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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GUILLERMO HERNANDEZ,

Applicant,

vs.

**SPIESS CONSTRUCTION; STATE
COMPENSATION INSURANCE FUND,**

Defendants,

WILLIAM A. HERRERAS, ESQ.,

Attorney fee claimant.

Case No. ADJ1455856 (GRO 0032468)
(Oxnard District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

We earlier granted the petition of defendant, State Compensation Insurance Fund (SCIF), for reconsideration of the Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) on May 9, 2014. In that decision, the WCJ awarded William A. Herreras, Esq., \$4,000.00 as a reasonable attorney's fee pursuant to Labor Code section 5814.5¹ for enforcing payment of an earlier award of section 5811 costs, which SCIF had unreasonably delayed subsequent to the issuance of that award.

SCIF contends that it was error to award attorney's fees for time expended by Mr. Herreras after defendant finally paid the section 5811 costs award with statutory interest and penalties on October 25, 2013, and that the amount of the attorney fee award is excessive.

An answer was received from Mr. Herreras. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

¹ Further statutory references are to the Labor Code unless otherwise stated.

1 For the reasons that follow, we affirm the WCJ's finding that a "total reasonable attorney fee[]"
2 under section 5814.5 is \$4,000.00.

3 **I. FACTUAL AND PROCEDURAL BACKGROUND**

4 On March 18, 2013, the WCJ ordered SCIF to pay \$5,230.20 in section 5811 costs for the
5 services of Ann Wallace, Ph.D., who had acted as applicant's vocational expert. SCIF sought
6 reconsideration of this order, but the Appeals Board denied reconsideration on June 3, 2013. SCIF did
7 not seek appellate review, so the order directing it to pay \$5,230.20 in section 5811 costs became final.

8 SCIF, nevertheless, did not promptly pay the \$5,230.20 costs award. Therefore, on July 17, 2013,
9 applicant's attorney, Mr. Herreras, filed: (1) a petition for section 5814 penalties and for section 5814.5
10 attorney's fees; and (2) a declaration of readiness (DOR).

11 At a mandatory settlement conference (MSC) of October 14, 2013, SCIF agreed to pay the
12 \$5,230.20 cost award within 20 days, plus penalties and interest. On October 25, 2013, SCIF paid.

13 On October 21, 2013, Mr. Herreras filed a petition asserting that he was entitled to a section
14 5814.5 attorney's fee of \$1,900 based on 4.75 hours of legal services at \$400.00 per hour. The 4.75
15 hours claimed consisted of: (1) 0.75 hours for services on July 17, 2013 (i.e., reviewing, drafting, and
16 serving the penalty petition and the DOR); (2) 0.5 hours of services on October 13, 2013 (i.e.,
17 preparation for the October 14, 2013 MSC); and (3) 3.5 hours of "travel" on October 14, 2013, which we
18 infer also includes his appearance time at the MSC.²

19 SCIF initially paid nothing on Mr. Herreras's section 5814.5 attorney's fee request. Therefore,
20 the matter went to a status conference on November 18, 2013. There, the parties could not agree on what
21 constitutes a reasonable section 5814.5 fee. Accordingly a trial was set for January 14, 2014.

22 On November 19, 2013, SCIF sent a letter to Mr. Herreras stating that it would issue a section
23 5814.5 attorney's fee payment of \$1,335.00 based on 4.45 hours of legal services at \$300.00 per hour.

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25 ² The WCAB may draw reasonable inferences from the record presented. (*Judson Steel Corp. v. Workers'*
26 *Comp. Appeals Bd. (Maese)* (1978) 22 Cal.3d 658, 664 [43 Cal.Comp.Cases 1205].) We infer that the 3.5 hours
27 of that date. This inference is supported not only by the fact that his October 21, 2013 petition did not separately
claim his appearance time, but also by the fact that Mr. Herreras's amended petition of November 21, 2013
claimed 3.5 hours for "travel and appearance" (italics added) on October 14, 2013.

1 The \$300.00 per hour mentioned in SCIF's letter is \$100.00 per hour less than that claimed in Mr.
2 Herreras's section 5814.5 petition. The 4.45 hours mentioned in SCIF's letter is 0.3 hours less than the
3 4.75 hours claimed in Mr. Herreras's petition. This 0.3 hours difference is apparently based on SCIF's
4 letter's assertion that, "according to Yahoo Maps," the travel time between Mr. Herreras's Grover Beach
5 office and the former Goleta district office of the WCAB is one hour and 21 minutes, not one hour and
6 30 minutes as claimed by Mr. Herreras's petition. SCIF's letter also asserted that a fee was not payable
7 for Mr. Herreras's appearance at the November 18, 2013 status conference "because the disputed [section
8 5811] cost [of \$5,230.20] had already been paid by that time."

9 On November 21, 2013, Mr. Herreras filed an amended petition for section 5814.5 attorney's fees
10 that increased his claim to \$3,420.00. The increase was based on his time preparing for, traveling to and
11 from, and attending the hearing of November 18, 2013.

12 On November 22, 2013, SCIF sent Mr. Herreras a check for \$1,335.00.

13 On January 14, 2014, the trial over the disputed section 5814.5 fee went forward.

14 In a post-trial brief, Mr. Herreras requested attorney's fees under section 5814.5 for all three
15 hearings (i.e., the October 14, 2013 MSC, the November 18, 2013 status conference, and the January 14,
16 2014 trial).

17 On May 9, 2014, the WCJ issued a finding that "total reasonable attorney fees are \$4,000.00."
18 The WCJ's Opinion on Decision stated that the "reasonable" attorney's fee under section 5814.5 was
19 "[b]ased on an hourly rate of \$400.00 per hour." The Opinion also observed that, if Mr. Herreras's
20 appearances at and travel time to and from all three hearings were considered, a fee at \$400.00 per hour
21 would equal \$5,600.00. Nevertheless, the Opinion stated: "it is found total reasonable attorney fees are
22 \$4,000.00."

23 SCIF then timely filed its petition for reconsideration.

24 In his Report, the WCJ recommended that SCIF's petition for reconsideration be denied, but the
25 WCJ also stated that "Mr. Herreras is entitled to the sum of \$5,600.00 less the \$1,335.00 SCIF has
26 already paid." It appears, therefore, that the WCJ is actually recommending that the Appeals Board
27 increase the section 5814.5 attorney's fee awarded to Mr. Herreras from \$4,000.00 to \$5,600.00. This

1 recommendation was based on a reasonable hourly rate of \$400.00 (with the WCJ noting that Mr.
2 Herreras "is a certified specialist practicing workers' compensation law in excess of twenty-five years")
3 and based on 14 hours of total time spent, including the three hearings referenced above. The WCJ gave
4 the breakdown of the 14 hours, as follows:

7/17/13	Preparation and filing of DOR and Penalty Petition	1.25
10/13/13	Preparation and review for hearing	.50
10/14/14	Hearing	3.50
10/23/13	Letter from Mr. Herreras to SCIF	.25
10/28/13	Letter from Mr. Herreras to SCIF	.25
11/17/13	Preparation and review for hearing	.50
11/18/14	Hearing	3.50
11/21/13	Letter [from] Mr. Herreras to SCIF	.25
1/13/14	Preparation	.50
1/14/14	Trial	3.50
	Total time spent	14.00

12 II. DISCUSSION

13 Labor Code section 5814.5 provides:

14 "When the payment of compensation has been unreasonably delayed or refused
15 subsequent to the issuance of an award by an employer that has secured the
16 payment of compensation pursuant to Section 3700, the appeals board shall, in
17 addition to increasing the order, decision, or award pursuant to Section 5814,
award reasonable attorneys' fees incurred in enforcing the payment of
compensation awarded."

18 There is no dispute that, after the WCAB awarded \$5,230.20 in section 5811 costs for the services
19 of Dr. Wallace, SCIF unreasonably delayed payment of that award and that, therefore, Mr. Herreras is
20 entitled to a section 5814.5 attorney's fee. The question is whether, in awarding a reasonable attorney's
21 fee incurred in enforcing the post-award payment of compensation: (1) the Appeals Board may consider
22 only the time expended by Mr. Herreras up until SCIF finally paid the \$5,230.20 award; or (2) the
23 Appeals Board may also consider the time expended by Mr. Herreras in litigating the proper amount of
24 the section 5814.5 fee.

25 We conclude that, when an attorney files a petition for section 5814 penalties and a section
26 5814.5 fee because a defendant has unreasonably delayed in making a post-award payment of
27 compensation, then any subsequent litigation over the proper amount of the fee is part and parcel of the

1 proceedings and, therefore, the section 5814.5 fee awarded may include reasonable hours expended by
2 the attorney in connection with that litigation. Nevertheless, section 5814.5 requires that any fee be
3 “reasonable,” and what constitutes a “reasonable” fee is within the sound discretion of the WCAB.

4 To conclude otherwise could lead to absurd results. To demonstrate, let us hypothetically assume
5 the following: (1) a defendant unreasonably delays the payment of compensation even though a final
6 award has been made; (2) the injured employee’s attorney files a petition for section 5814 penalties and
7 section 5814.5 attorney’s fees; (3) after successfully enforcing the unreasonably delayed award and
8 obtaining section 5814 penalties on the amount delayed, the attorney submits a section 5814.5 fee claim
9 to the defendant for legal services incurred in enforcing the award; (4) this section 5814.5 fee claim is
10 reasonable with respect both to the number of hours and the hourly rate claimed; and (5) nevertheless, the
11 defendant unilaterally issues a check for one-quarter of the requested reasonable amount. As a practical
12 matter, this forces the attorney either to accept whatever the defendant offers regardless of the amount,
13 which cannot be the intent of section 5814.5, or to litigate the reasonable amount of the section 5814.5
14 fee.

15 Let us further assume that: (1) the attorney litigates the issue of the reasonable amount of the fee;
16 (2) the defendant steadfastly refuses to increase its offer to pay one-quarter of the reasonable amount
17 claimed; (3) the attorney expends an additional 10 hours of time in litigation over the fee; and (4) the
18 WCAB determines that the number of hours and hourly rate claimed by the attorney throughout the
19 entire course of the proceedings were reasonable.

20 As discussed in *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324, 1336
21 (Appeals Board en banc), section 5814.5 fees are expressly payable “in addition to” section 5814
22 penalties and, therefore, section 5814.5 fees are themselves a penalty for a defendant’s unreasonable
23 failure to pay an actual award of compensation. The purposes of the section 5814.5 attorney’s fee
24 penalty are: (1) to encourage defendants to comply with, and not unreasonably delay, awards of
25 compensation; (2) to encourage attorneys to continue to provide representation to injured workers after
26 an award, when payment of the award is subsequently unreasonably delayed or refused; and (3) to
27 reasonably compensate the employee’s attorney for enforcing unreasonably delayed awards. If the

1 WCAB were limited to awarding a section 5814.5 attorney's fee of only the original reasonable amount
2 requested by the attorney, then these purposes of section 5814.5 would be significantly undermined.
3 That is, it would reduce a defendant's incentive to timely pay the award of compensation and reduce its
4 incentive to make a reasonable section 5814.5 payment to the attorney. Therefore, a defendant should
5 not be able to unilaterally decide what constitutes a "reasonable" section 5814.5 fee with impunity.

6 This is not to say, however, that an attorney should be entitled to any and all hours expended in
7 connection with litigation over the "reasonable" amount of a section 5814.5 fee. Otherwise, there would
8 be no incentive for the attorney *not* to litigate the amount of the section 5814.5 fee. However, as
9 indicated by *Ramirez*, the WCAB has wide latitude in determining what constitutes a "reasonable" fee
10 under section 5814.5 because such "fees are to be paid for time *reasonably* incurred, at a reasonable
11 hourly rate." (73 Cal.Comp.Cases at p. 1335 (italics added).) Therefore, in exercising its discretion to
12 determine the amount of a "reasonable" section 5814.5 attorney's fee, the WCAB should consider,
13 among other things: (1) the attorney's original section 5814.5 fee request; (2) the defendant's response to
14 the original fee request; and (3) the nature and extent of any subsequent litigation over the section 5814.5
15 fee dispute.

16 Here, SCIF had two disputes with Mr. Herreras's initial section 5814.5 fee request of \$1,900
17 based on 4.75 hours of legal services at \$400.00 per hour. First, SCIF claimed that \$300.00 per hour was
18 a reasonable hourly rate. Second, SCIF claimed that the travel time between Mr. Herreras's Grover
19 Beach office and the former Goleta district office of the WCAB is one hour and 21 minutes, not one hour
20 and 30 minutes as claimed by Mr. Herreras.

21 With respect to the hourly rate, however, the WCJ's Report correctly observes that Mr. Herreras
22 is a certified specialist in workers' compensation who has been practicing law in California for more than
23 25 years; indeed, the State Bar website establishes that Mr. Herreras has been practicing law in California

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1 for over 45 years.³ For the time period in question (i.e., 2013 and 2014), the decisions issued by the
2 WCAB clearly establish that \$400.00 an hour is a reasonable hourly rate for a certified specialist with
3 over 45 years of experience.⁴ Neither SCIF's November 19, 2013 letter nor its May 28, 2014 petition for
4 reconsideration cites to any case that might suggest to the contrary.

5 With respect to the issue of travel time, SCIF's November 19, 2013 letter claims that "Yahoo
6 Maps" indicates that the trip between Mr. Herreras's office in Grover Beach and the former Goleta
7 district office of the WCAB is actually nine minutes less each way than Mr. Herreras claimed. However:
8 (1) SCIF does not specify whether this nine-minute difference takes commute traffic into account;
9 (2) SCIF fails to recognize that a section 5814.5 attorney's fee includes not only time expended in actual
10 travel, but also time expended in parking, etc.; and (3) in any event, as discussed above, the 3.5 hours of
11 time claimed by Mr. Herreras for October 14, 2013 includes not just his travel but also the time he
12 actually expended in appearing at the October 14, 2013 MSC.

13 Accordingly, taking the entire record into account, we affirm the WCJ's finding that, under
14 section 5814.5, the "total reasonable attorney fee" is \$4,000.00. That is, the WCJ properly exercised his
15 discretion in allowing: (1) the original \$1,900 requested by Mr. Herreras based on 4.75 hours of legal
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17 ³ Under Evidence Code sections 452(d) and 452(h), judicial notice may be taken of the records the State Bar
18 of California, as posted on its official website. (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1171; *In re White*
19 (2004) 121 Cal.App.4th 1453, 1469, fn. 14.) We take judicial notice of the State Bar's on-line records showing
that Mr. Herreras was admitted to practice in California in January 1967 and that he is a certified specialist in
workers' compensation law. (See <http://members.calbar.ca.gov/fal/Member/Detail/39669>).

20 ⁴ See *Funk v. Delta Dental Plan of California* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 566 (Appeals
21 Board panel decision) (\$400.00 per hour fee under section 5801 for Sacramento attorney who was certified
22 specialist and who had practiced law for 18 years); *Sharma v. Lam Research Corp.* (2014) 2014 Cal. Wrk. Comp.
23 P.D. LEXIS 161 (Appeals Board panel decision) (\$400.00 per hour fee under section 5801 for San Jose attorney
24 who had practiced law for 34 years but was not a certified specialist); *Dominquez v. Whole Foods Markets* (2014)
25 2014 Cal. Wrk. Comp. P.D. LEXIS 54 (Appeals Board panel decision) (\$400.00 per hour fee under section
26 5710(b)(4) for Burlingame attorney who had practiced law for 18 years but was not a certified specialist); *Viveiros*
27 *v. Turlock City Tow Service* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 343 (Appeals Board panel decision)
(\$400.00 per hour fee under section 5801 for Modesto attorney who was a certified specialist and who had
practiced law for 15 years); *Thompson v. County of Los Angeles* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 284
(Appeals Board panel decision) (\$400.00 per hour fee under section 5801 for Los Angeles attorney who was a
certified specialist and who had practiced law for 37 years).

The Appeals Board observes that, in discussing the experience and certified specialist status of the
attorneys mentioned above, we took judicial notice of the WCAB's own records in the Electronic Adjudication
Management System (EAMS), as well as judicial notice of the State Bar's records regarding the attorneys.

1 services at \$400.00 per hour; plus (2) an additional amount for Mr. Herreras's litigation of the issue of a
2 fee (including appearing at two settlement conferences and a trial) in the face of SCIF's assertions that
3 only \$300.00 per hour is warranted and that his actual travel time was actually nine minutes less each
4 way.

5 The \$4,000.00 fee the WCJ actually awarded is less than the \$5,600.00 fee the WCJ *might* have
6 awarded, as discussed in his Report. However, taking the whole record into account, the "total" fee
7 \$4,000.00 under section 5814.5 is "reasonable" because it represents a fair balance of the factors
8 discussed in the paragraphs above. In any event, Mr. Herreras did not seek reconsideration of the May 9,
9 2014 award of a "total" fee of \$4,000.00 and, therefore, he has waived any claim to a higher fee. (Lab.
10 Code, §§ 5902, 5904.)

11 Because the WCJ found that \$4,000.00 is the "total" amount of a reasonable attorney's fee under
12 section 5814.5, SCIF is entitled to credit against this amount for the \$1,335.00 it previously paid to Mr.
13 Herreras.

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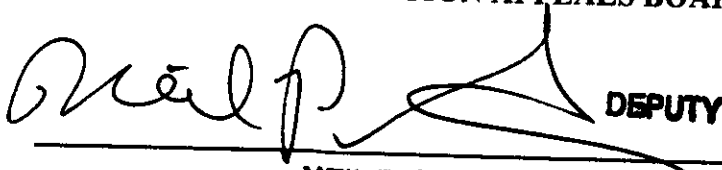
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1 For the foregoing reasons,


2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings of Fact and Award issued by the workers' compensation administrative law
4 judge on May 9, 2014 is **AFFIRMED**.

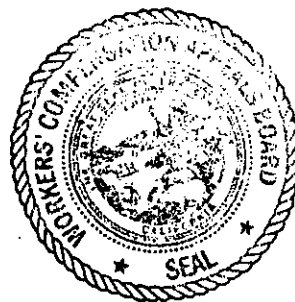
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6 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **DEPUTY**
NEIL P. SULLIVAN

10 **I CONCUR,**

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13 **DEIDRA E. LOWE**

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16 **FRANK M. BRASS**



17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **DEC 09 2014**

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

21 **WILLIAM HERRERAS**
22 **STATE COMPENSATION INSURANCE FUND**

23 **NPS/bea**

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