

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

MICHAEL NEUFELD, *Applicant*

vs.

**COUNTY OF SAN BERNARDINO FIRE DEPARTMENT,
*Permissibly Self-Insured, Defendant***

**Case Number: ADJ11297621
Van Nuys District Office**

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

Applicant seeks reconsideration of our January 8, 2021 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Opinion and Order), wherein we granted the Petition for Reconsideration (Petition) filed by applicant from the Findings and Order (F&O) issued October 20, 2020 by the workers' compensation administrative law judge (WCJ). In our decision, we granted reconsideration, rescinded the WCJ's F&O, and substituted our own Findings and Order directing defendant to pay penalties pursuant to Labor Code section 5814¹.

In the instant Petition, applicant contends that we should issue a new Opinion and Order awarding applicant's attorney attorney's fees under section 5814.5.

We have considered the Petition for Reconsideration and defendant's Answer, and we have reviewed the record in this matter.

For the reasons set forth in our prior Opinion and Order, which we hereby incorporate, and for the reasons discussed below, we will grant applicant's Petition.

Under section 5814.5, "[w]hen the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award [...] 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." (Lab. Code, § 5814.5; see also

¹ Unless otherwise indicated, all further statutory references will be to the Labor Code.

Ramirez v. Drive Financial Services (2008) 73 Cal.Comp.Cases 1324, 1334 (Appeals Board en banc) (“The right to seek attorney’s fees under section 5814.5 comes into existence only after applicant has been awarded compensation and defendant has unreasonably delayed payment.”)

In this case, we awarded applicant penalties under section 5814 in our October 20, 2020 Opinion and Order. Applicant’s earlier Petition for Reconsideration did include a request for reasonable attorney’s fees, as well as a discussion of applicant’s attorney’s time spent and hourly rate. Moreover, attorney’s fees were listed as an issue at trial. (September 16, 2020 Minutes of Hearing/Summary of Evidence, p. 2:22-24.) Accordingly, we will grant applicant’s Petition and affirm our January 8, 2021 Opinion and Order, except that we will amend the January 8, 2021 Opinion and Order to include an award of attorney’s fees under section 5814.5. We will return the matter to the trial level so that the parties may attempt to resolve the amount of attorney’s fees, with jurisdiction reserved to the WCJ if the parties are unable to reach an informal resolution as to what constitutes a reasonable section 5814.5 attorney’s fee, taking into consideration applicant’s Bill of Particulars any other relevant evidence the parties may proffer. (*Ramirez, supra*, 73 Cal.Comp.Cases at 1334-1346 (analogizing fees under section 5814.5 with fees under section 5801); *Lee v. Workers’ Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 1082 (writ den.) (“the attorney’s time, effort, care, experience and results” may be considered in determining “reasonable and appropriate hourly rate”).)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the January 8, 2021 Opinion and Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 8, 2021 Opinion and Order is **AFFIRMED**, except that the Findings of Fact and the Order are **AMENDED** as follows:

FINDINGS OF FACT

3. Applicant's attorney is entitled to an award of attorney's fees under Labor Code section 5814.5 because of defendant's unreasonable delay in restoring applicant's sick and vacation time.

ORDER

IT IS ORDERED that defendant pay a penalty, under Labor Code section 5814, of 25% of the benefits awarded under Labor Code section 4850.

IT IS FURTHER ORDERED that defendant pay applicant's attorney's reasonable fee under Labor Code section 5814.5, in an amount to be informally adjusted by the parties, with jurisdiction reserved at the trial level if the parties cannot informally resolve the issue of attorney's fees under Labor Code section 5814.5.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR (see attached concurring opinion),

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 11, 2021

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

**MICHAEL NEUFELD
STRAUSSNER SHERMAN
KEGEL, TOBIN & TRUCE**

REB/pc

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

CONCURRING OPINION OF COMMISSIONER LOWE

While I concur with the majority’s conclusion, I write separately to emphasize the following. As I wrote in my dissent to our January 8, 2021 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration, I do not believe that the award of penalties under Labor Code section 5814 was appropriate in the matter before us. However, I agree with the majority that once penalties under Labor Code section 5814 have been awarded, attorney’s fees under Labor Code section 5814.5 should also be awarded.



WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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**MICHAEL NEUFELD
STRAUSSNER SHERMAN
KEGEL, TOBIN & TRUCE**

REB/pc

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