

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**WORKERS' COMPENSATION APPEALS BOARD**  
**STATE OF CALIFORNIA**

**JOSE JUAREZ,**

*Applicant,*

**vs.**

**WATKINS MANUFACTURING  
CORPORATION, Permissibly Self-Insured,**

*Defendant.*

**Case No. ADJ994369 (SDO 0274313)**

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

Following our grant of applicant's petition for reconsideration of the February 12, 2014 Findings and Award of the workers' compensation administrative law judge (WCJ) on April 28, 2014, we issued a June 19, 2014 Notice Of Intention To Return Case To The Trial Level For Determination Of Attorney's Fees Pursuant To Labor Code Section 5814.5 As Part Of Decision After Reconsideration (NIT), which is incorporated by this reference. On July 14, 2013, we received defendant's response and objection to the NIT.

In the NIT we explained that we disagreed with the WCJ's February 12, 2014 Finding of Fact 4, which states, "There is no basis to award an attorney's fee." This is because the WCJ found in Finding of Fact 3 that applicant was entitled to a ten percent penalty pursuant to Labor Code section 5814, which allows for such a penalty when "payment of compensation has been unreasonably delayed." In that defendant unreasonable delayed payment of compensation, we determined that there is a basis to award attorney's fees pursuant to Labor Code section 5814.5, which provides as follows:

"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."

As discussed in the NIT, an award of attorney's fees pursuant to Labor Code section 5814.5 is appropriate in this case in light of defendant's unreasonable delay in paying compensation and the time

1 and effort expended by applicant's counsel in enforcing applicant's entitlement to that compensation.

2 Also as discussed in the NIT, the WCJ's failure to identify Labor Code section 5814.5 as a basis  
3 for awarding fees is not reversible error per se because applicant did not specifically identify that section  
4 in connection with his claim at the trial level. Nevertheless, the December 11, 2013 Minutes of Hearing  
5 expressly identify "Attorney's fees" as an issue to be determined by the WCJ, and applicant seeks to  
6 recover attorney's fees in his petition for reconsideration. This led us to conclude that Labor Code  
7 section 5814.5 provides a basis for awarding attorney's fees, contrary to the WCJ's Finding Of Fact 4,  
8 and we noticed our intention through the NIT to issue a Decision After Reconsideration rescinding the  
9 WCJ's February 12, 2014 Finding of Fact 4, and returning the case to the WCJ for further proceedings  
10 and issuance of an award of applicant's attorney's fees pursuant to Labor Code section 5814.5.

11 On July 14, 2014, we received defendant's response and objection to the NIT. In that response  
12 defendant argues that applicant waived any claim for attorney's fees under Labor Code section 5814.5  
13 because that section was not specifically identified by him at the trial level as a basis for awarding fees.  
14 While it is true that a party's failure to raise an issue may result in waiver of the issue, it cannot be said  
15 that applicant waived the issue of attorney's fees in this case because "Attorney fees" is expressly  
16 identified in the December 11, 2013 Minutes of Hearing as the first issue to be addressed by the WCJ and  
17 it is identified as an issue by applicant in his petition for reconsideration. The problem with applicant's  
18 request for attorney's fees is not his failure to timely assert a claim for them, but his failure to cite Labor  
19 Code section 5814.5 as a basis for awarding them. Thus, the substantive issue of attorney's fees has not  
20 been waived by applicant.

21 It has long been recognized that a grant of reconsideration has the effect of causing the whole  
22 subject matter to be reopened for further consideration and determination. (*Great Western Power Co. v.*  
23 *Industrial Acc. Com. (Savercool)* (1923) 191 c 724, 729 [10 I.A.C. 322]; *State Comp. Ins. Fund v.*  
24 *Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98; *Pasquotto v.*  
25 *Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 230, fn. 7 (Appeals Board en banc).) This means that  
26 once reconsideration is granted, the Appeals Board has full power to make new and different findings on  
27 issues presented for determination at the trial level, even with respect to issues not raised in the petition

1 for reconsideration. (*Ibid*; cf. *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18  
2 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co, v. Industrial Acc. Com.* (Sowell) (1943) 58 Cal.App.2d  
3 262, 266-267 [8 Cal.Comp.Cases 79].)

4 Having determined that applicant's claim for attorney's fees has merit as discussed in the NIT, we  
5 afforded defendant an opportunity to be heard on our noticed intention to rescind the WCJ's February 12,  
6 2014 Finding of Fact 4 and return the case to the trial level for determination of the issue pursuant to  
7 Labor Code section 5814.5. We do not accept defendant's objection to the NIT that applicant waived his  
8 claim for attorney's fees by citing Labor Code section 5813 in support of the claim instead of Labor  
9 Code section 5814.5.

10 Accordingly, we proceed as noticed in the NIT by rescinding the WCJ's February 12, 2014  
11 Finding of Fact 4 and entering a new finding that there is a basis for awarding fees pursuant to Labor  
12 Code section 5814.5. The case is returned to the trial level for further proceedings and issuance of an  
13 award of applicant's attorney's fees pursuant to Labor Code section 5814.5 if the parties are unable to  
14 informally adjust the amount themselves.

15 For the foregoing reasons,

16 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals  
17 Board that the February 12, 2014 Finding of Fact 4 of the workers' compensation administrative law  
18 judge is **RESCINDED** and the following is **SUBSTITUTED** in its place:

19 **FINDINGS OF FACT**

20 \*\*\*\*

21 4. There is a basis for awarding applicant reasonable attorney's fees pursuant to Labor Code  
22 section 5814.5, with the exact amount of the attorney's fees to be determined by a workers'  
23 compensation administrative law judge if the parties are unable to informally adjust the amount between  
24 them.

25 ///

26 ///


27 ///

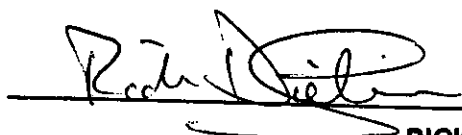
1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'  
2 Compensation Appeals Board that the case is RETURNED to the trial level for further proceedings and  
3 decision by the workers' compensation administrative law judge as appropriate in accordance with this  
4 decision.

5 WORKERS' COMPENSATION APPEALS BOARD

6  
7   
8 RONNIE G. CAPLANE

9 I CONCUR,

10  
11  
12   
13 FRANK M. BRASS

14  
15   
16 DEPUTY  
17 RICK DIETRICH



18 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

19 SEP 09 2014

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 JOSE JUAREZ  
24 MANUEL RODRIGUEZ  
25 TROVILLION, INVEISS & DEMAKIS

26 JFS/abs

27 JUAREZ, Jose

1 **WORKERS' COMPENSATION APPEALS BOARD**  
2 **STATE OF CALIFORNIA**  
3

4 **JOSE JUAREZ,**

5 *Applicant,*

6 *vs.*

7 **WATKINS MANUFACTURING**  
8 **CORPORATION, Permissibly Self-Insured,**

9 *Defendant.*

Case No. ADJ994369 (SDO 0274313)

**NOTICE OF INTENTION  
TO RETURN CASE TO  
TRIAL LEVEL FOR DETERMINATION  
OF ATTORNEY'S FEES  
PURSUANT TO LABOR CODE  
SECTION 5814.5 AS PART OF  
DECISION AFTER RECONSIDERATION**

10  
11 We earlier granted applicant's petition for reconsideration of the February 12, 2014 Findings and  
12 Award of the workers' compensation administrative law judge (WCJ), who found that applicant is  
13 entitled to medical mileage and parking expense reimbursement in the total amount of \$151.19, plus a  
14 10% penalty of \$15.12 against that amount pursuant to Labor Code section 5814.<sup>1</sup> The WCJ further  
15 found in Finding of Fact 4 that, "There is no basis to award an attorney's fee."

16 It is admitted that applicant sustained cumulative industrial injury to his pulmonary system and  
17 upper back while working for defendant as a foam core assembler during the period ending January 22,  
18 1999.

19 Applicant contends that the WCJ should have sanctioned defendant and awarded attorney's fees  
20 pursuant to section 5813 in addition to ordering reimbursement and awarding the 10% penalty.

21 An answer was not received. The WCJ provided a Report and Recommendation on Petition for  
22 Reconsideration (Report) recommending that reconsideration be denied.

23 ///

24 ///

25  
26 <sup>1</sup> Further statutory references are to the Labor Code.  
27

1 Based upon our initial review of applicant's petition and the record in this case, it appears that an  
2 award of attorney's fees is appropriate, but that the award should be made pursuant to section 5814.5,  
3 which provides in full as follows:

4 "When the payment of compensation has been unreasonably delayed or  
5 refused subsequent to the issuance of an award by an employer that has  
6 secured the payment of compensation pursuant to Section 3700, the appeals  
7 board *shall*, in addition to increasing the order, decision, or award pursuant  
8 to Section 5814, award reasonable attorneys' fees incurred in enforcing the  
9 payment of compensation awarded." (Emphasis added.)

10 The WCJ's February 12, 2014 award of a penalty pursuant to section 5814 is based upon his  
11 determination that "compensation has been unreasonably delayed or refused" as set forth in section  
12 5814(a) and as discussed in his Report. No party sought reconsideration of the amount of the penalty and  
13 the WCJ's award is a final decision concerning that issue.<sup>2</sup> However, the WCJ further states in his  
14 February 12, 2014 Finding of Fact 4 that, "There is no basis to award an attorney's fee." This shows that  
15 the WCJ did not consider applying section 5814.5, which provides that the Appeals Board "shall" award  
16 reasonable attorneys' fees incurred in enforcing payment of compensation awarded.

17 The WCJ's lack of sua sponte application of section 5814.5 is not reversible error per se because  
18 applicant did not specifically identify a claim under section 5814.5 for fees as an issue to be determined  
19 at the December 11, 2013 trial. However, the Minutes of Hearing do expressly identify "attorney's fees"  
20 as an issue to be determined by the WCJ, and applicant through the petition seeks to recover attorney's

21 <sup>2</sup> Section 5814 subdivisions (a) and (b) provide as follows:

22 "(a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of  
23 an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten  
24 thousand dollars (\$10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion  
25 to accomplish a fair balance and substantial justice between the parties.

26 "(b) If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this  
27 section, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent  
of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused. This  
self-imposed penalty shall be in lieu of the penalty in subdivision (a)..."

The WCJ does not explain why he found 10% to be the appropriate penalty in light of section 5814(a), which authorizes a  
penalty of up to 25%. However, he correctly notes in his Report that applicant does not challenge the penalty amount in his  
petition.

1 fees as discussed in the Report. This leads us, along with our consideration of the record and the law, to  
2 conclude that an award of fees is justified under section 5814.5, and we notice our intention to issue a  
3 Decision After Reconsideration rescinding the WCJ's February 12, 2014 Finding of Fact 4, and returning  
4 the case to the WCJ for further proceedings and issuance of an award of applicant's attorney's fees  
5 pursuant to section 5814.5.

6 In order to assure that the parties are fully apprised of our intention to return the case to the WCJ  
7 for a determination of attorney's fees pursuant to section 5814.5, and to provide them with a fair  
8 opportunity to respond, we notice our intention as set forth below. The parties may present written  
9 response or objection to the Workers' Compensation Appeals Board within twenty (20) days of the date  
10 this notice is served. Thereafter, we will issue a final Decision After Reconsideration.

11 For the foregoing reasons,

12 **IT IS ORDERED** that the following Notice Of Intention is given:

13 **NOTICE OF INTENTION**

14 **NOTICE OF INTENTION** is hereby given that the Workers' Compensation Appeals Board will  
15 issue a Decision After Reconsideration rescinding the February 12, 2014 Finding of Fact 4 of the  
16 workers' compensation administrative law judge and returning the case to the trial level for further  
17 proceedings and a decision by the workers' compensation administrative law judge of the attorney's fees  
18 to be awarded applicant's attorney pursuant to Labor Code section 5814.5 unless good cause is shown in  
19 writing why we should not to take those actions within **twenty (20)** days after the date of service of this  
20 Notice of Intention.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 IT IS FURTHER ORDERED that pending issuance of a Decision After Reconsideration any  
2 and all correspondence, objections, motions, requests, and communications shall be filed in paper format  
3 in writing (not e-filed or in electronic format) with the Workers' Compensation Appeals Board, P.O.  
4 Box 429459, ATTENTION: Office of the Commissioners, San Francisco, CA 94142-9459, and not  
5 with any local office.

6 WORKERS' COMPENSATION APPEALS BOARD

7  
8   
9 RONNIE G. CAPLANE

10 I CONCUR,

11  
12  
13 

14 FRANK M. BRASS

15  
16  DEPUTY  
17 RICK DIETRICH



18  
19 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

20  
21 JUN 19 2014

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

24 JOSE JUAREZ  
25 MANUEL RODRIGUEZ  
26 TROVILLION, INVEISS & DEMAKIS

27 JFS/abs

JUAREZ, Jose