

Significant Decision

The Board's en banc decision on the application of Labor Code § 5814 enacted by SB 899.

Myron Abney v Aera Energy; and Liberty Mutual Insurance Company
(Filed 12/08/04)
Workers Compensation Appeals Board
En Banc Decision
GRO 024430

Significance: The penalty under the newly enacted Labor Code § 5814 applies to all dates of injury, even when the underlying misconduct occurs *before* the statute's June 1, 2004, operative date. On the other hand, the conclusive presumption of subdivision (c), and the statute of limitations of subdivision (g), only apply after June 1, 2004.

Facts: In 2003, the Board found applicant sustained a cumulative injury ending September 21, 2000, and awarded temporary disability ("TD") from January 16, 2001, to date and continuing. The parties stipulated applicant's TD rate was maximum.

In 2004, applicant filed a petition for penalty under former Labor Code § 5814 alleging unreasonable delay in increasing his TD rate as required by Labor Code § 4661.5. On April 19, 2004, SB 899 was enacted, which first amended, and then added new Labor Code § 5814 that became operative on June 1, 2004. On July 26, 2004, a hearing was held on the penalty issue, and on August 5, 2004, the WCJ awarded a penalty. The amount of the penalty, however, was calculated in accordance with the newly enacted Labor Code § 5814, i.e., that the amount of the penalty is 25% of the delayed payment, less credit to defendants for amounts paid under Labor Code § 4650(d) on the same unreasonably delayed or refused benefit payment.

Newly aggrieved, applicant petitioned for reconsideration alleging it was error to apply the newly enacted Labor Code § 5814 to his case, because SB 899 does not contain a retroactivity clause, and because there is no evidence the Legislature intended the new penalty statute to apply to misconduct that occurred before June 1, 2004.

Discussion: Based on the language of statute, and on the stated purpose and intent of SB 899, as well as relevant case law, the Board concluded that the remedies provided by the revised Labor Code § 5814 apply as follows:

First, Labor Code § 5814 enacted by SB 899, and operative on June 1, 2004, *applies to misconduct that occurred prior to June 1, 2004*, where the finding of misconduct is made on or after June 1, 2004.

Second, as of June 1, 2004, upon approval of a C&R, or stipulations and orders, or upon submission of any issue for determination, *any accrued claims for penalty, regardless of whether penalty petitions have been filed, are conclusively presumed to have been resolved*, unless expressly excluded by the terms of the settlement document, or in the statement of issues. (Labor Code § 5814(c).)¹

Third, the statute of limitations in Labor Code § 5814 (g)—prohibiting actions to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due—applies to actions brought on or after June 1, 2004.²

Note: Currently, *Green v WCAB* (B171921), and *SCIF v WCAB (Singleton)* (B177217) are before the Court of Appeal, Second Appellate District, Division Eight. These cases include the issue of whether a penalty awarded before June 1, 2004, but not final because it was appealed, is affected by the enactment of SB899. On December 17, 2004, oral argument was held, and in both cases *Abney* was discussed. Hence, it is expected the court's decision will include whether it approves, or disapproves of *Abney*.

¹ Labor Code § 5814 (c) provides:

(c) Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.

² Labor Code § 5814(g) provides:

(g) Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due.