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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JORGE GARCIA,

Applicant,

vs.

**SARA LEE CORPORATION; ACE
AMERICAN INSURANCE COMPANY c/o
ESIS,**

Defendants.

Case No.: ADJ8406355
(San Luis Obispo District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the June 13, 2016 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant is entitled to a penalty of 25% of the costs of the of medication and related travel due to delays related to the July 15, 2015 Independent Medical Review (IMR); that applicant is entitled to a \$2,000.00 penalty plus interest from September 16, 2015 until the supplemental job displacement voucher (voucher) is provided; and that the reasonable value of applicant's attorney's services is the actual time spent to enforce the IMR determination and the provision of the voucher at the hourly rate of \$400.00.

Defendant contends that the WCJ erred in finding a penalty for delay in the authorization of medication. Defendant also contends that the WCJ erred in awarding a \$2,000.00 penalty arguing that the maximum amount of penalty permitted by Labor Code¹ section 5814 is 25% of the amount of the voucher actually used and that applicant has not yet used any portion of the voucher. Finally, defendant contends that the WCJ erred in allowing attorney fees based on actual time spent at the hourly rate of \$400.00 arguing that applicant's attorney's fee should be 15% of the penalty found.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 Based on our review of the record and for the reasons discussed below, we will grant
2 reconsideration, amend the WCJ's decision to find that defendant is liable for a penalty in the amount of
3 25% of the actual amount of the voucher used. We will otherwise affirm the WCJ's decision for the
4 reasons stated in her Report, which we adopt and incorporate, except to the extent it addresses the
5 amount of the voucher penalty and except for her recommendation that we deny reconsideration.

6 Defendant does not dispute that it unreasonably delayed the provision of the \$8,000.00 voucher or
7 the finding of a 25% penalty for that delay. However, defendant argues that the maximum amount of
8 penalty permitted by section 5814 is 25% of the amount of the voucher actually used and that the amount
9 applicant will eventually use has not yet been determined. We agree.

10 Section 5814 states that:

11 When payment of compensation has been unreasonably delayed or refused, either
12 prior to or subsequent to the issuance of an award, the amount of the payment
13 unreasonably delayed or refused shall be increased up to 25 percent or up to ten
14 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.

15 (Lab. Code, § 5814(a).)

16 There are two panel decisions that support defendant's position: *Stonebraker v. Master Cooling*
17 *Corporation*, (OXN 137267) 2007 Cal. Wrk. Comp. P.D. LEXIS 90 and *Portugal v. Mikasa, Inc.*,
18 *Gallagher Bassett Services, Inc.* (ADJ4312477) 2009 Cal. Wrk. Comp. P.D. LEXIS 143.

19 In *Stonebraker*, the Appeals Board panel stated that:

20 [W]e have concern [] in awarding a \$1,500 penalty when the actual amount of the
21 voucher used by applicant is as yet unknown. If applicant does not use the entire
22 amount allowed by the voucher, the 25% penalty of \$1,500 awarded against the
23 potential value of \$6,000 will exceed 25% of "the amount of the payment
24 unreasonably delayed or refused," contrary to the limitation described in Labor Code
25 section 5814(a). A voucher has no monetary value until such time as it is converted
when the injured worker receives training. Accordingly, we will amend the findings
to provide for a penalty in the amount of 25% of the actual amount of the voucher
used.

26 (*Stonebraker, supra*, (OXN 137267) 2007 Cal. Wrk. Comp. P.D. LEXIS 90.)
27

1 Although not binding precedent, Appeals Board panel decisions are citable authority. (See
2 *Griffith v. Workers' Comp. Appeals Bd. (Griffith)* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54
3 Cal.Comp.Cases 145].) We agree with the reasoning in *Stonebraker* and *Portugal*. Section 5814 states
4 that unreasonably delayed compensation "shall" be increased "up to" 25% or \$10,000.00, whichever is
5 less. The legislature's use of the word "shall" denotes mandatory language that establishes a maximum
6 limit for the penalty. However, if the applicant here eventually uses less than the \$8,000.00 voucher,
7 then the \$2,000.00 penalty will be more than 25% of the delayed compensation. This is not permitted by
8 section 5814.

9 Accordingly, we will amend the WCJ's decision to find that defendant is liable for a penalty in
10 the amount of 25% of the actual amount of the voucher used. We will otherwise affirm the WCJ's
11 decision.

12 For the foregoing reasons,

13 **IT IS ORDERED** that defendant's Petition for Reconsideration of the June 13, 2016 Findings
14 and Award is **GRANTED**.

15 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
16 Compensation Appeals Board, that the June 13, 2016 Findings and Award is **AFFIRMED, EXCEPT** as
17 **AMENDED** below.

18 **FINDINGS OF FACT**

19 * * *

20 2. Defendant is liable for a penalty in the amount of 25% of the amount of the
21 voucher applicant actually uses, in an amount to be adjusted by the parties when
22 applicant uses the voucher, with jurisdiction reserved at the trial level if there is
any dispute.

23 * * *

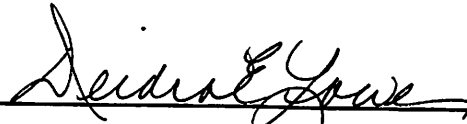
24 **AWARD IS MADE** in favor of **JORGE GARCIA** and against **ACE**
25 **AMERICAN INSURANCE COMPANY** as follows:

26 * * *

1 b. Defendant is liable for a penalty in the amount of 25% of the amount of the
2 voucher applicant actually uses, in an amount to be adjusted by the parties when
3 applicant uses the voucher, with jurisdiction reserved at the trial level if there is
4 any dispute.

5 * * *

6 **WORKERS' COMPENSATION APPEALS BOARD**

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9 DEIDRA E. LOWE

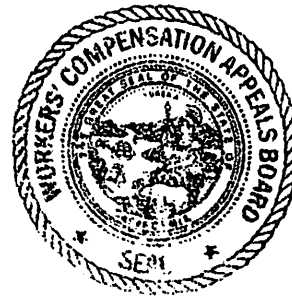
10 I CONCUR,

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13 FRANK M. BRASS

14 CONCURRING, BUT NOT SIGNING

15 RICHARD L. NEWMAN DEPUTY
16



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

19 SEP 06 2016
20

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

23 JAMES P. HARVEY
24 JANE WOODCOCK
25 JORGE GARCIA
26



27 PG/acw

GARCIA, Jorge

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WCAB CASE NO. ADJ 8406355

JORGE GARCIA

V.

SARA LEE CORPORATION and
ACE AMERICAN INSURANCE COMPANY C/O ESIS

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

LYDIA K. MOURENZA

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I
INTRODUCTION

Identity of petitioner:	DEFENDANT
Timeliness:	YES
Verification:	YES

Date of Issuance of Findings and Award	JUNE 13, 2016
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Petitioner's Contentions: Penalty is not warranted re late
authorization following IMR overturn; Penalty is not due re SJD voucher; L.C.
§5814.5 attorney fee award is excessive.

II
FACTS

Maximus issued an Independent Medical Review Final Determination Letter overturning a utilization review non-certification of Klonopin and Lexapro on July 15, 2015 (EXHIBIT #10). Applicant's attorney corresponded with the defense attorney 7/20/2015 (Exhibit #11) as to

the IMR overturn with a demand to authorize the medications and treating psychiatrist Dr. Goodman. By letter of 7/27/2015 applicant confirmed address and phone number of applicant's pharmacy for authorization of Klonopin and Lexapro (**Exhibit #12**). Petitioner corresponded with the applicant's treating psychiatrist Dr. Goodman 7/27/2015 (**Exhibit 'HH'**) including a copy of the PQME Steiner's 7/20/2015 report which indicated the continued current treatment for a period of six months reasonable to maintain the applicant's permanent and stationary status (**Exhibit 'BB' pages #6, #7**) and requesting Dr. Goodman's assistance in providing the recommended six additional months of treatment.

The case in chief resolved by stipulated award September 16, 2015 relative to a date of injury of February 3, 2010 to the neck, right shoulder, upper extremities including both wrists and psyche at 37% permanent disability with future medical treatment and 15% bump-up. Applicant reserved possible penalty re late authorization of medication (**EAMS Doc ID 57786666**). The Minutes of hearing of 9/16/2015 indicate "App. Entitled to \$8,000.00 voucher" (**EAMS Doc ID 57786664**).

The applicant again contacted the defendant 9/22/2015 re medication authorization and penalty (**Exhibit #13**) which was responded to the same date indicating that the lack of pharmacy authorization was relayed to claims along with the demand to resolve a penalty, noting that no penalty petition had been received (**Exhibit 'FF'**).

A Penalty Petition and Declaration of Readiness to Proceed were filed by the applicant's attorney (**EAMS Doc ID 58753579, 58753576**) re voucher, medical treatment and penalties. A Mandatory Settlement Conference was held February 3, 2016 at which time costs and sanctions were raised by defendant with counter-claim by applicant; the Pre-trial Conference Statement prepared (**EAMS Doc ID 59163271**) and the case set for trial April 4, 2016.

At the time of trial the sanction/costs claims were taken off calendar, and the defendant's objection to applicant's attorneys affidavit of time re Labor Code § 5814.5 sustained. The case proceeded to trial, the applicant testified with the aid of a Spanish language interpreter. Due to my hospitalization and medical recovery period the decision issued June 13, 2016 (EAMS Doc ID 60497898, 60497892) finding the applicant entitled to a penalty of 25% of the costs of medication and travel to the pharmacy to obtain the prescriptions; 25% or \$2,000.00 penalty for failure to timely issue the SJDB voucher; and attorney's fees under L.C. § 5814.5 to enforce those benefits. The defendant below has Petitioned contesting the award of penalties to the injured worker and L.C. §5814.5 attorney fees to his attorney.

III

DISCUSSION

Title 8 CCR§ 9792.10.7(a) (2) requires authorization within 5 days of an Independent Medical Review Final Determination overturning a utilization review non-certification. It is undisputed that the IMR Determination issued July 15, 2015 relative to medications Klonopin and Lexapro. Petitioner misidentifies Exhibit #12 (Petition for Reconsideration 6/30/2016 page 5, lines 21-55; EAMS Doc ID 60742807) with what may be a demand letter from the applicant's attorney of the same date, July 27, 2015. It is correctly noted that Exhibit #10 is not a demand letter from the applicant's attorney, but rather the IMR Determination Letter. Based upon testimony of the applicant that he received medication on July 30, 2015 Petitioner devalues the correspondence of applicant's attorney of September 22, 2015 (Exhibit #13) however it is

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apparent that if authorization had issued, the defense attorney was likewise unaware (**Exhibit "FF"**). The Petitioner has failed to submit any evidence of authorization of these medications. The award of 25% of the costs of the medications and related travel to the pharmacy until provided is appropriate. As well as attorney fees for time spent on his client's behalf to obtain the medications which includes three letters and Petition for Penalties effectively requested by the defendant (**Exhibits #11, #12, #13, 'FF'**).

The Supplemental Job Displacement Voucher (SJDV) is to be provided to the injured worker within 25 days from a final Award: Title 8CCR §10133.56(c). Here the case in chief resolved by Stipulation September 16, 2015. Defendant was advised by Applicant's attorney December 17, 2015 (**Exhibit #14**) that the voucher had yet to be provided with a demand for provision of the voucher and penalty for the delay. Petitioner's claim of inability to submit the voucher into evidence at trial is disingenuous and misleading (**Petition for Reconsideration 6/30/2016 page 4, lines 4-5; EAMS Doc ID 60742807**). There has been no production of a voucher and no request at trial to submit.

The SJDV is designed to be essentially self-administered. The assertion that the applicant failed to request the voucher or submit expenses as a defense to lack of compliance is not well founded and an attempt to shift the failings of the Petitioner to the applicant. Here the entitlement to and amount of the voucher is known as based upon the percentage of permanent disability and date of Stipulated Award. The applicant was effectively prohibited from engaging in rehabilitation due to Petitioner's failure to provide the required voucher. It is impossible to determine what opportunities may have been lost to applicant by this lack of action.

There was a demand for the voucher (**Exhibit #14, 12/17/2015**), penalty petition (**EAMS Doc ID58753579**), DOR, Notice of 12/28/2015 setting the hearing, a Mandatory Settlement Conference February 3, 2016, and Trial April 4, 2016 with a no voucher being produced. There is no reasonable basis for dispute of applicant's entitlement and defendant's liability for the \$8,000.00 voucher due to the injured worker by October 11, 2015. Penalty under L.C. §5814 of 25% the value of the voucher is deemed reasonable and appropriate under the circumstances.


Due to the award of penalty to enforce the voucher the applicant's attorney is entitled to fees under Labor Code §5814.5 based upon time spent.

IV

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: July 21, 2016


LYDIA MOURENZA
Workers' Compensation Administrative
Law Judge

Served by mail on all parties listed
on the Official Address Record on:
Thursday, July 21, 2016

By: Nancy Dorfman