

Penalties:

I. New 5814 Penalty section:

A. Unreasonable delay: 5814. 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. Discovery by employer prior to employee claim for penalty and correction: 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 above.

C. Settlement of penalties: Upon the approval of a compromise and release, findings and award, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claim for penalty has been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award.

D. Submission of penalties for decision: Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.

E. Authorized treatment and payment: No unreasonable delay in the provision of medical treatment shall be found when the treatment has been authorized by the employer in a timely manner and the only dispute concerns payment of a billing submitted by a physician or medical provider in section 4603.2.

F. Statute of Limitations: Notwithstanding any other provisions of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due.

II. Audit penalty: Any employer or insurer that knowingly violates section 5814 with a frequency that indicates a general business practice is liable for administrative penalties of not to exceed four hundred thousand dollars (\$400,000). Penalty payments shall be imposed by the administrative direction and deposited into the

return-to-work fund established pursuant to section 139.48. The administrative director may impose a penalty under either this section or subdivision (e) of section 129.5.

III. Operative Dates:

A. Old 5814: (b) This section shall become inoperative on June 1, 2004, and, as of January 1, 2005, is repealed, unless a later enacted statute, that becomes operative on or before January 1, 2005, deletes or extends the dates on which it becomes inoperative and is repealed.

B .New 5814: This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section. This section shall become operative on June 1, 2004.

C. Abney v. Aera Energy and Liberty Mutual Ins. Co. 69 CCC 1552 WCAB en banc) For the reasons discussed below, The WCAB held that section 5814, as enacted by SB 899 and operative June 1, 2004, applies to unreasonable delays or refusals to pay compensation that occur prior to the operative date where the finding of unreasonable delay is made on or after June 1, 2004. They also conclude that section 5814(c), involving the conclusive presumption of the resolution of accrued penalty claims, applies as of the June 1, 2004 operative date of section 5814, and that the statute of limitations set forth in section 5814(g) applies to actions to recover penalties brought on or after the June 1, 2004 operative date.

1. SECTION 5814, AS ENACTED BY SB 899 AND OPERATIVE JUNE 1, 2004, APPLIES TO UNREASONABLE DELAYS OR REFUSALS TO PAY COMPENSATION THAT OCCUR PRIOR TO THE OPERATIVE DATE WHERE THE FINDING OF UNREASONABLE DELAY IS MADE ON OR AFTER JUNE 1, 2004.

- a. The WCAB found the WCJ properly calculated the penalty amount under section 5814 as enacted by SB 899 and operative June 1, 2004 based on the following:
- b. In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers'*

Comp. Appeals Bd. (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd. (Karaikos)* 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183, 185].) Thus, the WCAB's first task is to look to the language of the statute itself. (*Ibid.*) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez)* (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd. (Karaikos), supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases 359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez), supra*, 76 Cal.App.4th at 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

c. When construing any particular statutory provision, however, we may also consider it in light of the entire statutory scheme of which it is part and harmonize it with related statutes, to the extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at p. 388; *Moyer v. Workmen's Comp. Appeals Bd., supra*, 10 Cal.3d at pp. 230-231; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236]; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (Hurtado)* (1995) 36 Cal.App.4th 1626, 1639 [60 Cal. Comp. Cases 559].)

d. Subsection (i) of section 5814 provides that the section becomes operative on June 1, 2004. It therefore indisputably applies to all unreasonable delays or refusals to pay compensation occurring on or

after that date. In this case, however, although the finding of penalty issued after June 1, 2004, the unreasonable delays in temporary disability payments occurred before the operative date. We conclude that the language of section 5814 itself, the stated purpose and intent of SB 899, as well as relevant case law, support our conclusion that the remedy afforded by the current rather than the prior version of section 5814 applies in cases where the alleged unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative date.

e. Subsection (h) of section 5814 specifically provides that “[t]his section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section.” This inclusive language is nowhere qualified or limited to unreasonable delays or refusals occurring only on or after the June 1, 2004 operative date, either in section 5814 itself or elsewhere in SB 899. (To do so would effectively negate its application to “all injuries,” contrary to the specific intent of the Legislature.) Furthermore, Section 49 of SB 899 provides:

f. “This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide relief to the state from the effects of the current workers’ compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately.”

This section supports the application of the new section 5814 remedy to cases where the alleged unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative date.

g. If we were to interpret the remedy afforded by the newly enacted section 5814 to take effect only as to alleged unreasonable delays or refusals on or after its operative date, we would ignore the “clear, unambiguous, and plain meaning” of Section 49 requiring that the act take effect “immediately” and provide relief “at the earliest possible time.”

Moreover, interpreting section 5814, operative June 1, 2004, to apply here, and to those cases where the alleged unreasonable delays or refusals to pay compensation occurred before the operative date, is consistent with existing case law regarding the nature of the workers’ compensation system and changes in its remedies. The right to workers’ compensation benefits is wholly statutory, i.e., not derived from common law. (*DuBois v. Workers’ Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 290]; *Le Parc Community Ass’n v. Workers’ Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1171 [68 Cal.Comp.Cases 1049]; *Northstar at Tahoe v. Workers’*

Comp. Appeals Bd. (1996) 42 Cal.App.4th 1481, 1484 [61 Cal.Comp.Cases 175]; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002-1003 [51 Cal.Comp.Cases 408, 411].) It is well settled that where a right or a right of action depending solely on statute is altered or repealed by the Legislature, in the absence of contrary intent, e.g., a savings clause, the new statute is applied even where the matter was pending prior to the enactment of the new statute. (See, e.g., *Younger v. Superior Court of Sacramento* (1978) 21 Cal.3d 102, 109; *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829-830; *Southern Service Co., Ltd. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12; *Penzinger v. West American Finance Co.* (1937) 10 Cal.2d 160, 170-171; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68.) "The justification for this rule is that all statutory remedies are pursued with the full realization that the Legislature may abolish the right to recover at any time." (*Governing Bd. of Rialto Unified School Dist. v. Mann, supra*, 18 Cal. 3d at p. 829, quoting *Callet v. Alioto, supra*, 210 Cal. at pp. 267-268.)

As stated by the Court in *Graczyk, supra*, concerning the right to workers' compensation benefits:

"This statutory right is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees. [Citations omitted.] Rights, remedies and obligations rest on the status of the employer-employee relationship, rather than on contract or tort." [Citations omitted.] (184 Cal.App.3d at p. 1003 [51 Cal.Comp.Cases at p. 411].)

Applying this principle to the facts before it, the *Graczyk* Court further explained:

H. "Moreover, applicant's inchoate right to benefits under the workers' compensation law is wholly statutory and had not been reduced to final judgment before the Legislature's 1981 addition of subdivision (k) [of section 3352] further clarifying the employee status of athletes. Hence, applicant did not have a vested right, and his constitutional objection has no bearing on the issue. (See *Johnson v. Workmen's Comp. App. Bd.* [1970] 2 Cal.3d [964, 972]; *Ruiz v. Industrial Acc. Com* [1955] 45 Cal.2d [409, 414]. . ." (184 Cal.App.3d at p. 1006 [51 Cal.Comp.Cases at p. 414].)

H. In *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App. 4th 913, 917-918 [69 Cal.Comp.Cases 199, 202],¹ the Court of Appeal quoted the Appeals Board's opinion with approval regarding the distinction between a procedural statute, which may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect (see, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288; *Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1211, fn. 20), and a substantive statute:

1. "[A] statute is 'procedural where it merely provides a new remedy for the enforcement of existing rights [citations omitted], where it neither creates a new cause of action nor deprives defendant of any defense on the merits [citation omitted].... It has also been said that a statute is 'substantive' when it " 'imposes a new or additional liability and substantially affects existing rights and obligations.' " [citations omitted.]

I. The Court, however, then took issue with the Appeals Board's characterization of the amendments in question as "substantive," concluding that "whether a statute is procedural or substantive does not depend on the degree it changes prior law. The test is whether the statute imposes a new or additional liability or affects existing vested or contractual rights on the one hand or merely changes the manner in which established rights or liabilities are invoked in the future." (116 Cal.App.4th at p. 918 [69 Cal.Comp.Cases at p. 202].)

Here, section 5814, as enacted by SB 899, does not alter an injured worker's existing right to seek penalties in the form of increased compensation on the basis of an unreasonable delay or refusal to pay benefits to which he or she are entitled, but simply changes the remedy available, i.e., the amount or calculation of the penalty, for enforcing those rights. Nor does it create a new cause of action or deprive the defendant employer or carrier of any defense on the merits. Moreover, as set forth previously, because the right to workers' compensation benefits is wholly statutory, a party does not have vested right in any

¹ In *Pebworth*, the Court held that the January 1, 2003 amendment to section 4646, allowing parties to settle prospective vocational rehabilitation services for a lump sum not to exceed \$10,000, applied to injuries occurring prior to January 1, 2003.

remedy or cause of action not reduced to a final judgment.

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899 and operative June 1, 2004, also applies to alleged unreasonable delays or refusals to pay compensation that occurred prior to the operative date. As our Decision After Reconsideration, we will therefore affirm the WCJ's Findings and Award of August 5, 2004.

2. SECTION 5814(c), INVOLVING THE CONCLUSIVE PRESUMPTION OF THE RESOLUTION OF ACCRUED PENALTY CLAIMS, APPLIES FROM THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.

a. the board held Here, section 5814(c) expressly states the conditions under which accrued claims for penalty shall be conclusively presumed resolved, either “[u]pon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board,” or “[u]pon the submission of any issue for determination at a regular trial hearing.” As the approval or submission conditions are the specific “triggers” for the conclusive presumption and those “triggers” did not become operative until June 1, 2004, we believe that the clear, unambiguous and plain meaning of this statutory language is that section 5814(c) applies only to the approval of compromise and releases, the issuance of findings and awards, stipulations and orders, and the submission of any issues at trial, on or after June 1, 2004.² (See *Martinez v. Jack Neal & Son, Inc.* (2004) 69 Cal.Comp.Cases 775, 779 (Appeals Board en banc).)

3.. THE STATUTE OF LIMITATIONS SET FORTH IN SECTION 5814(g) APPLIES TO ACTIONS TO RECOVER PENALTIES BROUGHT ON OR AFTER THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.

a. Section 5814(g) provides:“(g) Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due.”

b. As noted previously, SB 899 is urgency legislation, with most of its provisions to take effect “immediately,” i.e., on its enactment date of April 19, 2004. The Legislature specified, however, that new section 5814 would not become operative until June 1, 2004. The most reasonable explanation for this is that

² Of course, a party may avoid the conclusive presumption under the specific exceptions provided in section 5814(c): having the claim for penalty expressly excluded in the findings and award, etc., and either submitting or expressly excluding the claim for penalty as an issue at trial.

section 5814 now contains a statute of limitations.³

As noted by the California Supreme Court in *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123, the Legislature may modify the statute of limitations period and apply the changed period to pending proceedings if the affected parties are allowed a reasonable time to pursue their remedy before the statute takes effect:

1. "... The retrospective application of a statute may be unconstitutional if ... it deprives a person of a vested right; or it impairs the obligation of a contract. But a statute which merely effects a change in civil procedure may have a valid retrospective application. [Citations omitted.] In accordance with this principle it has been specifically held that the legislature may shorten or extend the period of the statute of limitations, or similar statutes relating to procedure, and that the changed period may be made applicable to pending proceedings. [Citations omitted.] There is, of course, one important qualification to the rule: where the change in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party. (*Coleman v. Superior Court* (1933) 135 Cal.App. 74 ...)"⁴

c. Thus, in order to provide due process to parties who had not yet filed their penalty claims for alleged unreasonable delays or refusals to pay compensation that would soon be beyond the reach of the new two-year limitations period, the Legislature allowed them until June 1, 2004 to bring such actions. For the reasons stated previously, however, effective June 1, 2004, those newly-brought penalty actions would be subject to the provisions of the new section 5814 enacted by SB 899.

The time period from April 19, 2004 to June 1, 2004, for perfecting soon to be barred penalty claims is further support for our conclusion that new

³ Until the enactment of SB 899, there was no time limitation in which to bring an action for unreasonable delay or refusal to pay compensation. Under new section 5814, such actions must be brought within two years from the date of the alleged unreasonable delay or refusal.

⁴ *Coleman*, in which a retroactive application of a new limitations period was held to deny the plaintiff a reasonable time in which to exercise his remedy, was distinguished by the Court in *Rosefield Packing*, at 4 Cal.2d p. 123, because in *Coleman*, the five-year period from the filing of the complaint had elapsed before the amendment to the law became effective, and thus, the amendment *immediately* cut off the plaintiff's cause of action.

section 5814 is not limited to unreasonable delays or refusals to pay compensation occurring on or after June 1, 2004. If it were so limited, the time period would not be necessary.

d. Accordingly, the board was persuaded that the statute of limitations set forth in section 5814(g) applies to actions to recover penalties brought on or after June 1, 2004, the operative date of section 5814.

III. Some issues under LC 5814.

A. **Labor Code section 5814.5** has not been repealed.

B. Separate acts: The issue has arisen – Is the \$10,000 limit for the life of the case or can multiple penalties be imposed for intervening legally significant events?

C. Labor Code section 5814 no longer applies to late payment of medical bills. No unreasonable delay in the provision of medical treatment shall be found when the treatment has been authorized by the employer in a timely manner and the only dispute concerns payment of billing submitted by a physician or medical provider. The only penalty provided for is pursuant to LC section 4603.2(b)(1) that states that medical bills not paid in 45 working days are subject to a 15% penalty and interest.

IV. Cases:

A. **Leinon v. Fishermans Grotto/Mid-Century Ins, 69 CCC 995 and 69 CCC 1449 (en Banc):**

1. On April 3, 2003, the Appeals Board granted reconsideration of the Supplemental Findings and Award issued by the workers' compensation administrative law judge ("WCJ") on January 13, 2003. In that decision, the WCJ found defendant Mid-Century Insurance Company liable for a penalty under Labor Code section 4650(d)⁵ on all temporary disability indemnity ("TDI"), where it paid the TDI within fourteen (14) days after finality of a prior Findings and Award that had determined the disputed issues of injury and temporary disability.

⁵ All statutory references are to the Labor Code, unless otherwise indicated.

2. In its petition for reconsideration, defendants contended that it avoided a section 4650(d) penalty by sending applicant a delay letter, that there is no obligation to pay benefits until adjudication of industrial injury, that there is no penalty in this case because TDI was timely paid, that the imposition of a section 4650(d) penalty is a denial of due process and equal protection, that section 4650 does not apply in a post-award situation, and that the WCJ's decision is not supported by the legislative record and scheme relating to penalties.

3. the Board held that based on our review of the relevant statutory and case law, The board held that where injury, disability or indemnity rate is disputed, no section 4650(d) penalty arises if the disputed disability indemnity payments are made within 14 days of a final order, decision or award imposing liability for those benefits or within 14 days of a defendant's acceptance of liability for the injury and disability benefits. They also held that an order, decision or award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them.

3. Section 4650 is phrased in terms of an accepted injury, and benefits which are not in dispute are payable for this accepted injury the board went on to stat that , based on the language and purpose of section 4650 the penalty under section 4650(d) applies only to periodic payments, including accrued periodic payments, where liability is accepted or where liability is ultimately imposed and the determination becomes final. An award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them. Thus, an award becomes final after a WCJ issues an award and reconsideration is not sought, or after the Appeals Board makes a determination on reconsideration and review is not sought in the Court of Appeal, or after appellate review of the Appeals Board's decision is denied (or the decision is affirmed). In the instant case, the award of disputed benefits did not become final until the Supreme Court's ultimate denial of review.

4. However, there is no "grace period" for delay in payment provided by the statutory right to reconsideration or appellate review. (See *Jensen v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.

App. 3d 244, 247 [50 Cal. Comp. Cases 369, 371]; *California Highway Patrol v. Workers' Comp. Appeals Bd. (Erebia)* (2003) 68 Cal. Comp. Cases 227, 232 [writ denied].) Thus, if a defendant does not file a petition for reconsideration from an award of disputed benefits but does not pay within 14 days of the award, it must include a section 4650(d) penalty. Likewise, if a defendant does not file a petition for writ of review from an adverse decision after reconsideration but does not pay within 14 days of that decision, it must include a section 4650(d) penalty.

5. The board held that in a disputed case, the defendant has 14 days to pay the disputed benefits after a final determination of the dispute, without risk of incurring the section 4650(d) penalty.

6. Finally, they observe that section 4650 describes several situations in which the penalty will be avoided. Under subdivision (a), no increase on TDI will apply where liability for the injury is denied within 14 days after knowledge of the injury and disability. Under subdivision (b), no increase on PDI will apply where the first payment is made within 14 days after the date of last payment of TDI and the employer continues the payments until the employer's reasonable estimate of PDI due has been paid, and if the amount of PDI 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 5401.⁶ And there is no penalty when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether TDI payments are owed and advises the employee, in a specified manner, why payments cannot be made within the 14-day period.

⁶ Based on the language of section 5401, no section 4650(d) penalty will apply to any payment due prior to or within 14 days after a claim form is personally delivered to the employer or mailed to the employer by first-class or certified mail.

