



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

August 2008

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# TAKING SHELTER IN ROUGH WATER

## The Safe Harbor Provision of Labor Code Section 5814

Labor Code Section 5814 (a) reads in part, “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 (\$10,000.00), whichever is less.”

It would be a misinterpretation to believe that only an unreasonable delay or refusal to pay compensation could trigger penalties under this section. An honest mistake followed by lack of quick remedial action may be enough to warrant penalties. The enactment of SB 899 altered Section 5814 by allowing for an increase of 15 percent in penalties for late payment of compensation falling under this section, thereby raising the penalty to 25 percent.

According to the August 5<sup>th</sup>, 2004 *en banc* decision of *Myron Abney vs. Aera Energy and Liberty Mutual Insurance Company* (2004) 69 CCC 1552, held that the newly enacted section applies to unreasonable delays or refusals to pay compensation, regardless of the date it occurred, where the finding of the unreasonable delay is made on or after June 1, 2004.

In order to determine whether liability will exist under Section 5814, it must be established whether there was a refusal to pay or an unreasonable delay in payment. Failure to pay compensation on a claim may constitute a refusal unless there is a good faith basis for the lack of payment. A more ambiguous term is “unreasonable” delay in payment of compensation or an award. This is where the saving grace of the safe harbor provision comes into play under Section 5814 (b), not only to allow for a reduction of the penalty down to 10 percent, but also to aid in setting guidelines for defining unreasonable delay.

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Labor Code Section 5814 (b) reads, “If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this 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.” It can be inferred by this section that the delay becomes unreasonable if it is discovered, yet remains unpaid until a petition for penalties is ultimately filed.

There has been misconception in reading Section (b) to mean that the late payment must be discovered by the *employer* for the reduced 10 percent penalty to be applicable. However, the Court of Appeal finally put this issue to rest in the August 15<sup>th</sup> 2006 decision of *New United Motors Manufacturing, Inc. vs. WCAB, and John Gallegos*, 71 CCC 1037, where it overruled the trial court’s finding that Subdivision (b) was inapplicable even though the 10 percent penalty was paid 47 days after the discovery, because the *Applicant* first discovered the potential violation. The court held that the statute does not limit its application to the event where the employer discovers a potential violation before the employee. In the court’s words, “Rather, the statute limits its application to the event where, as here, the employer discovers a potential violation *before the employee claims a penalty.*”

If the delay is made in paying an award and the error is not corrected by the time the employee files a claim for penalties under Section 5814, reasonable attorney fees incurred in enforcing the payment of compensation awarded can be granted by the court under Section 5814.5.

Courts are currently granting as reasonable fees hourly compensation in the range of \$250.00 to \$350.00 an hour. The rule of thumb in formulating any defense is to first assess whether or not the statute or law can be enforced. Fortunately for employers, Labor Code Section 5814 (g) imposes timelines and offers a statute of limitations defense by providing in part that, “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.” Formulating a defense will be best avoided in paying compensation due to an employee plus an additional self-imposed 10 percent penalty immediately upon discovery of the late payment, regardless of how the discovery was made.

*Article by Tina Asadi, Orange Office*

### **WCAB Weather Forecast: Slow and Grumpy**

Gov. Arnold Schwarzenegger temporarily cut the wages of state employees down to the federal minimum wage limit of \$6.55 per hour. Wage cuts will hit workers at the Division of Workers' Compensation and its related agencies, including Cal/OSHA as well as the California Department of Insurance. Combined with the pending “go live” of the EAMS (Electronic Adjudication Management System) project and the current experimentation with the new paperless system at the Board, WCAB litigation may be about to face the “perfect storm.”

Patience will undoubtedly become the new watchword for a while. We would expect to see a slower response to requests to set cases, requests for panel QME assignments in litigated cases, and a host of other services provided through the DIR and the WCAB system.

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## Speaking Of EAMS

Adjusters need to be aware that the WCAB is now asking for trial exhibits to be provided at, or in advance of, the Mandatory Settlement Conference and, to the extent possible, to be provided in a physical format amenable to scanning. The documents should not have holes punched in them, nor should they be stapled or tabbed. They will be scanned into the WCAB electronic database.

By August 25<sup>th</sup>, if EAMS “go live” remains on schedule, the documents will also have to have an official cover sheet and official document separators which are supposed to be available by that date. In the interim, we are providing a home-made coversheet identifying the exhibits we are mailing to the board or hand-carrying to the MSC.

As for records obtained by subpoena, we understand that each page in the record will either have to have a sequential page number or be Bates stamped so that the documents within the record can be appropriately designated and referenced for evidence. This has typically not been done by copy services because it usually entails an extra charge.

We sometimes run into situations where clients ask us to appear at a conference at the last minute. In these situations, the adjuster will have to either provide EAMS compliant exhibits to us in time for the conference or (preferably) advise us sufficiently in advance of a pending conference that our appearance is requested on their behalf, so that we can prepare the exhibits in the proper manner. Although not quite the rule yet, we envision

that when the new AD rules become law (scheduled for October) failure to have the exhibits properly submitted and scanned by the time of the MSC may prevent the defendant from having them entered in evidence.

***Forewarned is forearmed!***

## Sending Files Electronically

We are happy to accommodate our clients who prefer to send documents and files electronically. However, there may be some practical considerations of which you need to be aware:

- 1) Documents may not yet be filed electronically to the WCAB and it may be as much as a year before outside users (such as carriers and law firms) will be allowed to file electronically. Thus, for now, any documents transmitted to counsel electronically will have to be printed, duplicated, served, and filed on paper.
- 2) While the term “original documents” takes on a whole new meaning in this e-world, documents which will ultimately be submitted must be *unaltered* and “un-annotated.” In other words, no underlines, highlights, margin notes, etc. If you send an entire claims file to us on CD or DVD, we will need to be able to separate out unaltered documents from “originals.” Depending on the format provided, this could present additional challenges.
- 3) Parties and lien claimants will be able to specify the *form* of documents and notices they wish to receive (paper or electronic) and we expect that most outside users will, for various reasons,

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specify a demand for paper documents for the time being. Again, they will require the contents of files and documents sent to us electronically to be printed out and duplicated in most instances.

- 4) In a few rare instances we have had adjusters send us only part of a file, advising that they will only send counsel "what we think you need." We feel that this is dangerous practice as the more information your attorney has, the better he or she will be able to provide you with sound advice and expertise on how best to resolve the issues in your case. In addition, if it is determined in the course of litigation that there are discoverable documents in the possession of the adjuster which have been suppressed, it opens the carrier up to potential sanctions and fines. When it comes to providing information and documentation to your attorney, "when in doubt, send it out."
- 5) In a few instances we have had discs provided to us of documents exceeding 1500 pages. E-documents and files of this extraordinary size present, as you might imagine, some extra-ordinary challenges in terms of printing and distribution. We suggest that, if contemplating sending (or having your attorney service send) extraordinarily large documents on disc, that you give us a call in advance to discuss how best to handle the information.

## Have You Seen Our Website Lately?

Want to see who you are talking to? We invite you to visit us on the World Wide Web at [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com). There you will be able to view the photos and biographies of our attorneys and paralegals, review past newsletters, and keep up to speed with recent Firm developments. You will also have an opportunity to send us feedback including questions you would like addressed by our Education Committee. Give it a try!

## Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](mailto:Howard.Stevens@mcdermott-clawson.com) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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