

WJT

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. LAO 576987**

5 **JOHN KEMP,**

6 *Applicant,*

7 **vs.**

8 **LOS ANGELES COUNTY METROPOLITAN
9 TRANSIT AUTHORITY; PERMISSIBLY
10 SELF-INSURED, CONSTITUTION STATE
11 SERVICE COMPANY,**

12 *Defendants.*

**OPINION AND ORDERS
GRANTING RECONSIDERATION
AND RESCINDING WCAB DECISION,
GRANTING RECONSIDERATION OF
WCJ'S DECISION, AND DECISION
AFTER RECONSIDERATION**

13 Defendant seeks reconsideration of the Findings and Award (F&A) of March 29, 2000, in
14 which the workers' compensation administrative law judge (WCJ) found defendant liable for a
15 10% penalty on the entire specie of medical treatment, pursuant to Labor Code section 5814.
16 Defendant contends that the delay in paying applicant's medical mileage claim was not
17 unreasonable under the circumstances. Applicant answers that defendant failed to establish any
18 legal or factual excuse for a 4-month delay in paying the medical mileage claim.

19 Applicant was found to be entitled to further medical treatment by virtue of a prior
20 Findings and Award issued in July 1997 in this case. On November 2, 1999, applicant's attorney
21 made a demand for medical mileage reimbursement on defense attorney Plotkins of the law firm
22 Jones, Nelson, Screeton & Cornforth ("Jones-Nelson"), who was then attorney of record for
23 defendant Los Angeles County Metropolitan Transit Authority. Applicant's claim for mileage
24 expense exceeded \$11,000.00. The expenses covered travel made during the periods 1987 to
25 1994, 1995 to June 1997, July 1997 to 1999, July 1987 to May 1997, and July 1997 to June 1999.

26 At the time the demand was made, Plotkins apparently had left Jones-Nelson, and the law
27 firm was closing down. Jones-Nelson received the demand in November 1999 but did not

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1 forward it to the claims adjuster until March 10, 2000. Applicant's file was being handled in the
2 Van Nuys office of Jones-Nelson, where attorney Carl Steiner was the managing partner.
3 According to Steiner's trial testimony, no attorney was assigned to applicant's file in the last
4 month of the Jones-Nelson law firm (November 1999), and the file had been transferred for
5 safekeeping to its Santa Ana office. Steiner became a partner in Guilford, Steiner, Sarvas &
6 Carbonara, a new law firm that opened on November 15, 1999. Applicant's file was transferred
7 there about that time. The new firm executed a Substitution of Attorneys on December 13,
8 1999.¹ Having received no response from prior defense law firm Jones-Nelson, applicant's
9 attorney filed a Declaration of Readiness to Proceed (DOR) on January 12, 2000. A conference
10 hearing was held on February 8, 2000. The law firm of Kegel, Tobin & Truce ("Kegel-Tobin")
11 appeared on defendant's behalf. Trial was set for March 28, 2000. On March 10, 2000, Steiner
12 sent applicant's attorney a letter on Guilford-Steiner letterhead which stated in relevant part as
13 follows:

14 "The claim was received by Jones Nelson Screeton & Cornforth in
15 November but in the transition of this file from that firm to ours,
16 the claim wasn't transmitted to the claims administrator. For that
reason it was not paid."

17 Applicant's mileage claim was paid on March 15, 2000, apparently due to the efforts of
18 the Kegel-Tobin firm. Applicant was paid the sum of \$4,720.53, i.e. less than half of what was
19 originally demanded. It appears that there has been no objection to this substantial adjustment.

20 In *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Stuart)* (1998) 18 Cal. 4th 1209
21 [63 Cal. Comp. Cases 916, 919], the California Supreme Court stated that the touchstone of a
22 section 5814 penalty is a delay or refusal to pay benefits that is unreasonable. Referring to its
23 precedents in the *Gallamore*, *Rhiner*, and *Christian* cases, the Court also stated in *Stuart* that "the
24 board should proceed with a view toward achieving a fair balance between the right of the
25 employee to prompt payment of compensation benefits, and the avoidance of imposition upon
26

27 ¹ It is not clear whether Guilford-Steiner or defendant's present firm, Kegel-Tobin, ever filed the Substitution of Attorney forms with the Appeals Board. See WCAB Rules 10308 and 10774.

1 the employer or [insurance] carrier of harsh and unreasonable penalties.” (63 Cal.Comp.Cases
2 916, 920.)

3 In *Avalon Bay Foods v. Workers' Compensation Appeals Board (Moore)* (1998) 18 Cal.
4 4th 1165 [63 Cal. Comp. Cases 902], the California Supreme Court held that medical
5 transportation expenses are a part of medical treatment expenses, and that carriers are allowed 60
6 days to pay such expenses without liability for penalty. In *Avalon Bay*, the Court again
7 emphasized that addition of a penalty is expressly limited by section 5814 to payments which are
8 unreasonably delayed. (63 Cal. Comp. Cases 912, citing *Gallamore v. Workers' Comp. Appeals*
9 *Bd.* (1979) 23 Cal.3d 815 [44 Cal. Comp. Cases 321].)

10 In the present case, we conclude that the delay in paying applicant's mileage demand does
11 not meet the threshold test of “unreasonableness” under the circumstances. The record indicates
12 that there was a four-month delay in payment of the mileage demand, from November 1999 to
13 March 2000. This delay exceeded the 60-day period set by the Supreme Court in the *Avalon Bay*
14 case. However, there is nothing in *Avalon Bay* which precludes a finding that under certain
15 circumstances, such as those presented here, the 60-day requirement may be waived. As noted
16 above, applicant's claim included mileage expense that was incurred in 1987. Thus, at the time
17 the demand was made, it appears that applicant had already rested on his right to reimbursement
18 for 12 years.² The most recent mileage expense specifically identified in the demand concerned a
19 period ending in June 1999. That is, applicant waited five months to claim even the recently-
20 incurred mileage expenses. It also appears that the lion's share of the mileage claims pre-dated
21 the *Avalon Bay* decision, applicant ultimately was paid less than half of what he claimed, and
22 there has been no objection to the substantial adjustment.

23 Mindful of the Supreme Court's admonition against harsh and unreasonable penalties,
24 and considering all the foregoing circumstances, including the fact that applicant waited
25 anywhere from 5 months to 12 years to make his mileage reimbursement claims, we conclude

26 _____
27 ² Defendant asserts that the changeover in defense law firms constitutes a sufficient excuse for nonpayment. (See *Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 223 [36 Cal. Comp. Cases 152].) Since we conclude that there was no unreasonable delay in the first instance, we do not reach the question of the validity of the excuse.

1 that defendant's 4-month delay in paying applicant's mileage claim was not "unreasonable"
2 within the meaning of Labor Code section 5814. As the threshold requirement of
3 unreasonableness has not been met, no penalty may be imposed under the statute. Accordingly,
4 we will grant reconsideration, rescind the WCJ's decision, and substitute our finding that
5 defendant is not liable for a penalty on medical treatment.

6 We note that on April 25, 2000, before being apprised of defendant's petition, we denied
7 applicant's petition for reconsideration, which concerned only attorney's fees. That issue is now
8 moot. We will grant reconsideration and rescind our decision of April 25, 2000 on our own
9 motion.

10 For the foregoing reasons,

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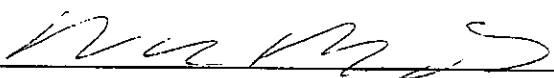
IT IS ORDERED, that reconsideration of the Appeals Board's "Order Denying Reconsideration" of April 25, 2000 is hereby **GRANTED** on Board motion, and that as the Decision After Reconsideration therein, said decision is **RESCINDED**.

IT IS FURTHER ORDERED, that reconsideration of the Findings and Award of March 29, 2000 is hereby **GRANTED**, and that as the Appeals Board's Decision After Reconsideration, said F&A is **RESCINDED**, and the following Finding is hereby **SUBSTITUTED** therefor:

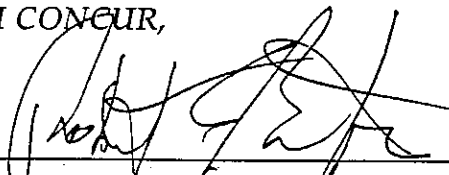
FINDING

1. Defendant is not liable for a penalty on medical treatment under Labor Code section 5814, for delay in paying applicant's mileage reimbursement claim.

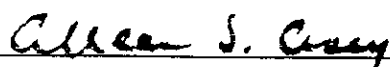
WORKERS' COMPENSATION APPEALS BOARD



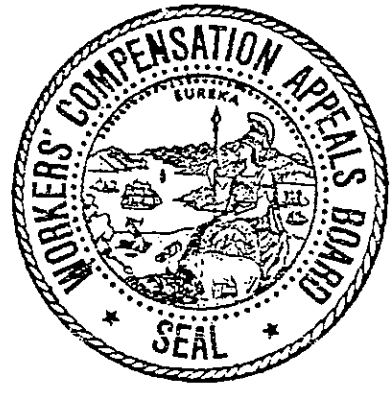
ROBERT N. RUGGLES

I CONCUR,


ROBERT E. BURTON



Colleen S. Casey



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

JUN 19 2000

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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