WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL PENA, ***Applicant,*** **vs.** **AQUA SYSTEMS; ATHENS ADMINISTRATORS CONCORD,** ***Defendants.***	**Case No.** **ADJ10308959** **(San Luis Obispo District Office)** **OPINION AND ORDERS DISMISSING PETITION FOR REMOVAL, GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks removal in response to the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 14, 2018. By the F&A, the WCJ found that there was an unreasonable delay in authorizing medical care. A penalty of 25% of the first visit with Dr. Lorant and attorney's fees were awarded in the F&A.

Defendant contends that there was not an unreasonable delay in authorizing medical treatment and it will be substantially prejudiced and irreparably harmed by the imposition of penalties and attorney's fees. Defendant also contends that an attorney's fee is improper because there was not a prior award for psychiatric treatment.

We received an answer from applicant. The WCJ filed a Report & Recommendation on Petition for Removal (Report) recommending that we dismiss the Petition as one for removal and deny the Petition as one for reconsideration.

We have considered the allegations of defendant's Petition for Removal, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will dismiss defendant's Petition as one for removal and grant the Petition as one for reconsideration. As our decision after reconsideration, we will rescind the F&A and issue new findings of fact to include: a finding of injury arising out of and in the course of employment (AOE/COE) to the psyche, there was an unreasonable delay in authorizing medical care, applicant is entitled to a 25% penalty on his first visit with Dr. Lorant and no attorney's fees may be assessed. An

award will be made for the penalty owed to applicant pursuant to the findings of fact.

FACTUAL BACKGROUND

Applicant claims injury to the head, neck, back, shoulders and psyche on October 5, 2015 while employed as a purchasing agent/laborer by Aqua Systems. Defendant disputes ~~liability~~ for injury to applicant's psyche, but not to the other body parts pled.

The matter initially went to trial on November 13, 2017. (Minutes of Hearing and Summary of Evidence, November 13, 2017.) The parties stipulated that applicant sustained injury AOE/COE to his head, neck, back and shoulders. (*Id.* at p. 2.) The issues included "[n]eed for further medical treatment" and claimed penalties for untimely paying of mileage and unreasonably failing to authorize medications. (*Id.*) On December 5, 2017, the WCJ issued a Findings and Award finding that applicant "is in need of future medical care" and awarded a 25% penalty for defendant's failure to timely pay mileage. (Findings and Award, December 5, 2017, p. 1.) The award included future medical treatment and a penalty pursuant to Labor Code section 5814 in accordance with the findings of fact. (Lab. Code, § 5814.)[1]

Subsequent to the December 5, 2017 award, Jamie Rotnofsky, Ph.D., evaluated applicant as the psychological panel qualified medical evaluator (QME) on December 22, 2017. (Applicant's Exhibit No. 5, Dr. Rotnofsky's Report, January 16, 2018, p. 1.) Dr. Rotnofsky diagnosed applicant with major depression, pain disorder and cognitive disorder. (*Id.* at p. 42.) It was noted by Dr. Rotnofsky that "there are no notes reflecting that Mr. Pena had received psychological treatment." (*Id.*) He opined that applicant's "depression/anxiety and cognitive disorder are considered to be 100% industrially-based." (*Id.* at p. 43.) Future treatment recommendations were made for psychiatric, psychological and neuropsychological treatment. (*Id.* at p. 46.) Dr. Rotnofsky's opinions remained unchanged in a supplemental report issued in April 2018 following review of additional records. (Applicant's Exhibit No. 6, Dr. Rotnofsky's Report, April 2, 2018, p. 5.)

On July 6, 2018, applicant sent a letter to defendant requesting authorization for treatment with Nir Lorant, M.D., as a secondary treater for psyche. (Applicant's Exhibit No. 7, Mr. Herreras' letter,

[1] All further statutory references are to the Labor Code unless otherwise stated.

July 6, 2018.) Defendant responded to the letter via email asking "if there has been an RFA [request for authorization] for sessions with Dr. Lorant." (Applicant's Exhibit No. 8, Email, July 12, 2018.)

On August 15, 2018, applicant filed a Declaration of Readiness to Proceed on the issue of treatment for his psyche, as well as a Petition for Penalties under section 5814 and attorney's fees under section 5814.5. (Lab. Code, §§ 5814, 5814.5.)

Applicant and defendant exchanged emails from October 23-24, 2018, wherein defendant provided applicant with a link to its medical provider network (MPN). (Applicant's Exhibit No. 11, Email, October 24, 2018.) On October 25, 2018, applicant sent defendant a letter advising that there are no psychiatry or psychology specialists in defendant's MPN within the counties of Santa Barbara and San Luis Obispo. (Applicant's Exhibit No. 12, Letter of Mr. Herreras, October 25, 2018.) Applicant contended that defendant's "MPN is defective." (*Id.*) Treatment with Dr. Lorant was requested again. (*Id.*)

The matter proceeded to trial again on October 29, 2018. The issues included injury AOE/COE to the psyche, a penalty for failure to promptly provide or authorize medical care to the psyche and fees under section 5814.5 if a penalty is assessed. (Minutes of Hearing and Summary of Evidence, October 29, 2018, p. 2; Lab. Code, § 5814.5.) The Minutes note that defendant authorized treatment with Dr. Lorant on October 25, 2018. (Minutes of Hearing and Summary of Evidence, October 29, 2018, p. 2.)

In the resulting F&A, the WCJ found that there was an unreasonable delay in authorizing medical care, assessed a penalty of 25% of the first visit with Dr. Lorant and found that applicant's attorney was entitled to fees under section 5814.5 in an amount to be adjusted between the parties. In the Opinion on Decision, the WCJ opines as follows:

> Turning to the issues at hand, based on the reports of Dr. Rotnofsky and notably the report of January 16, 2018, (Applicant's Exhibit 5) the undersigned has little doubt in concluding that applicant did sustain injury AOE/COE to the psyche. The reports are very clear and the reports reasoning are certainly solid that the applicant did sustain the injury as alleged. There is no contrary evidence. Dr. Rotnofsky concludes that applicant is in need of future medical care.
> (Opinion on Decision, December 14, 2018, p. 3.)

The F&A does not contain a finding of fact regarding injury AOE/COE to applicant's psyche.

In his Report, the WCJ states that defendant improperly filed a petition for removal since the F&A is a final order and is therefore subject to reconsideration. (WCJ's Report, December 27, 2018, p. 1.) The WCJ further reiterated that he found that applicant sustained injury AOE/COE to his psyche based on the reporting of Dr. Rotnofsky. (*Id.* at p. 2.) The WCJ noted that applicant made a demand for treatment with Dr. Lorant on July 6, 2018, and defendant did not authorize this treatment until October 25, 2018. (*Id.*) This was found to be an unreasonable delay by the WCJ, resulting in the award for a penalty and a fee for applicant's attorney.

DISCUSSION

I.

The WCJ in his Report raises the issue of whether defendant should have sought removal or reconsideration of the F&A. A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) The Court of Appeal has given examples of threshold issues as including "whether the injury arises out of and in the course of employment, the territorial jurisdiction of the appeals board, the existence of an employment relationship or statute of limitations issues." (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662, citations omitted.) "Such issues, if finally determined, may avoid the necessity of further litigation." (*Id.*, internal quotation marks and citations omitted.)

Defendant petitioned for removal rather than reconsideration of the F&A. In the F&A, the WCJ only made findings that there was an unreasonable delay in authorizing medical care, assessed a 25% penalty and found attorney's attorney was entitled to fees.

However, one of the issues for trial was injury AOE/COE to the psyche. The only medical reporting submitted at trial were Dr. Rotnofsky's reports. The Minutes do not reflect that defendant raised any defenses at trial to injury AOE/COE to applicant's psyche. The Opinion on Decision states that the WCJ found applicant had sustained an injury AOE/COE to this body part based on the reporting of Dr. Rotnofsky, although there is no finding of fact on this issue in the F&A. The WCJ is charged with the duty to make determinations on all issues in controversy. (Lab. Code, §§ 5313, 5815.) Having listed the issue of injury AOE/COE to the psyche as an issue for trial, the WCJ should have expressly decided the issue in the findings of fact contained in the F&A. (See *Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) ["the WCJ must make and file findings upon all facts involved in the controversy and issue an award, order, or decision stating the determination as to the rights of the parties"].)

In its Petition, defendant does not challenge the WCJ's opinion regarding injury AOE/COE to the psyche, only the finding of an unreasonable delay in authorizing medical care and the resulting award for a penalty and attorney's fees. We agree with the WCJ that Dr. Rotnofsky's reporting supports a finding of injury AOE/COE to this body part. We will consequently substitute the F&A to include a finding of fact that applicant sustained injury AOE/COE to the psyche since this was a specific issue set for trial, the WCJ opined that he found an injury to this body part in his Opinion on Decision, the medical evidence supports this finding and defendant does not dispute the WCJ's conclusion on causation.[2]

Injury AOE/COE is a threshold issue. Defendant became liable for medical care for applicant's psyche, as well as money to applicant and his attorney as a result of the F&A. The F&A is therefore a final order subject to reconsideration and we will dismiss defendant's Petition as one seeking removal.

II.

Section 4600 requires defendant to provide reasonable medical treatment to cure or relieve from

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[2] It is acknowledged that applicant's date of injury is after January 1, 2013 and therefore, his permanent disability, if any, must be determined in accordance with section 4660.1. (Lab. Code, § 4660.1.) Although section 4660.1 precludes an increase in applicant's permanent impairment rating for a psychiatric disorder unless he qualifies for one of the statutory exceptions in section 4660.1(c)(2), he is not precluded from claiming an injury to psyche and receiving psychiatric treatment under this statute.

the effects of an industrial injury. (Lab. Code, § 4600(a).) Medical treatment is considered part of compensation and subject to penalties under section 5814. (See Lab. Code, § 3207; see also *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902 [62 Cal.Comp.Cases 891]; *Davison v. Industrial Acc. Com.* (1966) 21 Cal.App.2d 15 [31 Cal. Comp. Cases 77].) Section 5814 provides for penalties as follows:

> 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.
>
> (Lab. Code, § 5814(a).)

The burden is on applicant to show a delay in the provision of benefits. (Lab. Code, § 5705 [the burden of proof is on the party holding the affirmative of the issue].) Once applicant establishes a delay in the provision of benefits, the burden shifts to defendant to prove that the delay was reasonable. (*Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 230 [36 Cal.Comp.Cases 152]; see also *Kamel v. West Cliff Medical* (2001) 66 Cal.Comp.Cases 1521, 1523 (Appeals Board en banc); *Berry v. Workmen's Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381, 383 [34 Cal.Comp.Cases 507] ["Once delay is shown, a satisfactory explanation must be made by the employer"].) The Court of Appeal has held that in the event of a delay of benefits, the "only satisfactory excuse...is genuine doubt from a medical or legal standpoint as to liability for benefits, and that the burden is on the employer or his carrier to present substantial evidence on which a finding of such doubt may be based." (*Kerley, supra*, at p. 227.) Whether a delay in delivery of benefits is unreasonable is a question of fact to be resolved by the Appeals Board. (See *Gallamore v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321].)

Applicant's psychiatric condition was found to be industrially caused by the QME Dr. Rotnofsky in his January 16, 2018 report and treatment recommended for this condition. The record does not reflect that defendant raised any issues with Dr. Rotnofsky's conclusions regarding causation or attempted to conduct further discovery to challenge those conclusions prior to or during the October 29, 2018 trial.

The record therefore does not support genuine doubt by defendant from a medical or legal standpoint for liability for benefits in relation to applicant's psychiatric condition. Once applicant requested treatment for his psychiatric condition per his July 6, 2018 request, defendant was obligated to provide it.

Defendant contends that no valid request for authorization (RFA) for psychiatric treatment has been issued, which has precluded it from conducting utilization review (UR) of the treatment recommendations pursuant to section 4610. (Lab. Code, § 4610.) Defendant fails to cite any authority for its contention that the mere selection of a physician to provide medical treatment itself constitutes a RFA for a "specific course of proposed medical treatment" subject to UR. (Cal. Code Regs., tit. 8, §§ 9785(g), 9792.6.1(t).) There is no specific course of treatment being proposed by applicant's selection of Dr. Lorant as a secondary treater; this is simply a request for an opportunity to be seen by a psychiatrist who can then report to applicant's primary treating physician (PTP) on what treatment, if any, is necessary to cure or relieve from the effects of applicant's psychiatric condition. (See Cal. Code Regs., tit. 8, § 9785(e)(3)-(4).) Defendant remains entitled and obligated to submit treatment recommendations for applicant's psychiatric condition to UR. (§ 4610.)

The Petition is not a model of clarity, but it appears that defendant also contends that the July 6, 2018 request from applicant for psychiatric treatment with Dr. Lorant cannot be a valid request for treatment because it was not a referral from the PTP. Defendant suggests that only a PTP may make a request for treatment with a secondary treating physician. It is acknowledged that an employee may only have one PTP and that the PTP is primarily responsible for managing the employee's care. (Cal. Code Regs., tit. 8, § 9785(a)(1) and (b)(1).) The PTP is also responsible for obtaining all of the reports from secondary physicians. (Cal. Code Regs., tit. 8, § 9785(e)(4).) However, defendant does not specifically cite to any statutory law or regulation that expressly requires a referral for treatment with a secondary treating physician to come from the PTP. This contention is therefore without merit.

Defendant did not produce any evidence at trial to explain why applicant's July 6, 2018 request to designate Dr. Lorant as a secondary physician for psyche was not complied with until October 25, 2018, a delay of approximately three and a half months. This delay was unreasonable since no satisfactory reason was provided by defendant for its refusal to comply with this request during this period. The WCJ

therefore acted within his discretion to impose a 25% penalty under section 5814. (See *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324, 1328 (Appeals Board en banc) [discretion is required by the WCJ in setting the amount of the penalty under section 5814].)

Defendant's delay in providing treatment for applicant's psyche was unreasonable and a penalty of 25% of applicant's first visit with Dr. Lorant is justified.

III.

Defendant contends that psychiatric treatment for applicant was authorized on October 25, 2018, prior to the issuance of an award for treatment to this body part. Defendant therefore contends that an award for an attorney's fee cannot be made under section 5814.5 for an unreasonable delay in providing this treatment since there was no prior award for psychiatric treatment.

Section 5814.5 states in full:

> When the payment of compensation has been unreasonably delayed or refused *subsequent to the issuance of an award* by an employer that has secured the payment of compensation pursuant to Section 3700, the appeals board shall, in addition to increasing the order, decision, or award pursuant to Section 5814, award reasonable attorneys' fees *incurred in enforcing the payment of compensation awarded.*
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> (Lab. Code, § 5814.5, emphasis added.)

In *Ramirez*, the en banc decision opined regarding a fee under section 5814.5 as follows, in pertinent part:

> The right to seek attorney's fees under section 5814.5 comes into existence only after applicant has been awarded compensation and defendant has unreasonably delayed payment.
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> ...
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> We emphasize, however, that a section 5814.5 fee is payable only where there has been a prior award of benefits, that defendant has unreasonably delayed payment of some or all of that award, and the applicant has incurred attorney's fees in enforcing the prior award. If there is no prior award, or no unreasonable delay, section 5814.5 fees shall not be awarded. *Moreover, section 5814.5 fees should be allowed only for legal services rendered in "enforcing" the unreasonably delayed prior award, and not for any other purpose.*
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> (*Ramirez, supra,* 73 Cal.Comp.Cases at pp. 1334 and 1336, emphasis added.)

The language in *Ramirez* is quite unambiguous. A fee under section 5814.5 is only payable where there is *a prior award* of benefits, there is an unreasonable delay in payment of some or all of *that* award, and applicant has incurred attorney's fees in *enforcing the prior award.* The majority believes that permitting an attorney's fee under section 5814.5 where there has been *any* prior award of the same species of benefits conflicts with the statute's plain language, as well as our previous, binding interpretation of this statute in *Ramirez.* Fees under this section are only permissible where applicant has incurred fees in specifically enforcing a prior award. That did not occur here.

This matter previously went to trial regarding applicant's need for future medical care on November 13, 2017. A Findings and Award issued on December 5, 2017 finding that applicant was in need of future medical care and awarded future medical treatment. However, at that trial, the parties had stipulated that applicant sustained injury AOE/COE to his head, neck, back and shoulders. The issue of injury AOE/COE to the psyche and the need for treatment to the psyche was not raised at that time. Additionally, Dr. Rotnofsky had not yet evaluated applicant or issued his reports until after the first award issued. It logically follows that the prior December 5, 2017 award for treatment was only for the body parts stipulated to be injured. There was no prior award for treatment to applicant's psyche at the time of the October 29, 2018 trial. In other words, the second trial was not conducted to enforce a prior award so there can be no award for attorney's fees under section 5814.5. We therefore agree with defendant that it was improper to award a fee to applicant's attorney under section 5814.5 as part of the December 14, 2018 F&A.

In conclusion, we will grant defendant's Petition as one seeking reconsideration, rescind the F&A and substitute it with a new findings of fact and award. The new findings will include a finding of injury AOE/COE to the psyche, there was an unreasonable delay in authorizing medical care, applicant is entitled to a 25% penalty on applicant's first visit with Dr. Lorant and no fees may be assessed under section 5814.5. An award will be made for the penalty under section 5814.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal of the Findings and Award issued by the WCJ on December 14, 2018 is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on December 14, 2018 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on December 14, 2018 is **RESCINDED** in its entirety and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Miguel Pena, born June 4, 1958, while employed on October 5, 2015, as a purchasing agent/laborer by Aqua Systems, sustained injury arising out of and in the course of employment to his psyche.

2. There was an unreasonable delay in authorizing medical care for applicant's psyche.

3. A penalty is assessed under Labor Code section 5814 in the amount of 25% of the first visit with Dr. Lorant.

4. No fees under Labor Code section 5814.5 may be assessed.

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AWARD

AWARD IS MADE in favor of **MIGUEL PENA**, against **AQUA SYSTEMS** and **ATHENS ADMINISTRATORS** as follows:

(a) A penalty in accordance with finding of fact number 3.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

JOSÉ H. RAZO

I DISSENT, (See Attached Dissenting Opinion.)

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 25 2019

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

ADELSON, TESTAN, BRUNDO, NOVELL & JIMENEZ
MIGUEL PENA
WILLIAM A. HERRERAS

AI/*pc*

CONCURRING AND DISSENTING OPINION OF COMMISSIONER SWEENEY

I respectfully dissent. I concur with sections I-II of the decision. However, I disagree with the analysis in section III and would retain the award for attorney's fees under section 5814.5 in the F&A.

I have previously opined on when fees may be imposed under section 5814.5 in a dissenting opinion:

> But, more importantly, I believe that section 5814.5 allows payment of reasonable attorney's fees for a defendant's delay or refusal to pay after *an award* has been made. I do not see that section 5814.5 only applies to those narrow circumstances where a defendant refuses to pay for a benefit item that has already been awarded and an attorney seeks to enforce payment of that item. I also observe that when a defendant refuses to comply with an order to pay a specific benefit item, section 5813 remedies could apply, which allow for imposition of sanctions and recovery of reasonable attorney's fees, so that a narrow reading of section 5814.5 seems duplicative.
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> Instead, I believe that the statute...more reasonably [reads] to say that once an applicant has an award of benefits, thereafter, whenever a defendant [unreasonably] refuses or delays payment on any item which would fall within that species of awarded benefits, applicant's attorney is entitled to payment under section 5814.5, *whether the particular item has been awarded or not.* Many times, a penalty recovery is minimal, and the amount of attorney time required to enforce payment is disproportionately large. Section 5814.5 encourages attorneys to pursue enforcement, and discourages defendants from failing to pay, and my reading fits squarely within this intent.
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> (*White v. Whole Foods* (December 17, 2012, ADJ7818660) [2012 Cal. Wrk. Comp. P.D. LEXIS 674, *10-11], emphasis in original.)[3]

In *White*, applicant was awarded temporary disability from July 8, 2010 through July 1, 2011 with the issue of temporary disability beginning July 2, 2011 and thereafter deferred. Subsequent to the award, in November 2011, applicant's treating physician found him temporarily disabled back to July

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) I refer to *White* because it considered a similar issue.

2011. Defendant resumed temporary disability as of November 29, 2011, but did not provide temporary disability from July 2, 2011 to November 28, 2011 due to an asserted lack of evidence to support work status. Applicant sought penalties under sections 5814 and 5814.5. The WCJ awarded applicant temporary disability during the disputed period, as well as a 25% penalty and attorney's fees under section 5814.5. The award for attorney's fees under section 5814.5 was rescinded by the Appeals Board, which applicant challenged on reconsideration. The majority panelists denied applicant's petition for reconsideration of the prior Opinion and Order, to which I dissented per the analysis above. Since applicant had previously been awarded temporary disability, I opined that his attorney was entitled to a fee under section 5814.5 to enforce payment of the benefit of temporary disability indemnity.

In this matter, there was a prior award for medical care before the October 29, 2018 trial. After the psychological QME Dr. Rotnofsky opined that applicant's psychiatric condition was industrially caused and recommended future medical care for this body part, defendant was obligated to provide that care. Defendant has given no valid explanation for delaying authorization of this treatment once applicant requested it. There is therefore no question that defendant unreasonably delayed medical care for applicant's industrial injury.

As in *White*, there was a prior award for the species of benefits for which applicant sought attorney's fees under section 5814.5. Applicant incurred attorney's fees to enforce his right to medical care. Since there was a prior award for medical care, applicant's attorney is entitled to fees for defendant's unreasonable delay in providing medical care to which applicant is entitled.

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I therefore respectfully dissent with section III of the above opinion. I would retain the finding of an entitlement to an attorney's fee under section 5814.5 and include an award for this fee in our substituted findings of fact and award.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 25 2019

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

ADELSON, TESTAN, BRUNDO, NOVELL & JIMENEZ
MIGUEL PENA
WILLIAM A. HERRERAS

AI/*pc*

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA

ADJ10308959

MIGUEL PENA v. AQUA SYSTEMS; ATHENS ADMINISTRATORS

REPORT & RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR REMOVAL

I
INTRODUCTION

As reflected in the Minutes of Hearing datec , applicant, born June 4, 1958, while employed as a purchasing agent/laborer, sustained injury arising out of and in the course of employment to his head, neck, back and shoulders on October 5, 2015.

On December 14, 2018, a Findings and Award issued which found that defendants had unreasonably delayed the authorization of psychiatric care, that defendants were liable for a penalty under Labor Code Section 5814, and that defendants were liable for fees to applicant's counsel under Labor Code Section 5814.5.

Defendant has filed a Petition for Removal contending: 1) that petitioner will suffer substantial prejudice and irreparable harm if removal is not granted; 2) that petitioner did not unreasonably delay the authorization of medical care; 3) that future psychiatric care was not previously awarded; 4) and that inferentially, the fees under Labor Code Section 5814.5 were inappropriate.

Before going further, the undersigned is certain that the Board has noted that this Petition is captioned as a "Petition for Removal."

The undersigned found that the defendants had unreasonably delayed in authorizing psychiatric care, that the action warranted a penalty and that applicant's attorney was entitled to fees under Labor Code Section 5814.5. Clearly, these are adjudication of rights between applicant and defendant obligating defendant to pay monies and are final orders. As such, removal is not the appropriate remedy. A Petition for Reconsideration is the appropriate remedy.

The Board may wish to consider dismissing this Petition as simply improper. The undersigned recognizes that the Board, at its discretion, may consider this to be a valid Petition for Reconsideration, for then the undersigned will discuss petitioner's arguments below as if this were a proper Petition for Reconsideration.

II
DISCUSSION

The undersigned issued an earlier decision in this case, dated December 5, 2017. In that Decision, the undersigned found that applicant had sustained injury AOE/COE to his head, neck, back and shoulders on October 5, 2015, and that applicant was in need of future medical care. At the hearing on October 18, which resulted in the complained-of decision, the issues were: injury AOE/COE to the psyche, a claimed penalty for failing to properly authorize that treatment to the psyche, and fees under Labor Code Section 5814.5 should a penalty be assessed.

In terms of injury AOE/COE to the psyche, the undersigned found that based on the reports of Dr. Rotnofsky and specifically his report of January 16, 2008 (applicant's Exhibit "5"), the applicant did sustain injury AOE/COE to the psyche. The undersigned also noted that there was no contrary evidence and Dr. Rotnofsky concluded that applicant was in need of future medical care.

By letter of July 6, 2018 (applicant's Exhibit "7"), applicant made demand for treatment with Dr. Lorant, a local psychiatrist. At the hearing on October 29, 2018, as reflected in the Minutes, the parties agreed that defendants did authorize psychiatric care with Dr. Lorant on October 25, 2018.

The undersigned found this to be an unreasonable delay.

As noted above, the panel QME, Dr. Rotnofsky, found injury to the psyche and that applicant was in need of future medical care. This report is dated January 16, 2018. Applicant made demand for care with a psychiatrist on July 6, 2018, and the care was not authorized until October 25, 2018.

This is an unreasonable delay. Furthermore, under Labor Code Section 4063, when an AME or QME resolve an issue that requires the defendant to provide a benefit, the defendant has the obligation to provide that benefit or to file a Declaration of Readiness to Proceed. Defendants did neither.

Petitioner also complains that the undersigned allowed a fee under Labor Code Section 5814.5 when psychiatric care was not previously awarded. Clearly, applicant was awarded future medical care in the award that issued in December of 2017. The fact that it wasn't psychiatric care makes no difference. There is no doubt, and the petitioner does not contend otherwise, that psychiatric care is part and parcel of applicant's injury. Simply put, if an industrial injury causes need for medical treatment to another part of the body, it is still part of the award of future medical treatment. For example, if applicant were to slip and fall because of his industrial injury and injure his knee, one would not need a specific award to render treatment to the knee as long as causation is clear. There is no difference in the case at hand. And because there was an award of future medical in existence, applicant's attorney is entitled to fees under Labor Code Section 5814.5.

Defendants' argument about substantial prejudice is, in the undersigned's opinion, misplaced. As the undersigned pointed out above, the complained-of decision is a final order, not subject to removal.

Petition argues that since there was no RFA, there was no opportunity for Utilization Review to approve, modify, or deny medical treatment.

Petitioner really is attempting to place the applicant in a "Catch 22" situation; defendants certainly have a right to exercise Utilization Review but they have to let the person see the doctor in the first place to find out what the physician proposes.

Finally, petitioner argues that the award of medical care did not include psychiatric where injury was in dispute.

This has been discussed above wherein the undersigned pointed out that Labor Code Section 4063 mandates that defendant provide a benefit when an AME or QME indicate its need and the fact that applicant was awarded future medical care does not necessarily mean a limitation

to only what was originally found, especially in light of the fact that the subsequent report that connects other care to the injury in question.

III
RECOMMENDATION

If the Board in its discretion considers this an appropriate Petition for Reconsideration, it is respectfully recommended that it be denied. If the Board considers this to be a Petition for Removal, it is recommended that it be dismissed as improper.

December 27, 2018

MICHAEL LeCOVER
Workers' Compensation Judge

Please see attached Proof of Service