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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

REBECCA GAGE,

Applicant,

vs.

**COUNTY OF SACRAMENTO, permissibly
self-insured,**

Defendant.

Case No. ADJ8010054
(Sacramento District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

DOCUMENT #1
BEGINS HERE

→ On October 29, 2015, the panel received defendant's petition for removal as a petition for reconsideration and granted reconsideration of the August 6, 2015 Findings Of Fact And Order of the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that disability pension advances paid under Labor Code section 4850.4 "constitute 'compensation' pursuant" to Labor Code section 3207, and that the penalty provisions of Labor Codes section 5814 apply when there is unreasonable delay or denial in payment of those advances.¹

It is admitted that applicant sustained industrial injury to her lumbar spine while employed by the County of Sacramento (County) as a deputy sheriff on September 14, 2011.

Defendant contends that the WCJ erred in finding that disability pension advances pursuant to section 4850.4 are "compensation" under section 3207, and further contends that the unreasonable delay or denial of payment of such advances is not subject to a section 5814 penalty.

An answer was received from applicant.

¹ Further statutory references are to the Labor Code unless otherwise stated. Section 3207 provides in full as follows: " 'Compensation' means compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence."

Section 5814(a) provides in full 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."

1 The WCJ provided a Report And Recommendation On Petition For Removal (Report)
2 recommending that removal be denied.

3 The WCJ's August 6, 2015 Findings Of Fact And Order is reversed as the Decision After
4 Reconsideration. Advances of disability retirement benefits pursuant to section 4850.4 are not equivalent
5 to regular workers' compensation benefits, but are obligations of the employer and the employer's
6 retirement system that are administered through a process apart from workers' compensation.² For these
7 reasons, a delay or denial of payment of such advances is not subject to a section 5814 penalty.

8 BACKGROUND

9 As shown by the August 3, 2015 Minutes of Hearing and Summary of Evidence (MOH),
10 applicant admittedly sustained industrial injury to her low back while employed by the County as a
11 deputy sheriff during the cumulative period through September 14, 2011. (MOH, 2:4-6.) Her workers'

12 ² Section 4850.4 provides in full as follows: "(a) A city, county, special district, or harbor district that is a member of the
13 Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los
14 Angeles City Employees' Retirement Systems, shall make advanced disability pension payments in accordance with Section
15 4850.3 unless any of the following is applicable: (1) After an examination of the employee by a physician, the physician
determines that there is no discernable injury to, or illness of, the employee. (2) The employee was incontrovertibly outside
the course of his or her employment duties when the injury occurred. (3) There is proof of fraud associated with the filing of
the employee's claim.

16 (b) Any employer described in subdivision (a) who is required to make advanced disability pension payments, shall make the
17 payments commencing no later than 30 days from the date of issuance of the last disbursed of the following: (1) The
employee's last regular payment of wages or salary. (2) The employee's last payment of benefits under Section 4850. (3) The
employee's last payment for sick leave.

18 (c) The advanced disability payments shall continue until the claimant is approved or disapproved for a disability allowance
19 pursuant to final adjudication as provided by law.

20 (d) An employer described in subdivision (a) shall be required to make advanced disability pension payments only if the
employee does all of the following: (1) Files an application for disability retirement at least 60 days prior to the payment of
benefits pursuant to subdivision (a). (2) Fully cooperates in providing the employer with medical information and in attending
21 all statutorily required medical examinations and evaluations set by the employer. (3) Fully cooperates with the evaluation
process established by the retirement plan.

22 (e) The 30-day period for the commencement of payments pursuant to subdivision (b) shall be tolled by whatever period of
23 time is directly related to the employee's failure to comply with the provisions of subdivision (d).

24 (f) After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange
for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision.
The repayment plan shall take into account the employee's ability to repay the advanced disability payments received. Absent
25 an agreement on repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an
independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the
26 repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced."

27 Section 4850.3 in turn provides in pertinent part as follows: "A city, county...may make advanced disability pension
payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability
allowance..."

1 compensation claim was addressed by entry of a stipulated award as approved by the WCJ on July 29,
2 2014. (*Id.* 2:12-13.)

3 On March 6, 2015, applicant applied to the Sacramento County Employees' Retirement System
4 (SCERS) for a service-connected disability retirement, and the application was acknowledged by SCERS
5 on June 3, 2015. (MOH, 2:15, 21-22.) On July 2, 2015, the County initiated payment of disability
6 retirement advances to applicant pursuant to section 4850.4. (*Id.* 3:3-4.)

7 Applicant claimed that the County's delay in initiating disability retirement advances entitles her
8 to recover a penalty pursuant to section 5814, and that sole issue was tried before the WCJ on August 3,
9 2015, with the issue of penalties deferred. (MOH, 4:2-4.)

10 In his August 6, 2015 decision, the WCJ found that disability retirement advances pursuant to
11 section 4850.4 are "compensation" as described in section 3207, and for that reason an unreasonable
12 delay in making such advances is subject to a penalty under section 5814. The WCJ explains his
13 reasoning and responds to defendant's contentions in his Report by quoting from his Opinion on Decision
14 and otherwise as follows:

15 In the Opinion on Decision, the undersigned noted:

16 The question becomes whether the delayed advanced
17 disability pension payments constitute 'compensation' for
purposes of Labor Code § 5814...

18 Labor Code §3207 falls within Division 4 of the Labor
Code. Labor Code §4850.4 also falls within Division 4 of
19 the Labor Code. Moreover, Labor Code §4850.4
undeniably confers a specific benefit upon an injured
20 employee who has filed an application for an industrial
disability retirement. Indeed, [Section 4850.4 'creates a
21 mandatory obligation on the employer's part to make
payments to an injured employee. The fact that Workers'
22 Compensation Appeals Board (WCAB) has no jurisdiction
over the injured workers' eligibility for receiving the
23 underlying industrial disability retirement does not negate
the benefit that is specifically conferred by [section] 4850.4.
24 Accordingly, it is determined that Labor Code [Section
5814 does apply to an employer's unreasonable failure to
25 timely make payments pursuant to Labor [Code section]
4850.4.

26 The Opinion on Decision attempted to carefully explain why the advanced
27 disability pension payments mandated by Labor Code §4850.41 constitute
'compensation' as that term is defined by [section] 3207. There can be
little dispute, [section] 4850.4 confers a benefit on the injured employee.

1 There is no question, [section] 4850.4 falls within Division 4 of the Labor
2 Code. It follows, therefore, that advanced disability pension payments
3 constitute 'compensation' and are subject to [section] 5814 penalties if
4 unreasonably delayed.

5 Defendant argues that disability pension payments are subject to the
6 County Employee's Retirement Law of 1937 and therefore do not
7 constitute 'compensation' for workers' compensation purposes. While the
8 entitlement to the underlying retirement benefit is governed by the 1937
9 Act and while the WCAB does not have jurisdiction over the entitlement to
10 the underlying benefit or, for that matter, the underlying benefit itself, there
11 is a significant distinction between the underlying pension benefit and the
12 obligation to pay advanced disability pension payments mandated by
13 [section] 4850.4.

14 Advanced disability pension payments are intended to cover a public safety
15 officer during the period of time that his or her retirement application is
16 pending. It could be that the officer is permanent and stationary and the
17 permanent disability has all been paid out. But for these advanced
18 disability pension payments, the officer would have no way of paying for
19 food or housing. These advanced payments are critical to the injured safety
20 officer's well-being during the period of time that it takes for the retirement
21 application to get processed.

22 Section 4 of Article XIV of the California Constitution vests the legislature
23 with the plenary power to create a complete system of workers'
24 compensation. This section specifies that a complete system of workers'
25 compensation includes adequate provisions for the comfort, health and
26 safety, and general welfare for all workers. Pursuant [to] this plenary
27 power, the Legislature adopted [section] 4850.4. Pursuant to [section]
3201, these payments are essential to the protection of a certain class of
injured workers.

Defendant argues 'disability pension advancements cannot be awarded to
an employee by the Workers' Compensation Board'. Defendant cites no
authority for this proposition. Then defendant contends, 'If the Workers'
Compensation Board is not vested with the jurisdiction to award disability
pension advancements under Labor Code §4850.4, it would be counter-
intuitive for the Workers' Compensation Board to have jurisdiction to
penalize an employer for any delay or denial of Labor Code §4850.4
disability pension advancements'. The question, however, is not whether
the WCAB can 'award' these benefits. The question is whether the WCAB
has jurisdiction to enforce a provision under Division 4 of the Labor Code
that makes these payments mandatory.

That is really the fundamental flaw in defendant's argument. While it is
true that [section] 4851 does not specifically address [section] 4850.4
payments, this section also does not exclude those payments from the
WCAB's jurisdiction. [Section] 4851, moreover, deals specifically with
[section] 4850 benefits and not advanced disability pension payments.

In conclusion, Labor Code [section] 4850.4 creates a specific benefit for
the injured worker. That benefit is the timely payment of advanced
disability pension payments. This 'benefit' falls under Division 4 of the
Labor Code. [Section] 3207 defines 'compensation' as all benefits
provided for under this Division. Labor Code §5814 applies to an
unreasonable delay in the payment of 'compensation'. As such, a delay in

1 the payment of [section] 4850.4 benefits would be subject to a [section]
2 5814 penalty if unreasonably delayed or denied. (Footnote omitted,
3 bracketed material substituted.)

4 DISCUSSION

5 Section 4850.4 provides for advanced payment of disability retirement benefits to certain public
6 safety employees who are covered by the Public Employees' Retirement System (PERS), the County
7 Employees Retirement Law of 1937, or the Los Angeles City Employees' Retirement System. (Footnote
8 2, *supra*.) The provision of that special benefit for those public safety employees is similar to the special
9 payments provided for public safety employees under section 4850.

10 Earlier panels of the Appeals Board found that delayed payment of the special benefits under
11 section 4850 is not subject to a penalty under section 5814.³ (*Johnson v. Workmens' Comp. Appeals Bd.*
12 (1971) 36 Cal.Comp.Cases 218 (writ den.); *Morgan v. Workmens' Comp. Appeals Bd.* (1971) 36
13 Cal.Comp.Cases 482 (writ den.)) This result was reached notwithstanding that section 4851 provides
14 the Appeals Board with "jurisdiction to award and enforce payment of these [section 4850] benefits
15 pursuant to Part 4," and further provides that the Appeals Board shall determine whether or not the
16 disability referred to in section 4850 arose out of and in the course of duty, when the disability
17 commenced and ceased, and the amount of section 4850 benefits to which the employee is entitled.⁴

18 Moreover, the payment of disability retirement advances is *not* the payment of workers'
19 compensation benefits. In this way, section 4850.4 differs from the statutory provision for payment of
20

21 ³ Section 4850 provides in pertinent part as follows: "Whenever any person listed in subdivision (b), who is employed on a
22 regular, full-time basis, and is disabled, whether temporarily or permanently, by injury or illness arising out of and in the
23 course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or
24 district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance
allowance payments, if any, that would be payable under this chapter, for the period of the disability, but not exceeding one
year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability
pension payments, or advanced disability pension payments pursuant to Section 4850.3..."

25 ⁴ Section 4851 provides in full as follows: "The governing body of any city, county, or city and county, in addition to anyone
26 else properly entitled, including the Public Employees' Retirement System, may request the appeals board to determine in any
27 case, and the appeals board shall determine, whether or not the disability referred to in Section 4850 arose out of and in the
course of duty. The appeals board shall also, in any disputed case, determine when the disability commenced and ceased, and
the amount of benefits provided by this division to which the employee is entitled during the period of the disability. The
appeals board shall have jurisdiction to award and enforce payment of these benefits pursuant to Part 4 (commencing with
Section 5300)."

1 industrial disability leave (IDL) under Government Code section 19870(a) to certain state workers as
2 "temporary disability" for an industrial injury. This distinction was recognized by the Supreme Court
3 when it held in *State of California v. Workers' Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th 128
4 [61 Cal.Comp.Cases 325] (*Ellison*) that a section 5814 penalty could be imposed for unreasonable delay
5 in payment of IDL pursuant to Government Code section 19870(a) because IDL is a form of temporary
6 disability indemnity.

7 In holding that a section 5814 penalty could be imposed for unreasonable delay in payment of
8 IDL, the Court in *Ellison* concluded that because the WCAB has jurisdiction over temporary disability
9 indemnity it also had jurisdiction over IDL, notwithstanding that the statutory provision authorizing IDL
10 is contained in the Government Code, writing as follows:

11 In light of the specific applicability of the Workers' Compensation Act...to
12 the state..., we cannot view the scattered provisions regarding specific
13 classes of state employees as demonstrating a legislative purpose that other
14 provisions of the act are applicable to only those classes of state workers.
15 The initial definition of IDL as meaning [temporary disability] 'as defined
16 in Divisions 4 ... and 4.5' (Gov. Code, § 19870, subd. (a)) evidences an
intent to grant state workers the benefits of all of those provisions,
including the penalty provision in question which is contained in division
4. The WCAB unquestionably has jurisdiction over these provisions.
(*Ellison, supra*, 44 Cal.App.4th at 146;

17 The *Ellison* Court's conclusion that IDL is temporary disability indemnity for workers'
18 compensation purposes was expressly recognized in *Brooks v. Workers' Comp. Appeals Bd.* (2008) 161
19 Cal.App.4th 1522, 1533-1534 [73 Cal.Comp.Cases 437], in which the Court of Appeal wrote as follows:

20 Although the court in *Ellison* relied on multiple grounds for reaching the
21 conclusion that the WCAB could award penalties based on the employee's
22 TD rate where the state did not provide any form of temporary disability
23 indemnity to its injured worker, we find the court's conclusion that IDL
24 constitutes temporary disability both necessary to the case and more
25 significantly, expressly set forth by Government Code section 19870,
26 subdivision (a)...The WCAB reached a similar conclusion to the present
27 case in *Salmon v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases
1042 (writ den.) [1534] (*Salmon*). In *Salmon*...the WCAB effectively
agreed with the WCJ's reasoning that IDL benefits are the same as TD for
purposes of applying the two-year limitation set forth in section 4656,
subdivision (c)(1). (*Salmon, supra*, 72 Cal.Comp.Cases at p. 1043.)
(*Brooks v. Workers' Comp. Appeals Bd., supra*, 161 Cal.App.4th at pp.
1533-1534

1 Similarly, in *Napa Valley Unified School District v. Workers' Comp. Appeals Bd. (Fineman)* 63
2 Cal.Comp.Cases 466 (writ den.), the Appeals Board panel upheld a section 5814 penalty for
3 unreasonable delay in paying the underlying temporary disability amount the applicant (a state employee)
4 would have received had the applicant not received IDL under Education Code section 44977 in lieu of
5 regular temporary disability benefits. (Cf. *California Ins. Guarantee Assn. v. Workers' Comp. Appeals*
6 *Bd. v. Workers' Comp. Appeals Bd. (Harris)* (2002) 67 Cal.Comp.Cases 171 (writ den.).)

7 Turning to the facts in this case, there is no regular workers' compensation benefit equivalent to
8 the disability retirement advances provided for certain public employees by section 4850.4. To the
9 contrary, entitlement to receive disability retirement benefits is governed by a separate statutory system
10 apart from workers' compensation, and the retirement system is administered by an independent
11 retirement board outside of the workers' compensation system. This distinction is recognized in section
12 4850.4(f) by its provisions for final adjudication of an employee's claim for disability retirement benefits
13 outside of the workers' compensation system, and for repayment of the benefits if the retirement
14 application is ultimately denied by the Retirement Board either by agreement with the agency or by "a
15 local agency administrative appeals remedy that includes an independent level of resolution to determine
16 a reasonable repayment plan." (Lab. Code, § 4850.4(f).) In addition, section 4850.4(f) authorizes the
17 local agency to initiate "litigation" to recover advanced payments if repayment is not made according to
18 a repayment plan.

19 The section 4850.4(f) provisions that exclude the WCAB from adjudicating the reimbursement of
20 overpaid disability retirement advances precludes the WCAB from exercising its exclusive jurisdiction
21 under section 5300. (See also, *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148 [52
22 Cal.Comp.Cases 27].) It also eliminates consideration of the extensive body of workers' compensation
23 law regarding the allowance of credit for overpayment of workers' compensation benefits. (See e.g.,
24 Lab. Code, 4909 [authorizing Appeals Board to allow credit for payments made during a time period
25 that there was not a legal obligation to do so]; *Maples v. Workers' Comp. Appeals Bd.* (1980) 111
26 Cal.App.3d 827 [45 Cal.Comp.Cases 1106]; *Appleby v. Workers' Comp. Appeals Bd.* (1994) 27
27 Cal.App.4th 184 [59 Cal.Comp.Cases 520]; *Ott v. Workers' Comp. Appeals Bd.* (1981) 118 Cal.App.3d

1 912 [46 Cal.Comp.Cases 545]; *Sea-Land Serv. v. Workers' Comp. Appeals Bd. (Lopez)* (1996) 14 Cal.4th
2 76 [61 Cal.Comp.Cases 1360]; *Hofer v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 277
3 (writ denied); *Johnson v. Workers' Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 587 (writ denied);
4 *California Indem. Ins. Co. v. Workers' Comp. Appeals Bd. (Estrella)* (2003) 68 Cal.Comp.Cases 233
5 (writ denied); *County of Sacramento v. Workers' Comp. Appeals Bd. (Stapp)* (1999) 64 Cal.Comp.Cases
6 788 (writ den.).)

7 By contrast, the Legislature has expressly provided for WCAB jurisdiction over other benefits
8 that are specially provided to certain categories of workers in lieu of regular workers' compensation
9 benefits. This is illustrated by section 4851, which extends WCAB jurisdiction to determinations
10 involving the provision of the enhanced temporary disability indemnity benefit provided certain public
11 employees under section 4850, albeit without the authority to impose a section 5814 penalty as discussed
12 above. No similar provision extends WCAB jurisdiction to section 4850.4 and jurisdiction should not be
13 inferred to cover payments that are administered under a separate system and are not equivalent to or
14 paid in lieu of a regular workers' compensation benefit.

15 The WCJ's August 6, 2015 decision is reversed.

16 For the foregoing reasons,

17 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
18 Board that the August 6, 2015 Findings Of Fact And Order of the workers' compensation administrative
19 law judge is **RESCINDED**, and the following is **SUBSTITUTED** in their place:

20 **FINDINGS OF FACT**

21 1. The stipulations of parties are incorporated herein as findings of fact:

22 a. Rebecca Gage, born or while employed on September 14, 2011, as a Deputy
23 Sheriff, Occupational Group 490, Sacramento, California, by the County of Sacramento, sustained injury
24 arising out of and in the course of her employment to her lumbar spine.

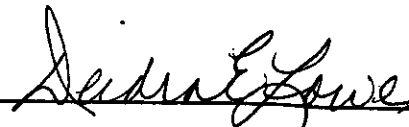
25 b. At the time of injury, the employer was permissibly self-insured.

26 c. The employee has been adequately compensated for all periods of temporary disability through
27 September 16, 2013.

1 2. The payments required by Labor Code section 4850.4 do not constitute "compensation" within
2 the meaning of Labor Code section 3207, and Labor Code section 5814 does not apply to an
3 unreasonable delay or denial of those payments.

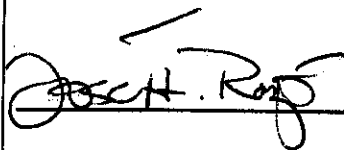
4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
5 Compensation Appeals Board that the case is **RETURNED** to the trial level.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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11 DEIDRA E. LOWE

12 **I CONCUR,**

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14 

15 **JOSÉ H. RAZO**

16 **I DISSENT (See Separate Dissenting Opinion),**

17
18 

19 **MARGUERITE SWEENEY**



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

22 **FEB 18 2016**

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

25 **REBECCA GAGE**
26 **MUSTAGNI HOLSTEDT**
27 **TWOHY DARNEILLE & FRYE**

JFS/abs

GAGE, Rebecca 

DISSENTING OPINION OF COMMISSIONER SWEENEY

I dissent. I would affirm the WCJ's August 6, 2015 decision for the reasons expressed in his Report, which is incorporated by reference herein, and for the reasons below.

"We begin with the familiar axiom that we must apply the plain language of the statute if it is unambiguous on its face." (*Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350], citing *Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1245.) The fundamental rule of statutory construction is to effectuate the Legislature's intent and "it is well-settled that we begin with its words because they generally provide the most reliable indicator of legislative intent...If the language is clear and unambiguous, there is ordinarily no need for judicial construction [and, therefore,] we presume the Legislature meant what it said and the plain meaning governs." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575, 578] [internal quotation marks omitted]; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289].)

Section 3207 plainly defines "compensation" as including "every benefit or payment conferred by this [Division 4] upon an injured employee." (*Italics added.*) Section 4850.4 is within Division 4 of the Labor Code as described in section 3207. Thus, the County is obligated to pay applicant the "compensation" due under section 4850.4 as conferred by Division 4 of the Labor Code, and the WCAB has jurisdiction to enforce that obligation. It makes no difference that disputes regarding claimed overpayments are adjudicated apart from the WCAB as provided in section 4850.4(f). To the contrary, the lack of any alternative for adjudicating an injured worker's entitlement to the benefit, while expressly providing such a process for disputes involving claimed overpayment, evidences an intention by the Legislature that the WCAB protect the injured worker by acting to assure that this item of compensation is timely paid.

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1 I would affirm the WCJ's decision.



WORKERS' COMPENSATION APPEALS BOARD


MARGUERITE SWEENEY, COMMISSIONER

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

10 **FEB 18 2016**

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

13 **REBECCA GAGE**
14 **MASTAGNI HOLSTEDT**
15 **TWOHY DARNEILLE & FRYE**

16 **JFS/abs** 

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

Case No. ADJ8010054

Applicant: REBECCA GAGE

Defendant: COUNTY OF SACRAMENTO

Workers' Compensation Administrative
Law Judge:
DUDLEY R. PHENIX

Date of Injury: Cumulative injury through
September 14, 2011.

**REPORT AND RECOMMENDATION ON
PETITION FOR REMOVAL**

DOCUMENT #3
BEGINS HERE



INTRODUCTION

Defendant has filed a timely, verified Petition for Removal. Defendant contests the undersigned's decision that Labor Code §5814 is an appropriate remedy for the unreasonable denial or delay in the payment of benefits under Labor Code §4850.4.

RELEVANT FACTS

Defendant's petition fairly sets forth the facts. As pointed out by defendant's petition, the only issue submitted for decision at the time of trial was whether Labor Code §5814 is an appropriate remedy for the failure to reasonably pay benefits under Labor Code §4850.4.

DISCUSSION

In the Opinion on Decision, the undersigned noted:

The question becomes whether the delayed advanced disability pension payments constitute "compensation" for purposes of Labor Code § 5814.

Labor Code §3207 defines compensation as follows:

"Compensation" means compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence (emphasis added).

Labor Code §3207 falls within Division 4 of the Labor Code. Labor Code §4850.4 also falls within Division 4 of the Labor Code. Moreover, Labor Code §4850.4 undeniably confers a specific benefit upon an injured employee who has filed an application for an industrial disability retirement. Indeed, §Section 4850.4 creates a mandatory obligation on the employer's part to make payments to an injured employee. The fact that Workers' Compensation Appeals Board (WCAB) has no jurisdiction over the injured workers' eligibility for receiving the underlying industrial disability retirement does not negate the benefit that is specifically conferred by §4850.4. Accordingly, it is determined that Labor Code §Section 5814 does apply to an employer's unreasonable failure to timely make payments pursuant to Labor §4850.4.

The Opinion on Decision attempted to carefully explain why the advanced disability pension payments mandated by Labor Code §4850.4¹ constitute "compensation" as that term is defined by §3207. There can be little dispute, §4850.4 confers a benefit on the injured employee. There is no question, §4850.4 falls within Division 4 of the Labor Code. It follows, therefore, that advanced disability pension payments constitute "compensation" and are subject to §5814 penalties if unreasonably delayed.

Defendant argues that disability pension payments are subject to the County Employee's Retirement Law of 1937 and therefore do not constitute "compensation" for workers' compensation purposes. While the entitlement to the underlying retirement benefit is governed by the 1937 Act and while the WCAB does not have jurisdiction over the entitlement to the underlying benefit or, for that matter, the underlying benefit itself, there is a significant distinction between the underlying pension benefit and the obligation to pay advanced disability pension payments mandated by §4850.4.

Advanced disability pension payments are intended to cover a public safety officer during the period of time that his or her retirement application is pending. It could be that the officer is permanent and stationary and the permanent disability has all been paid out. But for these advanced disability pension payments, the officer would have no way of paying for food or housing. These advanced payments are critical to the injured safety

¹ All further statutory references are to the Labor Code.

officer's well-being during the period of time that it takes for the retirement application to get processed.

Section 4 of Article XIV of the California Constitution vests the legislature with the plenary power to create a complete system of workers' compensation. This section specifies that a complete system of workers' compensation includes adequate provisions for the comfort, health and safety, and general welfare for all workers. Pursuant this plenary power, the Legislature adopted §4850.4. Pursuant to §3201, these payments are essential to the protection of a certain class of injured workers.

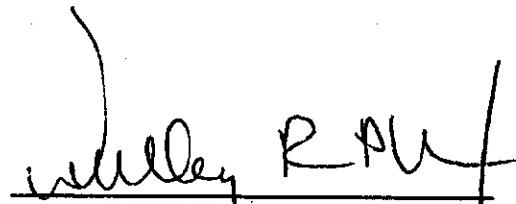
Defendant argues "disability pension advancements cannot be awarded to an employee by the Workers' Compensation Board". Defendant cites no authority for this proposition. Then defendant contends, "If the Workers' Compensation Board is not vested with the jurisdiction to award disability pension advancements under Labor Code §4850.4, it would be counter-intuitive for the Workers' Compensation Board to have jurisdiction to penalize an employer for any delay or denial of Labor Code §4850.4 disability pension advancements". The question, however, is not whether the WCAB can "award" these benefits. The question is whether the WCAB has jurisdiction to enforce a provision under Division 4 of the Labor Code that makes these payments mandatory.

That is really the fundamental flaw in defendant's argument. While it is true that §4851 does not specifically address §4850.4 payments, this section also does not exclude those payments from the WCAB's jurisdiction. §4851, moreover, deals specifically with §4850 benefits and not advanced disability pension payments.

In conclusion, Labor Code §4850.4 creates a specific benefit for the injured worker. That benefit is the timely payment of advanced disability pension payments. This "benefit" falls under Division 4 of the Labor Code. §3207 defines "compensation" as all benefits provided for under this Division. Labor Code §5814 applies to an unreasonable delay in the payment of "compensation". As such, a delay in the payment of §4850.4 benefits would be subject to a §5814 penalty if unreasonably delayed or denied.

RECOMMENDATION

The Petition should be denied.


DUDLEY R. PHENIX
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DRP: vw

Served by mail September 9, 2015 on the following:

By: V. White

V. White