WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VINCENT DILIBERTO, *Applicant*

vs.

CITY OF MODESTO, Permissibly Self-Insured,
Administered By ATHENS ADMINISTRATORS, *Defendant*

Adjudication Number: ADJ19773230
Lodi District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of April 23, 2026, wherein it was found that defendant unreasonably rejected liability of a presumptive Labor Code section 3212 "heart trouble" injury pursuant to Labor Code section 5814.3, assessing a $50,000 penalty. In this matter, the parties have stipulated that while employed on May 10, 2024 as a fire engineer, applicant sustained injury to his heart in the forms of atrial fibrillation, left ventricular hypertrophy, and mitral valve regurgitation causing temporary disability from May 11, 2024 to July 16, 2024, permanent disability of 30% and the need for further medical treatment. The issue of section 5814.3 penalties was deferred in the stipulations. However, it does not appear that an Award has yet been issued based on the stipulations.

Defendant contends that the WCJ erred in finding that it unreasonably rejected liability and finding it subject to a $50,000 penalty. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report). In addition, defendant has requested that we consider a supplemental pleading it filed in response to the WCJ's Report. We hereby accept this document for filing, and we have considered this filing.

As explained below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code 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, Labor Code 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.
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> 2. For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code 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 May 29, 2026 and 60 days from the date of transmission is July 28, 2026. This decision is issued by or on July 28, 2026, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 May 29, 2026, and the case was transmitted to the Appeals Board on May 29, 2026. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on May 29, 2026.

Turning to the merits, the parties stipulated that applicant was injured while working as a fire engineer for the City of Modesto. Applicant testified that while at work on May 10, 2024 he began to work out but then began sweating profusely, had spotty vision, and a sporadic heart rate. He hooked himself up to a heart monitor and saw his heart rate go up very high and then go low. An ambulance was called. He testified that a monitor in the ambulance confirmed atrial fibrillation. (Minutes of Hearing and Summary of Evidence of March 30, 2026 trial at p. 4.)

He was then taken to the emergency room. According to the records summarized later by qualified medical evaluator internist Andrew McClintock Greenberg, M.D., in the emergency room applicant was given an EKG which showed atrial fibrillation with rapid ventricular response. He was diagnosed in the emergency room with "new onset [atrial fibrillation]." He was admitted into the hospital on the date of injury. (November 20, 2024 report at p. 8.) He was seen by a cardiologist in the hospital on the same day who diagnosed applicant with "New onset AFib, controlled ventricular response, questionable paroxysmal versus lone." He was kept in the hospital overnight and evaluated again by a cardiologist who again diagnosed "new onset AFib" and recommended "continue to work up paroxysmal atrial fibrillation on an outpatient basis and consider RF ablation." Applicant was discharged from the hospital on May 11 but continued to be seen on an outpatient basis where he continued to be diagnosed with atrial fibrillation. (November 20, 2024 report at pp. 11-12.)

On July 15, 2024 he was seen by Alexis L. Dasig, M.D. who noted that he was last seen by [cardiologist] Dr. Ramilo on 6/5/24, and it was decided that he needed ablation and Stanford was recommended. He has an appointment to go to Stanford 7/26/24. In the meantime, he would like to go back to modified work because his case is in delay and now his employer is using his personal sick time to cover for his days off. He would like to try light work." Based on applicant's request for light work, he was given modified duties of "office type work and no lifting over lbs. No pulling or pushing. No reaching, no climbing." (November 20, 2024 report at p. 12.)

He was told that his supervisor submitted his workers' compensation claim on his behalf. (Minutes of Hearing and Summary of Evidence of March 30, 2026 trial at p. 5.) He testified that "when he was in the ER, his supervisor notified him that the paperwork had been started on the work comp side, and to worry about his health not the paperwork." (Minutes of Hearing and Summary of Evidence of March 30, 2026 trial at p. 5.)

Applicant's testimony that the claim had been submitted is corroborated by a July 23, 2024 denial issued by defendant. The denial stated, in pertinent part:

> Athens Administrators is handling your workers' compensation claim on behalf of City of Modesto. This notice is to advise you of the status of disability benefits for your workers' compensation injury on the date shown above.
>
> After careful review and consideration of all information received, we are denying your cardiac claim as there is no substantial medical, legal or factual evidence to support a confirmed diagnosis for a heart condition under the presumption pursuant to labor code 3212 related to your employment with City of Modesto. You have an appointment at Stanford's arrhythmia clinic on 7/26/2024 and a QME panel has been requested. Should we receive such medical evidence, we will revisit our decision on compensability.

After the denial, applicant apparently resubmitted his claim on September 12, 2025 and was evaluated by QME Dr. McClintock Greenberg who issued a report on November 20, 2024 finding that applicant sustained compensable atrial fibrillation, mitral valve regurgitation, and left ventricular hypertrophy. Nevertheless, the claim was not accepted until February of 2025, nine months after the injury when paperwork had been initiated on applicant's claim, seven months after the claim was first denied "after careful review and consideration," five months after applicant had to resubmit his claim, and three months after a QME found applicant's claims compensable.

Labor Code section 5814.3(a) states:

> Notwithstanding Section 5814, when liability has been unreasonably rejected for claims of injury or illness as defined in Sections 3212 to 3213.2, inclusive, the amount of the penalty shall be five times the amount of the benefits unreasonably delayed due to the rejection of liability, but in no case shall the penalty exceed fifty thousand dollars ($50,000). The question of rejection and the reasonableness of the cause shall be determined by the appeals board in accordance with the facts.

Labor Code section 3212 applicable to this case states, in pertinent part:

> (1) … in the case of members of fire departments, except those whose principal duties are clerical, such as stenographers, telephone operators, and other officeworkers … the term "injury" includes … heart trouble that develops or manifests itself during a period while the member is in the service of the office, staff, department, or unit.
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> (2) The … heart trouble … so developing or manifesting itself in those cases

> shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. The presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
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> (3) The … heart trouble … so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.

We agree with the WCJ that the rejection of liability was unreasonable, and that the penalty was warranted.

Defendant makes much of when a defendant's duty to investigate a claim first arises. Regardless of when such a duty arises generally, in this case applicant testified that his employer told him that the paperwork for his workers' compensation case had been initiated soon after the injury, and the WCJ found this testimony credible. In fact, this testimony was completely corroborated by the fact that applicant received a denial on July 23, 2004, a little more than two months after his injury. The denial expressly refers to "your workers' compensation claim" and "your cardiac claim." The denial states that it was made "after careful review and consideration" and acknowledges applicant's upcoming cardiac appointment at Stanford.

Although the grounds for the denial were that there was no "substantial medical, legal or factual evidence to support a confirmed diagnosis for a heart condition," applicant's co-worker's and supervisor had witnessed applicant's injury or its immediate after-effects, saw him transported to the emergency room, where he was admitted to the hospital. Although defendant did not offer evidence regarding the information that was given "careful review and consideration," by the time of the rejection of liability, applicant had been diagnosed with atrial fibrillation by the emergency room physician, the admitting hospitalist, and the cardiologist on duty at the hospital, and the treating cardiologist had already recommended an ablation. Applicant clearly already had a diagnosed heart condition.

Defendant's Petition ignores this history prior to the resubmission of the claim in September of 2004. Defendant's Petition also ignores the rationale given in the first rejection of liability and gives a completely different rationale for its delay in its Petition, stating that it was reasonable to give it an opportunity to rebut the heart trouble presumption. Defendant states that it

wanted to investigate applicant's prior manifestations of heart problems while working with previous employers.

However, although the Labor Code section 3212 "presumption is disputable and may be controverted by other evidence," the final paragraph of section 3212 contains an anti-attribution clause, which states that, "The … heart trouble … so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation." The anti-attribution clause in Labor Code section 3212 limits the type of evidence that may be used to rebut the Labor Code section 3212 presumption. In *City and County of San Francisco v. Workers' Comp. Appeals Bd. (Weibe)* (1978) 22 Cal.3d 103 [43 Cal.Comp.Cases 984], the Supreme Court explained that the non-attribution clause in section 3212.5, which is identical to the non-attribution clause contained in section 3212, did not allow the presumption to be rebutted by evidence of pre-existing heart disease. Rather, the employer was only "free to rebut the statutory presumption by proving that some contemporaneous nonwork-related event -- for example, a victim's strenuous recreational exertion -- was the sole cause of the heart [trouble]." (*Weibe*, 22 Cal.3d at p. 112.) "That is, an employer may rebut the presumption, but only with proof of causation by a nonindustrial event occurring at the same time as the heart trouble developed or manifested itself." (*Johnson v. Workers' Comp. Appeals Bd.,* 163 Cal. App. 3d 770, 776.)

Thus, defendant in this case could not rebut the section 3212 presumption by proving the existence of preexisting disease. Rather, it could only rebut the presumption by showing that an event occurring at the same time of applicant's current employment was the sole cause of his heart trouble. Given that defendant does not appear to argue that the workout that precipitated applicant's symptoms did not occur in the course of and arising out of employment, it would have been clear by even the most cursory investigation that by the time of the July 2024 denial a contemporaneous non-work-related event was not the sole cause of the heart trouble. The WCJ's conclusion that defendant's denial was unreasonable is amply supported by the record before us. The fact that applicant had to resubmit his claim, and the claim was not accepted until many months after the resubmission is superfluous. Of course, "Superfluity does not vitiate." (Civil Code sec. 3537.)

Defendant also claims that no benefits were unreasonably delayed because applicant did not sustain any apparent out of pocket loss. In response to this argument, we incorporate the following discussion in the WCJ's Report:

Delay of Benefits:

The Portesi case is distinguishable from these facts. By defendant's admission at trial, they paid 4850 benefits to the applicant from May to July, and then took it back by taking away his PTO time. Defendant claims, "Case law establishes that a payroll coding or reclassification issue is not a delay of benefits within the meaning of § 5814.3," and then cite to Portesi, a case from 1997. Labor Code Section 5814.3 is not mentioned in Portesi, because Portesi pre-dates it. Therefore, Portesi does not answer the question as to whether benefits were delayed "within the meaning of Labor Code Section 5814.3," as indicated by defendant.

Portesi is distinguishable because it addressed a penalty for defendant's failure to timely convert vacation and sick time to Labor Code § 4850 benefits pursuant to stipulated award. In that case, the issue was conversion of lost PTO time to 4850 time. Here, the opposite was done, where Defendant paid 4850 time but later converted it to PTO time, without applicant's knowledge or consent. In doing so, they stripped applicant of a benefit that was previously paid to him. They only did this after the denial of his claim in July of 2024. They did so with the intent to deprive him of that benefit, and this was therefore not a mere payroll coding or reclassification issue as they are suggesting. This is not a bookkeeping issue but instead Defendant's attempt to credit themselves back for benefits that were not due, in contradiction to Labor Code Section 4909.

We agree with the WCJ that the operation of section 5814.3 should not depend on whether or not the injured worker is lucky enough to have medical insurance that will pay for his medical care after a wrongful denial or whether the injured worker has sufficient accrued time off or money in the bank to allay the wrongful withdrawal of benefits. We note that in this case, the medical records appear to suggest that applicant himself suggested an early return to work because of defendant's delay in approving his claim.

With regard to the amount of benefits delayed, the applicant credibly testified that any indemnity paid to him was converted to non-industrial time off, and this testimony is consistent with the fact that defendant actually issued a denial. Exhibit 1 shows that the payment of indemnity corresponding to the period May 11, 2024 to July 16, 2024 was not made until February 10, 2025. We note that even at the temporary disability indemnity rate, not taking Labor Code section 4850 into account, the temporary disability benefits due to the applicant would be in excess of $10,000. Therefore, since section 5814.3 imposes a penalty of five times the benefits delayed, a penalty of the maximum $50,000.00 was warranted.

We agree with the WCJ that defendant's conduct in taking away workers' compensation benefits is squarely withing the issue of Labor Code section 5814.3 penalty and there was no due

process issue in considering this claw back of benefits in determining the amount of the penalty due to the applicant. With regard to the issue of any further sanctions, the WCJ has not yet made a final decision on that issue, and it is not before us in the instant Petition.

We therefore deny the defendant's Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of April 23, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 28, 2026

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

VINCENT DILIBERTO
DUARTE, URSTOEGER & RUBLE
LENAHAN, SLATER, PEARSE & MAJERNIK

DW/oo

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