, properly addressed, and placed in the mail. Without the testimony there is no verification of business practices or a foundation for the information listed in the benefit printout.

If the check was in fact delayed, the burden is on applicant to prove that the delay was unreasonable.

Section 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.

In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc), we emphasized that section 5814 affords a WCJ discretion in determining the penalty which should be assessed, with a primary view towards the goals of encouraging the prompt payment of benefits by making delays costly on defendants, and of ameliorating the effects of any delays on the injured worker. In *Ramirez*, we listed several factors to be considered in assessing a

section 5814 penalty. The factors listed in *Ramirez* are: (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.)

In this matter, the aforementioned factors were not discussed in the opinion, and the record is incomplete. Applicant did not testify as to whether the second check was received promptly after its issue date of February 27, 2024. The record is confusing as the petition for penalties indicates that as of April 27, 2024, applicant still had not received payment, yet the second check was cashed in May of 2024. In fact, it is unclear whether applicant is arguing delay of the second check or only the first. Thus, the actual length of delay cannot be ascertained.

Applicant also alleges costs under section 5813. Under section 5813(a), we have the discretion to order sanctions for "bad-faith actions or tactics which are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a).) These include "actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10421.) Sanctions under section 5813 are designed to punish litigation abuses and to provide the court with a tool for curbing improper legal tactics and controlling their calendars. (*Duncan v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 302.) Accordingly, sanctions are similar to penalties under section 5814, in that they are designed to have both remedial and penal aspects. (See *Ramirez*, *supra*, 73 Cal.Comp.Cases 1324 (Appeals Board En Banc).)

Again, it must be determined whether the settlement payment was actually made as noted above. However, based on the current record, there is no evidence offered to support a finding that defendant acted in bad faith or willfully intended to disrupt proceedings.

Accordingly, we will grant the Petition for Reconsideration and, as our Decision after Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the WCJ's decision of August 20, 2025. is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2025

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

ROGER LIBRON
LAW OFFICE OF JIM RADEMACHER
CHONG LEGAL GROUP

TF/abs

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