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Dear Subscriber,

In an En Banc Opinion, the WCAB Rules on The Impact of Labor Code Section 5814, Labor Code Section 5814.5.

In *Ramirez v. Drive Financial Services; and One Beacon Insurance Co.*, (09/09/08) 73 Cal. Comp. Cases _____. En Banc, the WCAB ruled that designated factors must be considered in awarding penalty under *Labor Code Section 5814*; successive penalty, though still allowed where there is a delay in paying a prior penalty, cannot be allowed if the defendant has reasonable doubt as to liability for the underlying penalty; applicant attorney fees under *Labor Code Section 5814.5* are to be awarded for pursuit of penalty for an unreasonable delay occurring after January 1, 2003, regardless of date of injury; and attorney fees under *Labor Code Section 5814.5* are to be based upon a reasonable hourly rate for reasonable time expended.

In *Ramirez*, the applicant resolved her claim for industrial injury, a cumulative trauma ending February 15, 2001, by way of a compromise and release in December 2004. The terms of the compromise and release allowed the defendant 30 days within which to issue payment. The defendant issued payment 5 days late, or 35 days after the issuance of the Order Approving Compromise and Release. Applicant then sent five letters over an approximate two month period demanding a 25% penalty be voluntarily paid to applicant. After receipt of the first four letters, defendant paid a ten percent penalty. Applicant thereafter filed a petition for a full 25% penalty.

At trial, the Workers' Compensation Judge found the amount paid for penalty by the defendant was reasonable. In so finding, the Judge noted that *Labor Code Section 5814* allowed discretion to the judge in making a determination for penalty to ensure a fair balance was created. The Judge further awarded the applicant counsel a fee based upon a percentage of the amount paid to the applicant, while denying fees under *Labor Code Section 5814.5* reasoning that this section only applies to dates of injury on or after its effective date, January 1, 2003.

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On petition for Reconsideration filed by applicant, the WCAB held that though the Judge does have the discretion to award an amount lesser than the 25% or \$10,000 maximum allowed under the statute, an explanation of how the Judge arrived at the amount awarded must be given. In finding that the Judge did not provide such an explanation, the WCAB rescinded the findings and award on this issue and remanded the matter back to the Judge for further discussion. The WCAB provided the following factors to guide future discretionary determinations:

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.

Insofar as the applicant's claim for a second penalty due to the defendant's election to pay only a 10% penalty, the WCAB affirmed that multiple and/or consecutive penalties may be awarded under the revised *Labor Code Section 5814*. However, the WCAB continued noting that under the facts of this case there did appear to be genuine doubt as to liability for a maximum penalty of 25% and, as such, this was not a circumstance where it appeared that multiple penalty for underpayment of the initial penalty would be appropriate. Without making a full determination, and with their opinion only as guidance to the parties and the Judge, the WCAB remanded the matter back to the Judge for further consideration and determination.

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After careful analysis, the WCAB concluded that attorney fees for efforts in enforcing an award are applicable to unreasonable delays occurring on or after January 1, 2003. The WCAB analyzed the actual language of the section and prior case law and concluded that *Labor Code Section 5814.5* "affected only rights and obligations pertaining to acts or events that occurred, or failed to occur, after the January 1, 2003 effective date." Based on the determination that the applicant attorney was entitled for fees under *Labor Code Section 5814.5*, the WCAB then defined the approach that is to be utilized in awarding the fees.

The WCAB held that in awarding fees under *Labor Code Section 5814.5*, the fees are to be in addition to the amount awarded the applicant, pursuant to the terms of the statute. The trial judge is to consider the amount of time and effort expended in enforcing the award and make an award of fees to applicant attorney based thereon, based upon the time and reasonable hourly value of the efforts of applicant attorney.

The matter was then remanded on all of the above issues for further proceedings.

Third District Court of Appeal Issues Published Opinion Holding Certain Injuries for Public Safety Officers are Not Subject to Apportionment Under Labor Code Section 4663.

In the Published case of *Dept. of Corrections and Rehabilitation v. WCAB (Alexander) (09/10/08)* [cite pending], the Third District Court of Appeal held that apportionment to pre-existing disease was not an allowable basis for apportionment for a Public Safety Officer who sustained injury on an industrial basis.

In *Alexander*, the applicant was a correctional officer at Solano State Prison. In September 2006, he filed an application for adjudication of his workers' compensation claim, alleging injury to his heart, cardiovascular system, and left shoulder. At trial, the following facts were stipulated:

1. Alexander sustained injury to the heart and left shoulder arising out of and in the course of employment.
2. He had received permanent disability compensation since on or around February 20, 2006.
3. Without apportionment, his permanent disability was 78 percent; apportionment, if legally appropriate,

would be at the level of 11 percent.

The issue to be litigated was whether *Labor Code Section 4663(e)* was in effect before January 1, 2007, barring apportionment of that part of Alexander's permanent disability, which had accrued as of then.

Thereafter, following trial, the Workers' Compensation Judge found as follows:

1. Section 4663(e) "is declaratory of existing law."
2. It applies retroactively to dates of injury preceding its enactment date (January 1, 2007).
3. The Legislature intended it to apply retroactively.

As a result of the Findings of the WCJ, apportionment was held not applicable to the applicant's injuries.

Defendant filed a Petition for Reconsideration, which was denied, and thereafter appealed to the Third District Court of Appeal.

In Holding that apportionment was barred under the facts of this case, the Third District Court of Appeal found that the addition of *Labor Code Section 4663(e)* after the initial adoption of *Labor Code Section 4663* was 'declaratory of existing law' prohibiting apportionment for public safety officers pursuant to *Labor Code Sections 3212 - 3213.2*. The Court reasoned that though *4663(e)* was not implemented at the time of the applicant's injury, the intent of the legislature was not to eliminate the presumption.

Civil Claim for Damages Resulting From Death of Employee Subject to Exclusive Remedy

The First District Court of Appeal, in an unpublished case of *Alejandre v. Valleycrest Companies* [cite pending], held that the death of an employee, caused by an on the job automobile accident after the employer had not fixed the truck's broken air bag system and had removed the air bag warning light from the dashboard, was subject to the exclusive remedy of Workers' Compensation.

In *Alejandre*, the applicant was killed while driving a work truck after being hit head on by another vehicle. The undisputed facts were that the employer had the work truck that Alejandre was driving taken for service approximately one year prior to the accident. At that time, the employer was made aware of a problem with the vehicle's airbag system and declined to have it serviced. Later, a company

mechanic disengaged the airbag warning light.

As a result of the accident, the family of Alejandro sued the employer for negligence, battery and wrongful death. The trial court dismissed the claim after the employer raised the affirmative defense of the workers' compensation exclusive remedy provisions.

On appeal from the dismissal, the First District Court of Appeal upheld the trial court dismissal of the civil lawsuit. In so holding, the Appeals Court reasoned that the risk of a faulty airbag for a driver was within the risks of an employment bargain. The Court reviewed relevant case law, particularly the Supreme Court opinion in *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 467-475 (*Johns-Manville*), "which held that workers' compensation remains the exclusive remedy available to an employee injured by an employer's intentional misconduct in failing to provide a safe workplace." After reviewing additional opinions on the issue, the Appellate Court concluded that this case also fell within the risks associated with employment. However, in closing, the Court further noted that the family did have the additional remedy of claiming the death was the result of the serious and willful misconduct of the employer which, if proven, would entitle the applicant to an additional 50% increase in the award.

Vocational Rehabilitation Maintenance Allowance is Not Considered Wage Loss

In the Published Opinion of *Medrano v. WCAB* [cite pending], the Second District Court of Appeal held that a defendant is not entitled to credit for wages earned by an injured worker while receiving vocational rehabilitation maintenance allowance (VRMA) payments.

In *Medrano*, the applicant was found to be entitled to VRMA, at the temporary disability rate due to a failure of the insurance company to adhere to the requirements for offering modified work. The applicant was offered a modified or alternative job at a time that he was found to be temporarily totally disabled and, thus, not able to work in any capacity. As a result, the WCAB awarded the applicant retroactive VRMA, at the temporary disability rate, "from March 31, 2004, and continuing until Medrano completed a vocational rehabilitation plan or he refused to enter into a plan, or it was found that he was not "feasible" to participate in such a plan, whichever occurred first." The applicant, however, had been employed during a portion of the time awarded and defendant filed a petition for reconsideration arguing that

defendant should, at a minimum, be allowed full credit for wages earned by the applicant during the time period that the VRMA was awarded. The WCAB upheld the decision of the trial judge, though awarded defendant full credit for wages earned by the applicant.

After a petition for writ of review was initially denied, and on appeal to the Supreme Court, review was granted by the Supreme Court with instruction to the District Court of Appeal to vacate the prior denial, and issue an opinion.

In holding that defendant was not entitled to credit for the wages earned by the applicant against the award of VRMA, the Second District Court of Appeal conducted a detailed review of applicable case law and reasoned that VRMA was not intended as a wage loss benefit. Rather, VRMA was a part of several benefits to which an injured worker could receive for vocational retraining. The Court reasoned that it would not be unreasonable for the applicant to work and supplement VRMA (paid at a lesser rate than temporary disability) while undertaking retraining. Further, the court noted that it was the failure of the defendant to make a proper bona fide offer of modified work that placed the applicant in a position to be forced to work. As a result, the Court noted, the defendant should not benefit from the failure to comply with their obligations.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,
The FSK Newsletter Team
Jason C. Hilfrink
(Chief Legal Editor)

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