

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

GREGORY ORTEGA, *Applicant*

vs.

SOUTHERN CALIFORNIA GAS CO., permissibly self-insured, *Defendants*

**Adjudication Numbers: ADJ10994258; ADJ18998346
Santa Barbara District Office**

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

Applicant seeks reconsideration of the Findings and Award, issued by the workers' compensation administrative law judge (WCJ) on July 23, 2024, wherein the WCJ found in pertinent part that applicant failed to sustain his burden of proof on the issue of penalties, sanctions and costs pursuant to his petition for penalties.

Applicant contends that defendant unreasonably delayed payment of permanent disability indemnity and therefore owed applicant an automatic statutory increase of 10% of the late payment, pursuant to Labor Code section 4650(d).¹ Applicant also contends that defendant's failure to timely pay the 10% owed under section 4650(d) and defendant's failure to timely pay permanent disability indemnity gives rise to penalties pursuant to section 5814. Applicant further contends that the WCJ should award attorney's fees per section 5814.5 and/or 5813.

We have not received an Answer from defendant.

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

We have considered the allegations in the Petition and the contents of the Report with respect thereto. Based on our review of the record, and as discussed below, we will grant applicant's Petition, rescind the WCJ's July 23, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this decision.

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

I.

As a preliminary matter, former Labor Code section² 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:

- (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 August 20, 2024, and 60 days from the date of transmission is Saturday, October 19, 2024. The next business day that is 60 days from the date of transmission is Monday, October 21, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Monday, October 21, 2024, 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.

² All statutory references are to the Labor Code unless otherwise stated.

Here, according to the proof of service for the Report and Recommendation by the WCJ, the Report was served on August 20, 2024, and the case was transmitted to the Appeals Board on August 20, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that 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 August 20, 2024.

II.

The parties proceeded to trial on May 9, 2024 on the issue of applicant's petition for penalties of December 6, 2023. They stipulated that:

On November 20, 2019, an award issued in the amount of 49 percent, equal to \$76,560.00. All monies due under this award were paid prior to the filing of a petition to reopen. Following the filing of a petition to reopen, the permanent disability increased to 54 percent, or \$87,942.50. On March 30, 2023, defendant paid an additional \$11,400.03. The parties appeared for trial on September 21, 2023, and the Minutes of Hearing reflect under comments 65 percent stipulation on petition to reopen. The Minutes of Hearing also reflect that settlement is pending with that box checked, and the matter was set for trial again on September 28, 2023. The matter was then continued to October 5, October 16, November 14, 2023, at which time the matter proceeded to trial. A Findings and Award issued on February 5, 2024, finding 65 percent permanent disability.

Defendant made a payment in the amount of \$17,275.71 on or about November 20, 2023.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), May 9, 2024 trial, p. 2.)

In the Petition for Reconsideration, applicant contends that defendant owed a 10% statutory increase retroactive to September 30, 2022, when defendant previously stopped paying permanent disability indemnity. (Lab. Code, § 4650(d); *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 562; see Exhibit B, benefit printout dated March 11, 2024 [MOH/SOE, May 9, 2024 trial, p. 3].) However, based on the record before us, we cannot determine when defendant had reasonable knowledge that further permanent disability indemnity was due pursuant to section 4650(b)(1). Applicant further contends that defendant's failure to pay the statutory increase, despite three trial dates, constitutes an unreasonable delay, triggering section 5814 penalties.

Pertinent here, section 4650(b) provides:

(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.

...

(Lab. Code, § 4650(b)(1).)

Section 4650(d) provides:

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(d).)

Thus, a statutory increase under section 4650(d) is a self-executing, strict liability provision not dependent on a finding of unreasonable delay and is intended to supplement, not replace, the section 5814 penalty. (*Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal.4th 1213, 1227 [58 Cal. Comp. Cases Cal.Comp.Cases 172]; *Cal. v. Workers' Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th 128, 139 [61 Cal.Comp.Cases 325].) "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, . . .*" (Lab. Code, § 4650(d), italics added; *Ellison, supra*, at 138-139; *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 910 [62 Cal.Comp.Cases 891].) Put another way, section 4650(d) requires that when a permanent disability

indemnity payment is untimely, an employer or insurance carrier is required to *automatically* include payment of an extra ten percent of permanent disability indemnity amount due and owing. Payments of permanent disability indemnity, and the additional ten percent on untimely permanent disability indemnity, if any, are made directly to the injured worker by the employer or insurance carrier, and an injured worker is not required to formally request them.

As we discussed in our en banc opinion in *Farris v. Industrial Wire Prods.* (2000) 65 Cal.Comp.Cases 824:

Thus, by its express terms, section 4650 makes it clear that the penalty under subdivision (d) of that section is but an ‘increase’ in the indemnity that is otherwise payable under that section. The section 4650(d) penalty has no ‘separate existence,’ independent of the late disability indemnity to which it attaches. Indeed, the section 4650(d) penalty only arises where an underlying indemnity payment is late. Therefore, the section 4650(d) penalty is clearly ‘derivative of’ and ‘dependent on and ancillary to’ the underlying disability indemnity. It is not a separate class or category of benefit.

(*Farris v. Industrial Wire Prods.* (2000) 65 Cal.Comp.Cases 824, 828 (Appeals Bd. en banc).)

Section 5814 states, in pertinent part:

(a) 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.

(b) If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this section, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused. This self-imposed penalty shall be in lieu of the penalty in subdivision (a).

(Lab. Code, § 5814.)

As we stated in our en banc opinion in *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Bd. en banc), 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.

To that end, in *Ramirez*, we listed several factors to be considered by the WCJ 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 v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324, 1329-1330 (Appeals Bd. en banc).)

We note that a section 4650(d) penalty is not a separate class or category of benefit, different from the underlying disability benefit to which it applies. Therefore, where it is determined that a defendant unreasonably delayed or failed to pay a section 4650(d) penalty, the penalty under section 5814 for that delay or failure to pay is assessed against the underlying benefit to which the section 4650(d) penalty attaches, as increased by the section 4650(d) penalty amount. It is not assessed only against the amount of the section 4650(d) penalty. (*Farris v. Industrial Wire Prods.* (2000) 65 Cal.Comp.Cases 824, 827 (Appeals Bd. en banc).)

The WCJ's decision "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*).) An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely

developed record.” (*Hamilton, supra*, at 476 (citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ determined that “[t]here is no evidence that the Defendant willfully and inappropriately failed to pay Permanent Disability benefits or unreasonably delayed the additional Permanent Disability owed to Applicant.” (July 23, 2024 Opinion on Decision, p. 2.) “[A]s with any other delay in the payment of compensation, it is the employer’s burden to establish that a delayed payment of a section 4650(d) penalty was reasonable.” (*Farris, supra*, at 831; see *Kerley v. Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 227, 230 [36 Cal.Comp.Cases 152, 154].) As the WCJ did not cite to evidence, we are unable to evaluate the basis for the WCJ’s decision. As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at 475.)

Based on the record before us, we are unable to determine 1) when defendant had reasonable knowledge that further permanent disability indemnity was due, pursuant to section 4650(b); 2) whether defendant made the permanent disability indemnity payment within 14 days of when it was due; 3) if defendant delayed in making the payment, whether defendant paid the 10% statutory increase; and, 4) if defendant should have increased the retroactive permanent disability indemnity payments, but failed to do so, whether that delay was unreasonable pursuant to section 5814.

Based on the foregoing, we grant applicant’s Petition, rescind the July 23, 2024 Findings and Award, and return the matter to the WCJ for further proceedings consistent with this opinion. Upon return to the trial level, we recommend that the WCJ make a clear record with respect to applicant’s contention of delayed payments for an earlier period of permanent disability indemnity (where applicant contends that payment on March 30, 2023 was incomplete); whether there is any amount of permanent disability indemnity due and owing; whether there was an obligation on the part of defendant to increase permanent disability indemnity payments by 10%, pursuant to section 4650(d); and if any payments were delayed, the reasonableness of said delay(s). The WCJ should then make a finding on applicant’s request for attorney’s fees pursuant to sections 5814.5 and/or 5813.

Furthermore there appears to be a typographical error in Finding No. 2. The amount of permanent disability indemnity awarded on November 20, 2019, was \$76,560.00, however

Finding No. 2 states: “On November 20, 2019, an Award issued in the amount of 49%, equal to \$476,560.00. ...” which a \$400,000 discrepancy. When the WCJ issues a new decision, the WCJ can correct this discrepancy.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on July 23, 2024 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2024

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

**GREGORY ORTEGA
STOUT, KAUFMAN, HOLZMAN & SPRAGUE
BRADFORD BARTHEL**

JB/pm

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