WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IGNACIO BARRON, *Applicant*

vs.

PAK'S CABINETS; SOUTHERN INSURANCE, administered by US ADMINISTRATOR CLAIMS, Defendants

Adjudication Number: ADJ9389953
Van Nuys 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.[1]

Applicant seeks reconsideration of the August 13, 2021 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that "[t]here was [*sic*] violation of Labor Code Section 4650." He ordered that applicant take nothing on his petition.

Applicant contends that defendant paid temporary disability benefits at the incorrect rate, and based on defendant's failure to timely pay the difference in benefits at the correct rate, he is entitled to a 10 percent increase in temporary disability indemnity under Labor Code[2] section 4650, penalties for unreasonable delay under section 5814, interest due under section 5800, attorney fees under section 5814.5 and sanctions under section 5813.

We have received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition for Reconsideration.

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[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[2] All further section references are to the Labor Code unless otherwise specified.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, 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 opinion.

FACTS

We will briefly review the relevant facts.

On December 21, 2018, a WCJ issued an Amended Finding & Award, which found in pertinent part that applicant, while employed during the period of April 1, 2012 through April 1, 2013 as a loader/unloader by defendant, sustained injury arising out of and in the course of employment to lumbar spine, left ankle, left knee and psyche; that applicant's earnings at the time of his injury "warranted indemnity rates of $1,066.72 for temporary disability"; and that defendant paid temporary disability indemnity at the weekly rate of $222.13 between April 1, 2013 through April 2, 2015. The WCJ awarded "Temporary disability at the rate of $1,066.72 per week beginning April 1, 2013 through April 2, 2015, less 15% for attorney fees, less credit for sums paid by defendant."

As relevant here, defendant sought reconsideration on the issue of whether applicant was entitled to the maximum temporary disability rate. In our decision of March 8, 2019, we affirmed the decision of December 21, 2018, except that we amended it as to a separate issue regarding defendant's liability to the Employment Development Department (EDD), and we awarded EDD a credit against applicant's permanent disability indemnity benefits. (Opinion and Order Granting Reconsideration and Decision after Reconsideration, dated March 8, 2019 (Opinion), p. 3, lines 1-6.)

No party challenged our March 8, 2019 decision.

Applicant alleges in the Petition for Reconsideration that defendant did not issue payment for the attorney's fees until April 10, 2019, and did not issue payment for the difference in temporary disability rates until April 12, 2019, and did not include the mandatory penalty under section 4650(d) or any interest under section 5800.

DISCUSSION

The relevant part of section 4650 provides as follows:

> (a) If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid, unless liability for the injury is earlier denied.
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> (b) (1) If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity, except as provided in paragraph (2). When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid.
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> (2) Prior to an award of permanent disability indemnity, a permanent disability indemnity payment shall not be required if the employer has offered the employee a position that pays at least 85 percent of the wages and compensation paid to the employee at the time of injury or if the employee is employed in a position that pays at least 100 percent of the wages and compensation paid to the employee at the time of injury, provided that when an award of permanent disability indemnity is made, the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier.
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> (c) Payment of temporary or permanent disability indemnity subsequent to the first payment shall be made as due every two weeks on the day designated with the first payment.
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> (d) If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan, as defined in subdivision (g). No increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether temporary disability indemnity payments are owed and advises the employee, in the manner prescribed in rules and regulations adopted pursuant to Section 138.4, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability

> indemnity payments are owed, and when the employer expects to have the information required to make the decision.

(Lab. Code, § 4650.)

As discussed in the en banc decision in the case of *Leinon v. Fishermen's Grotto, Mid-Century Ins. Co*. (2004) 69 Cal. Comp. Cases 995 (Appeals Board en banc), section 4650 contemplates several exceptions to its requirement that indemnity be increased by 10 percent for failure to pay temporary disability indemnity or permanent disability indemnity within 14 days of knowledge:

> …we observe that section 4650 describes several situations in which the penalty will be avoided. Under subdivision (a), no increase [of temporary disability indemnity] will apply where liability for the injury is denied within 14 days after knowledge of the injury and disability. Under subdivision (b), no increase [of permanent disability indemnity] will apply where the first payment is made within 14 days after the date of last payment of [temporary disability indemnity] and the employer continues the payments until the employer's reasonable estimate of [permanent disability indemnity] due has been paid, and if the amount of [permanent disability indemnity] has been determined, until that amount has been paid. Under subdivision (d), the penalty will not apply where the employer continues the employee's wages under a defined salary continuation plan, and no increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. And there is no penalty when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether [temporary disability indemnity] payments are owed and advises the employee, in a specified manner, why payments cannot be made within the 14-day period.

(*Id.* at pp. 1000-1001.)

In this case, there is no evidence that any of these exceptions apply to defendant's obligation to pay temporary disability indemnity. The WCJ's Report indicates that applicant's request for a penalty under section 4650 was denied because the amount to be paid to EDD was not determined until a conference held on June 10, 2019. However, our Opinion modified the award to allow the lien claim of EDD against permanent disability indemnity, *but not against temporary disability indemnity*.

Moreover, defendant could and did pay the temporary disability indemnity portion of the award before the June 10, 2019 status conference, issuing a payment dated April 10, 2019 to applicant's attorney (Defendant's Exhibit B, Benefits Printout, dated June 16, 2020, p. 1, first line

under "CLAIMANT'S ATTORNEY"), and a payment dated April 12, 2019 to applicant (*Ibid*. at p. 2, first line under "TEMPORARY TOTAL").

The record does not adequately explain why the awarded amount of temporary disability indemnity was not fully paid within 14 days of service of our March 8, 2019 Opinion, which was a final decision. Because it appears that service of our March 8, 2019 Opinion marks defendant's date of knowledge of the exact final amount of temporary disability indemnity due for purposes of section 4650, it follows that the April 10, 2019 and April 12, 2019 payments are late and should be subject to a 10 percent increase under section 4650 for not occurring with 14 days of that date. If defendant was genuinely unable to determine whether indemnity payments were owed and in what amount after service of the March 8, 2019 decision, then it should have advised applicant of this in writing as required by section 4650, subsection (d).

The August 13, 2021 decision treats the issue of penalties under section 5814 as waived because that issue was not included in the March 7, 2018 Pre-Trial Conference Statement (PTCS). While it is true that under section 5814, subsection (c), findings and awards are conclusively presumed to include any accrued penalty claims unless penalties are expressly excluded, a penalty claim for failure to timely pay temporary disability indemnity per our March 8, 2019 Opinion did not accrue until after that decision was served. To be clear, applicant's claim for penalties for late payment under section 5814 did not accrue until more than a year after the March 7, 2018 PTCS and could not possibly have accrued until after our March 8, 2019 Opinion. Accordingly, the issue of post-award penalties under section 5814 was not waived and ought to have been addressed in the August 13, 2021 F&O.

Because the WCJ regarded all penalties as waived, his decision did not address the June 29, 2020 letter from former defense counsel to applicant's attorney. (Defendant's Exhibit A). That letter makes an offer of proof that defendant did not receive the March 8, 2019 Opinion until at least five days after the following Monday, March 11, 2019. The letter suggests that defendant justifiably did not enter the decision into their system until March 19, 2019, and that payments made on April 10, 2019 and April 12, 2019 should therefore be considered timely. (*Id.* at p. 1, last paragraph.)

Defendant's amended trial brief, of which judicial notice was taken, asserts that the Appeals Board did not serve Protective Insurance. (Defendant's Amended Trial Brief, dated April

26, 2021, p. 2, lines 15-17.) This appears to be an error, as defendant's insurer is identified in its Answer as Southern Insurance, not Protective Insurance.

WCAB Rule 10390(c) requires that a defendant: "Identify the insurer and/or employer as the party or parties and not identify a third party administrator as a party. The third party administrator shall be included on the official address record and case caption if identified as such." Here, the third party claims administrator is listed on the official address record, but *no insurer of any kind is identified*. This failure by defendant is subject to sanctions, and defendant is warned to correct the official address record forthwith. (See *DiFusco v. Hands On Spa* (2025) 90 Cal.Comp.Cases 1007.)

In any event, when a party is represented, service is generally required only upon a party's representative and not upon the party itself, and the Appeals Board served defendant's counsel of record at the time. (Cal. Code Regs., tit. 8, §§ 10625(a), 10628(a).) Defendant's amended trial brief represents that defense counsel received the Appeals Board's decision on March 19, 2019, and that they transmitted it to the claims examiner on March 21, 2019. (Defendant's Amended Trial Brief, dated April 26, 2021, p. 2, lines 15-17.) Lashawn Lee, a claims adjuster for the third party administrator, testified at trial that she received a copy of the decision from defense counsel, and that she issued checks dated April 10, 2019 and April 12, 2019. (Minutes of Hearing and Summary of Evidence dated April 27, 2021, p. 7, lines 2-7.)

The timing of defendant's actions and whether they were reasonable under the circumstances should be considered by the WCJ in addressing whether there ought to be a penalty for unreasonable delay under section 5814. Even assuming the version of events described in defense counsel's letter are accepted, the payments of April 10, 2019 and April 12, 2019 are untimely under section 4650 because they are more than 14 days after March 19, 2019. We note that applicant may also be entitled to penalties on the unpaid section 4650(d) penalty.

Like the claim for post-award penalties under section 5814, applicant's request for interest on awarded temporary disability indemnity and for attorney fees for enforcement of the award of temporary disability indemnity were not waived, because the right to post-award interest and enforcement fees could not accrue until after the award. Thus, along with applicant's penalty claim under section 5814 and the application of a 10 percent increase under section 4650, the WCJ must address interest under section 5800 and attorney's fees under section 5814.5.

Additionally, the issue of sanctions was raised by applicant, and the WCJ must address whether the record supports a finding of any bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, which would warrant sanctions under section 5813.

Accordingly, as our Decision After Reconsideration, we rescind the F&O and return the matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the August 17, 2021 Findings and Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
NOVEMBER 2, 2026

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

IGNACIO BARRON
MICHAEL BURGIS & ASSOCIATES, P.C.
COOPER BROWN, APC

CWF/*cs*

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