

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

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4                                   **Case No. ADJ7527243**

5                                   **LEANNE FIORENTINO,**

6                                   *Applicant,*

7                                   **vs.**

8                                   **ALLAN HANCOCK COLLEGE, Permissibly**  
9                                   **Self-Insured, Administered by WORKERS'**  
10                                   **COMPENSATION ADMINISTRATORS,**

11                                   *Defendants.*

12                                   **OPINION AND ORDER**  
13                                   **GRANTING RECONSIDERATION**  
14                                   **AND DECISION AFTER**  
15                                   **RECONSIDERATION**

16                                   Defendant, Allan Hancock College, permissibly self-insured, seeks reconsideration of the  
17 Findings and Award, August 12, 2011, in which a workers' compensation administrative law judge  
18 (WCJ) found defendant unreasonably delayed payment of applicant's temporary disability benefits and  
19 imposed a penalty of \$4,701.16, pursuant to Labor Code section 5814.

20                                   Defendant contests the award of a penalty, contending there was no unreasonable delay in  
21 payment of applicant's temporary disability indemnity where it was required to incorporate applicant's  
22 benefits into her regular paycheck as part of a salary continuation plan. Applicant has not filed an answer  
23 to defendant's petition.

24                                   Following our review of the record, and for the reasons set forth below, we shall grant  
25 reconsideration to reverse the Findings and Award.

26                                   **I.**

27                                   By Findings and Award issued May 19, 2011, applicant was found to have sustained an industrial  
cumulative trauma injury to her psyche over the period April 9, 2009 through April 9, 2010, while  
employed by Allan Hancock College, resulting in continuing temporary disability beginning April 9,  
2010.

                                  Defendant's claims adjuster, Workers' Compensation Administrators, informed applicant by  
letter dated May 24, 2011, that she would be receiving the temporary disability benefits awarded in the

1 May 19, 2011 Findings and Award through her regular paycheck.

2 A payment for temporary disability benefits will be included in your  
3 regular paycheck since you are receiving salary continuation from your  
4 employer pursuant to the California Education Code and any applicable  
5 union contract with your employer. Your temporary disability benefits after  
6 May 6, 2011 will be paid directly to you because you exhausted all your  
7 salary continuation benefits as of May 6, 2011. Details of the payment are  
8 contained in the attached "Indemnity Payment History"

9 Ms. Holly Barrett of Allan Hancock College subsequently informed applicant by letter dated May  
10 27, 2011, that her "available paid leave is exhausted on May 6, 2011. Your official date to return to work  
11 was May 7, 2011. However, according to our records, you are currently temporarily disabled . For this  
12 reason you have been placed on a 39-month disability re-employment list as of May 7, 2011."

13 On June 21, 2011, defendant's claims adjuster informed applicant:

14 Allan Hancock College has advised that your salary continuation benefits  
15 will be ending on June 21, 2011 and not May 6, 2011 as was previously  
16 believed. Therefore, we have paid an additional \$5,513.17 in temporary  
17 disability benefits to the College for the period of May 7, 2011 through  
18 June 21, 2011. The temporary disability will be included in your salary  
19 continuation benefits paid by the College.

20 The College will be sending you a separate letter with an explanation of  
21 your salary continuation benefits. It is my understanding the College will  
22 be issuing you payment of your salary continuation benefits on June 30,  
23 2011, which is the first payroll period after issuance of the Findings and  
24 Award, where your check could be issued by the College.

25 It is anticipated you will have some permanent disability as a result of your  
26 work injury. The \$4,674.2 in temporary disability benefits we have paid  
27 directly to you for the period of May 7, 2011 to June 14, 2011 will be  
28 applied to your permanent disability benefits since the temporary disability  
29 we paid directly to the College will be included in your salary continuation  
30 benefits from the College.

31 Your weekly temporary disability benefits remain at \$838.96. Your next  
32 temporary disability check will be issued on June 28, 2011 in the amount  
33 of \$838.96 for the period of June 22, 2011 to June 28, 2011. Thereafter  
34 your checks will be issued every two weeks on Tuesday until your  
35 condition has reached maximum medical improvement (MMI) or you have  
36 been released to return to work.

37 Applicant had apparently disputed defendant's calculations and Ms. Barrett sent applicant a  
38 revision of the calculation of her salary continuation benefits on June 22, 2011. She informed applicant  
39 that due to the finding of industrial injury, her previously exhausted leave benefits, including sick leave,

1 vacation and comp time. would be reinstated and recalculated so that it could be used to cover the  
2 difference between her temporary disability benefits and her salary.

3 Please note that while you are receiving salary continuation benefits, your  
4 temporary disability benefits are paid to Allan Hancock College and  
5 incorporated into your salary continuation benefits. Your salary  
continuation benefits will be paid on the your next regularly scheduled pay  
period which is 06/30/2011.

6 The matter came on for hearing on July 6, 2011, on applicant's petition for penalties for  
7 defendant's delay in payment of her temporary disability benefits. The matter was submitted on the  
8 parties' trial briefs. Defendant made the following offer of proof as to the testimony of Holly Barrett:

9 That a Findings and Award issued May 19th, 2011, and was received at the  
10 employer prior to the cutoff date of May 23rd, 2011. Supervisor approval  
11 was required. The next payroll cutoff was June 23rd, 2011 for the June 30,  
12 2011 payroll. Payments are issued on standard dates. The payroll is  
13 handled by the Santa Barbara Education Office. There are no payroll  
14 checks at Hancock College. All requests are directed through the Santa  
Barbara Education Office and are mailed from the Santa Barbara office on  
the date that the payroll period ends. The final calculations were computed  
after June 15th, 2011 at the applicant's request which resulted in the June  
22nd letter and check.

15 A Findings and Award issued on August 12, 2011, in which the WCJ concluded defendant  
16 unreasonably delayed payment of applicant's temporary disability benefits, and imposed a penalty in the  
17 amount of \$4,701.16, on the delayed payment of \$47,101.61.

## 18 II.

19 As explained in the WCJ's Opinion on Decision, applicant's salary continuation payment on  
20 June 30, 2011, covering the period April 9, 2010 through May 6, 2011, was unreasonably delayed  
21 because it was not incorporated into applicant's next regular paycheck on May 31, 2011. The WCJ found  
22 the defendant's reason for delaying payment until June 30, 2011, due to the time it took to calculate the  
23 applicant's benefits under the applicable provisions of the Education Code, to be unreasonable.

24 Labor Code section 5814 provides in relevant part:

25 (a) When payment of compensation has been unreasonably delayed or  
26 refused, either prior to or subsequent to the issuance of an award, the  
27 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.

1       Therefore, under Subsection (a), upon a finding of unreasonable delay, the amount of a penalty is  
2 to be calculated on the amount of the actual payment which has been unreasonably delayed or refused,  
3 and the WCJ shall have discretion to impose a penalty up to 25 percent of the delayed payment or up to  
4 ten thousand dollars (\$10,000.00), whichever is less.

5       The only satisfactory excuse for a delay in the payment of a benefit is "genuine doubt from a  
6 medical or legal standpoint as to liability for [the] benefit," and the burden is upon the employer to  
7 present substantial evidence upon which a finding of such doubt may be based. (*Kerley v. Workers'*  
8 *Comp. Appeals Bd.* (1971) 4 Cal.3d 223, at p. 230 [36 Cal.Comp.Cases 152, at 157], see also, e.g., *Berry*  
9 *v. Workers' Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381, 383 [34 Cal.Comp.Cases 507, 508-509];  
10 *Bekins v. Workers' Comp. Appeals Bd. (Garner)* (1980) 103 Cal.App.3d 675, 681-683 [45  
11 Cal.Comp.Cases 256, 258].)

12       The issue of whether a delay or a refusal to pay a benefit is "unreasonable" is a question of fact to  
13 be resolved by the Board. (Lab. Code, §5814; see, also, *Gallamore v. Workers' Comp. Appeals Bd.*  
14 (1979) 23 Cal.3d 815, 823 [44 Cal.Comp.Cases 321, 325]; *Kampner v. Workers' Comp. Appeals Bd.*  
15 (1978) 86 Cal.App.3d 376, 383 [43 Cal.Comp.Cases 1198, 1204]; *Laucirica v. Workers' Comp. Appeals*  
16 *Bd.* (1971) 17 Cal.App.3d 681, 684 [36 Cal.Comp.Cases 1283, 1285].) Each case must be judged on its  
17 own facts as to whether the delay was reasonable or not. (*Kampner, supra.* 86 Cal.App.3d at pp. 380,  
18 384 [43 Cal.Comp.Cases at 1201, 1204]; accord: *Smith v. Workers' Comp. Appeals Bd.* (1986) 186  
19 Cal.App.3d 1451, 1456 [51 Cal.Comp.Cases 520, 524].)

20       We do not agree that defendant's delay was unreasonable.

21       Defendant provided evidence that the time to accurately calculate and issue payment of  
22 applicant's temporary disability benefits through her regular paycheck was based upon cut-off dates  
23 imposed by the Santa Barbara County Education Office. We see no basis for concluding, as indicated in  
24 the WCJ's opinion, that the employer's training or staff conduct in calculating applicant's benefits were  
25 based upon fundamental errors. As the evidence indicates that payment was to be made through the  
26 employee's regular paycheck, the cut-off date for issuance of a check came almost immediately upon  
27 receipt of the award. That the employer took several days to make the calculation to integrate applicant's

1 temporary disability benefits with her salary continuation benefits in this case was not unreasonable.

2 Accordingly, we shall grant defendant's petition for reconsideration and will reverse the WCJ's  
3 finding that defendant unreasonably delayed payment of applicant's temporary disability benefits.

4 For the foregoing reasons.

5 **IT IS ORDERED** that the August 31, 2011 Petition for Reconsideration be, and hereby is.  
6 **GRANTED.** and as our Decision After Reconsideration, the Findings and Award, issued August 12,  
7 2011 is **AMENDED** as follows:

8 **FINDING OF FACT**

9 Defendant, Allan Hancock College, did not unreasonably delay payment of applicant's temporary  
10 disability benefits.

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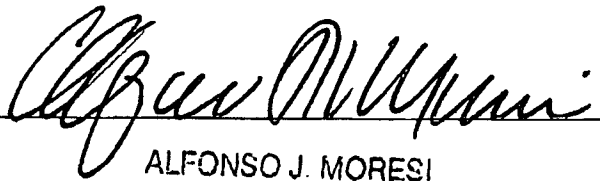
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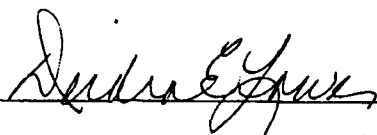
ORDER

Applicant's petition for penalty is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

  
ALFONSO J. MORESI

I CONCUR,



LEANNE FIORENTINO  
CONCURRING, BUT NOT SIGNING



FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 27 2011

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

LEANNE FIORENTINO  
GOLDMAN, MAGDALIN & KRIKES, LLP



SV/jp

FIORENTINO, Leanne