

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS
FROM: JOE TRUCE
DATE: February 27, 2002
RE: BURDEN OF PROOF/LABOR CODE §5814 PENALTIES

I am enclosing the most recent en banc decision of the Appeals Board entitled Kamel v. West Cliff Medical; Superior National Insurance Company filed on December 24, 2001.

In Kamel the board has reaffirmed existing law that Labor Code §5814 clearly contemplates that when an injured worker has shown a delay in the payment of compensation, the burden is on the employer to show good reason for the delay.

In Kamel the applicant was the only witness and testified that his permanent disability checks were late. Based on the applicant's testimony, the Workers' Compensation Judge found that the defendant "had unreasonably delayed the payment of permanent disability indemnity" and assessed a 10% penalty against the entire amount of these benefits.

In its Petition for Reconsideration, defendant argued that the applicant "completely failed to establish that the delay was anything other than an inadvertent clerical delay caused by human error in the normal course of business..."

Apparently the defendant relied on the case of State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Stuart) (1998) 63 CCC 916. In Stuart the California Supreme Court overturned the finding of a Labor Code §5814 penalty for a delay in providing compensation on the basis of "human error."

However, in addressing this argument the board stated in relevant part as follows:

"Moreover, in Stuart unlike the instant case, the defendant presented evidence as to the basis for the delay. Specifically, it was shown by the defendant that while the claims adjuster assigned to the applicant's case was on vacation, the adjuster covering his case load erroneously entered the employer's change of address as that for the applicant. This inadvertent clerical error, which the applicant's assigned adjuster testified he would not have made, resulted in a one-week delay in the receipt of temporary disability benefits..."

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In comparing this case to the Stuart case, the board commented as follows:

"Here, defendant proffered no testimonial or documentary evidence to explain its delay in the provision of permanent disability indemnity...Without such evidence, as explained by the WCJ in his report, 'whether the delay in question was clerical inadvertence, act of God, insurmountable business problems, inexcusable neglect or intentional is speculative."

In its en banc decision in Kamel the board has served notice that once a delay is established, the defendant must present evidence as to the legal justification for the delay which usually contemplates the testimony of the adjuster.

WJT:dab
Enclosure - Kamel case

cc list attached

1 addressed in that case the discrete situation of an employer *intentionally* refusing to pay, not as
2 here, a situation where the delay was *inadvertent*. *Kerley* is thus distinguishable on this ground,
3 for there is no factual finding in this case that the delay in payment was intentional.” (emphases
4 in original.)

5 Nowhere in *Stuart*, however, did the Court state or imply that it was shifting the burden
6 of proof so that an applicant, having shown a delay in the provision of benefits, must now also
7 show that the delay in question was unreasonable. Moreover, in *Stuart*, unlike the instant case,
8 the defendant presented evidence as to the basis for the delay. Specifically, it was shown by the
9 defendant that while the claims adjuster assigned to the applicant’s case was on vacation, the
10 adjuster covering his caseload erroneously entered the employer’s change of address as that for
11 the applicant. This inadvertent clerical error, which the applicant’s assigned adjuster testified he
12 would not have made, resulted in a one-week delay in the receipt of temporary disability
13 benefits.
14

15 Here, defendant proffered no testimonial or documentary evidence to explain its delay in
16 the provision of permanent disability indemnity from February 21, 2001 to March 28, 2001.
17 Without such evidence, as explained by the WCJ in his report, “[w]hether the delay in question
18 was clerical inadvertence, act of God, insurmountable business problems, inexcusable neglect or
19 intentional is speculative.”
20

21 In *County of Sacramento v. Workers’ Comp. Appeals Bd. (Souza)* (1999) 69 Cal.App.4th
22 726 [64 Cal.Comp.Cases 30], also cited by defendant, the Court of Appeal reversed the
23 imposition of a section 5814 penalty where inadvertent clerical error caused a brief delay of
24 eight days in the payment of death benefits. Again in *Souza*, however, evidence had been
25 presented by the County as to the reason or basis for the delay so that the Court could properly
26 determine whether the delay in question was unreasonable. This is underscored by the Court’s
27

1 applicant's failure to provide any evidence of "institutional neglect," defendant would, in effect,
2 place the burden of proof on the applicant as to whether the delay in question was unreasonable.
3 There is, however, no legal authority for this proposition.

4 On the contrary, for more than thirty years it has been held that the language of section
5 5814 clearly contemplates that when an injured worker has shown a delay in the payment of
6 compensation, the burden is on the employer to show good reason for the delay. (*Kerley v.*
7 *Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 273 [36 Cal.Comp.Cases 152, 154]; *Ramirez v.*
8 *Workmen's Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227 [35 Cal.Comp.Cases 383, 388];
9 *Berry v. Workmen's Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381 [34 Cal.Comp.Cases 507,
10 508-509].) As the California Supreme Court concluded in *Kerley*, at 36 Cal.Comp.Cases 157,
11 "the only satisfactory excuse for delay in payment of disability benefits, whether prior to or
12 subsequent to an award, is genuine doubt from a medical or legal standpoint as to liability for
13 benefits, and that the burden is on the employer or his carrier to present substantial evidence on
14 which a finding of such doubt may be based."
15

16
17 Here, none of the cases cited by defendant, including the recent California Supreme Court
18 case of *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Stuart)* (1998) 18
19 Cal.4th 1209 [63 Cal.Comp.Cases 916], provide support for overturning longstanding precedent
20 by changing who has the burden of proof on the reasonableness of a delay in the payment of
21 compensation under section 5814.

22 It is correct that the Court in *Stuart* did distinguish, at 63 Cal.Comp.Cases 924, the
23 language in *Kerley* with respect to what constituted the only satisfactory excuse for delay in
24 payment of disability benefits: "[O]ur opinion in *Kerley* was not intended to address the
25 universe of potential factual circumstances that could give rise to delay in payment. Instead, we
26

1 in the payment of compensation has been shown by the applicant, the defendant then has the
2 burden of proof as to the reasonableness of the delay, including whether the delay was
3 inadvertent or was a solitary instance of human error. Accordingly, because the defendant here
4 failed to present any evidence regarding the basis for its delay in paying permanent disability
5 indemnity, we will affirm the WCJ's decision.
6

7
8 **I. BACKGROUND**

9 Applicant, while employed as a medical technologist on November 10, 1998, sustained
10 industrial injury to his back, left hip and lower extremity. In Findings and Award issued on
11 February 2, 2000, it was determined, among other things, that this injury caused permanent
12 disability of 48 percent. After defendant delayed payment of the permanent disability indemnity
13 awarded—subsequent to its check dated February 21, 2001, defendant's next check was not
14 issued until March 28, 2001²—applicant filed a Declaration of Readiness to Proceed (DOR) on
15 April 17, 2001, seeking a section 5814 penalty for the delay. Following defendant's failure to
16 appear at the May 21, 2001 mandatory settlement conference, this matter was set for trial on June
17 14, 2001.
18

19 At the trial of June 14, 2001, applicant was the only witness. He testified that he called the
20 insurer on either the 25th or the 26th of March 2001, because he had not received a check for
21 permanent disability indemnity following the one dated February 21, 2001. Applicant stated that
22 he spoke to a Mr. Louth who told him that the next check would be sent very soon, and that
23 thereafter, the checks would be on time. No mention was made, however, of what had caused the
24 delay. Applicant received the next check, which included the amounts past due and the 10
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26
27 ² Pursuant to section 4650(c), payment of permanent disability indemnity subsequent to the first payment "shall be made as due every two weeks on the day designated with the first payment."

1 percent increase under section 4650(d),³ two days after his conversation with Mr. Louth.

2 Based on this record, the WCJ determined in the Findings and Order issued on July 3,
3 2001, that defendant had unreasonably delayed the payment of permanent disability indemnity,
4 and thereby assessed a 10 percent penalty against that entire amount of those benefits
5 pursuant to section 5814. Defendant timely petitioned for reconsideration from the WCJ's
6 decision. On September 21, 2001, the Board granted defendant's petition to further study the
7 factual and legal issues in this case, and it was subsequently determined that an en banc decision
8 would be appropriate.
9

10 11 II. DISCUSSION

12 Section 5814 provides:

13 "When payment of compensation has been unreasonably delayed or
14 refused, either prior to or subsequent to the issuance of an award, the full
15 amount of the order, decision or award shall be increased by 10 percent. ⁴
16 The question of delay and the reasonableness of the cause therefor shall be
17 determined by the appeals board in accordance with the facts. Such delay
18 or refusal shall constitute good cause under Section 5803 to rescind, alter
19 or amend the order, decision or award for the purpose of making the
20 increase provided for herein."

19 Defendant presented no evidence whatsoever with respect to the delay in this case. In
20 contending that applicant "completely failed to establish that the delay was anything other than
21 an inadvertent clerical delay caused by human error in the normal course of business," including
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23 ³ Section 4650(d) provides that "[i]f any indemnity payment is not made timely as required by this section, the
24 amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee. . ."
25 In *Rhiner v. Workers' Comp. Appeals Bd* (1993) 4 Cal.4th 1213 [58 Cal.Comp.Cases172, 183], the California
Supreme Court stated that "the Legislature intended the section 4650 penalty to supplement, not to replace, the
section 5814 penalty."

26 ⁴The phrase "the full amount of the order, decision or award" has been interpreted by the California Supreme Court
27 as applying to the entire class of each benefit, e.g., permanent disability indemnity as in this case, unreasonably
delayed or refused. (*Gallamore v Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321,
328]; *Rhiner, supra*, 58 Cal.Comp.Cases at p. 176.)

1 discussion of *Kampner v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376 [43
2 Cal.Comp.Cases 1198] at 64 Cal.Comp.Cases 34:

3 "The *Kampner* court essentially adopted the decision of the Board, with
4 minor qualifications. One qualification noted by the court is that the
5 inadvertence must indeed be innocent. In *Kampner*, the insurer presented
6 evidence the delay was in part caused by the fact it was shorthanded and
7 had a backlog of cases to handle. The court explained: 'We [] do not
8 interpret the board to hold that a shortage of personnel or heavy workload
9 at the employer or carrier with regard to the adjusting of workers'
10 compensation claims excuses a delay in payment. While such conditions
11 explain a delay, they do not make the delay reasonable.' (86 Cal.App.3d
12 at p. 384.)"

13 Thus, petitioner has cited no legal authority, nor have we found any, which supports the
14 proposition that a defendant may delay the payment of compensation benefits, (in this case for
15 almost a month,⁵) and present no evidence whatsoever as to the reason for the delay, but escape
16 penalty under section 5814 because the *applicant* had failed to prove the delay was unreasonable.
17 This includes the case of *County of San Luis Obispo v. Workers' Comp. Appeals Bd. (Barnes)*
18 (2001) 92 Cal.App.4th 869 [66 Cal.Comp.Cases 1261], which was decided by the Court of
19 Appeal subsequent to the Board's granting reconsideration in this matter.⁶

20 In *Barnes*, at 66 Cal.Comp.Cases 1264, the Court citing *Kerley, supra*, stated at the outset
21 that "[t]he burden is on the employer to establish that a delay is reasonable." The defendant in
22 *Barnes*, unlike the instant case, presented the testimony of the adjuster handling the applicant's
23 claim, who described the process used in making the quarterly section 5814 payments for the
24 prior delay in providing medical expenses. Although she could not explain the specific basis for
25 the delay in question, the Court found that uncontradicted evidence in the record, including the

25 ⁵ In both *Stuart, supra*, at 63 Cal.Comp.Cases at p. 923-924 and *Souza, supra*, 64 Cal.Comp.Cases at p. 35, the brief
26 period of the delay, one week and eight days, respectively, was a factor in the determination that the inadvertent delay
27 in each case was not unreasonable.

⁶ We note that a request to decertify *Barnes* is currently pending before the California Supreme Court.

1 adjuster's testimony, gave rise to the inference that the delay was inadvertent. (66
2 Cal.Comp.Cases at p. 1266.) In this respect, the Court noted that the defendant had been paying
3 Barnes' medical expenses for more than 25 years, making quarterly penalty payments without
4 complaint for approximately four years and took prompt corrective action; the amount delayed of
5 \$97.87 in relation to the potential penalty of \$40,000.00 (the defendant having paid in excess of
6 \$390,000.00 in medical benefits on Barnes' behalf) was disproportionate; and the fact that the
7 parties' agreement did not contain a timetable for payment,⁷ etc. (*Id.*)
8

9 Although the defendant here, as in *Barnes*, promptly took corrective action, the other
10 factors pertinent to the Court's inquiry in *Barnes* were not established in this case, and thus, do
11 not give rise to the inference of a reasonable inadvertent delay. More specifically, defendant
12 failed to present any evidence relevant to the nature of its delay, e.g., its process or procedures
13 regarding the payment of the benefits at issue as in *Barnes*. In addition, the permanent disability
14 benefits here, as noted previously and unlike the benefits in *Barnes* (or the delayed proceeds in
15 *Kampner, supra*, 43 Cal.Comp.Cases 1198), have a directly applicable statutory timetable for
16 payment. (Lab. Code, §4650(c).) Furthermore, evidence of a long history of ongoing timely
17 payments and the disproportionate amount of the penalty to the amount delayed in *Barnes*, are
18 absent in this case.
19

20 Finally, in addition to well-established case law regarding who has the burden of proof as
21 to the reasonableness of a delay under section 5814, common sense and fairness dictate that the
22 party responsible for the delay should have that burden. In this case, defendant chose not to
23 present any evidence with respect to its delay of permanent disability benefits, and after an
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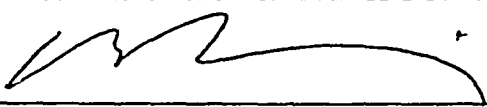
25 ⁷ Thus, the Court reasoned, citing the holding in *Avalon Bay Foods v. Workers' Comp. Appeals Bd. (Moore)* (1998)
26 18 Cal.4th 165 [63 Cal.Comp.Cases 902, 909-912] that the 60-day time limit in Labor Code section 4603.2 applied to
27 payment of medical transportation expenses because such expenses are an aspect of the broader class of medical
treatment, that the defendant had at least until June 30, 1995 to issue the check for the quarter ending April 30, 1995.
Therefore, that check, mailed on July 15, 2001, was approximately 15 days late.

1 adverse decision, improperly attempted to shift the burden of proof to applicant as to the
2 reasonableness for the delay. Under these circumstances, a section 5814 penalty was correctly
3 imposed against defendant for unreasonable delay in the payment of permanent disability
4 indemnity. Accordingly, we will affirm the Findings and Order of July 3, 2001.

5 For the foregoing reasons,

6 **IT IS ORDERED** as the Decision After Reconsideration of the Board (En Banc) that the
7 Findings and Order of July 3, 2001, is **AFFIRMED**.

8 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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11 MERLE C. RABINE, Chairman

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13 COLLEEN S. CASEY, Commissioner

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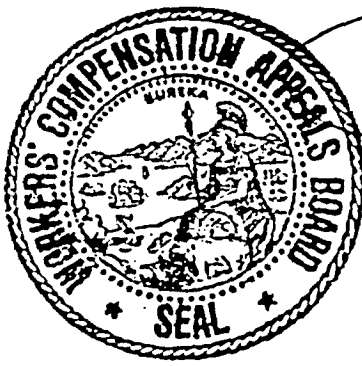
15 JAMES C. CUNEO, Commissioner

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17 WILLIAM K. O'BRIEN, Commissioner

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19 FRANK M. BRASS, Commissioner

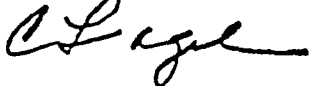


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23 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

24 **DEC 24 2001**

25 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD**
26 **EXCEPT THE LIEN CLAIMANTS.**

27 vb/tab



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4 indemnity. Accordingly, we will affirm the Findings and Order of July 3, 2001.

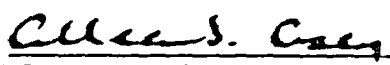
5 For the foregoing reasons,

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7 **IT IS ORDERED** as the Decision After Reconsideration of the Board (En Banc) that the
8 Findings and Order of July 3, 2001, is **AFFIRMED**.

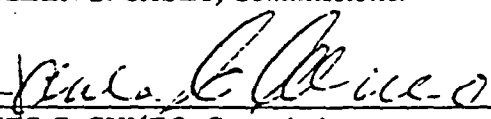
9 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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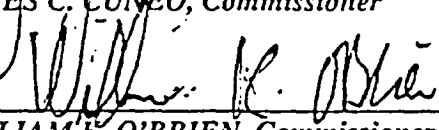
11 MERLE C. RABINE, Chairman

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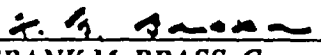
13 COLLEEN S. CASEY, Commissioner

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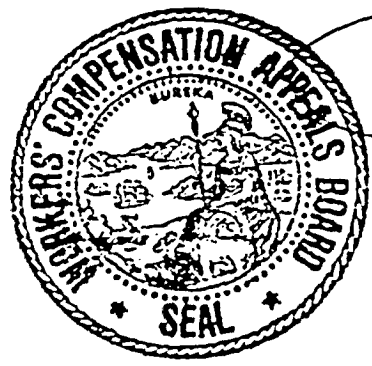
15 JAMES C. CUNEO, Commissioner

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17 WILLIAM K. O'BRIEN, Commissioner

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19 FRANK M. BRASS, Commissioner



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23 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

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