

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

CASE NO. MON 0237492

JOE LEWIS,

Applicant,

vs.

CITY OF LOS ANGELES,

Defendant(s).

FINDINGS AND ORDER

LEGAL SERVICES BUREAU
By: DANIEL O. ESCAMILLA
Representatives for Blue Cross

PIERCE & WEISS
By: JEFFREY E. WEISS
Attorneys for Defendant

An application having been filed herein; all parties having appeared; and the matter having been regularly submitted, the Honorable **PAMELA W. FOUST**, Workers' Compensation Administrative Law Judge, finds and orders as follows:

FINDINGS OF FACT

1. Applicant obtained medical treatment reasonably required to cure or relieve from the effects of the injury herein in connection with the lien of Blue Cross, in the amount of \$6,553.9, payable to Legal Services Bureau on behalf of Blue Cross.
2. Defendant violated the provisions of Labor Code §4603.2 and failed to comply with an award and an order of the WCAB, such that Blue Cross is entitled to three ten percent penalties plus interest in connection with its lien claim filed in this matter.
3. Defendant is not liable to Blue Cross for a penalty under Labor Code §5814.

4. Defendant is not liable to Blue Cross for sanctions and costs under Labor Code §5813.

5. Defendant is not liable to Blue Cross for attorney's fees under Labor Code §5814.5

ORDER ALLOWING LIEN CLAIM

IT IS ORDERED that the lien of Blue Cross be, and it hereby is allowed in the in the sum of \$6,553.9 plus three ten percent penalties and interest.

DATE: 6/28/00



PAMELA W. FOUST
Workers' Compensation
Administrative Law Judge

Served on parties and interested lien claimants on the above date.


By: Ester Loanzon

CASE NO. MON 0237492

JOE LEWIS

v.

CITY OF LOS ANGELES

**WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:**

PAMELA W. FOUST

DATE OF INJURY:

12/31/97

OPINION ON DECISION

Background

On April 22, 1998, applicant filed an Application, designated MON 237492, alleging hypertension and headaches arising out of cumulative trauma ending December 31, 1997. The parties referred him to Dr. Miller, Agreed Medical Examiner in internal medicine, who performed an evaluation on August 25, 1998.

Blue Cross lien filed a lien in the amount of \$6,553.97 on January 19, 1999 with an attachment listing the names of the vendors, the dates of service, and the amount of the payment.

Dr. Miller's issued his report on February 4, 1999, expressing the opinion that applicant's hypertension was industrially related. On that same day, defendant's third party administrator objected to the Blue Cross lien on the basis that injury AOE/COE was in issue. Dr. Miller was deposed on behalf of defendant on April 28, 1999, but did not change his opinion.

On August 5, 1999, Stipulations With Request for Award were approved in MON 237492 finding that applicant sustained an injury consisting of hypertension and headaches. The following appeared in the Stipulations:

"5. Medical-legal expenses are payable by defendant as follows:
Dr. Martin Goldfarb \$2,199.89
Blue Cross \$6,553.97
Microstat \$147.19"

On January 5, 2000, Blue Cross filed a Declaration of Readiness to Proceed requesting a hearing on the issues of self-procured treatment and "penalties and interest as set forth in Labor Code Sections 4603.2(B) and 5814." A petition for penalties and sanctions was filed by the lien claimant on March 15, 2000.

The matter came on calendar for a lien trial on April 17, 2000. An order issued in the Minutes of Hearing pursuant to defendant's agreement that it would pay the lien plus interest on those items that it conceded to be industrially related. Blue Cross was also joined as a party applicant. Issues were framed and the trial was continued to May 18, 2000.

On May 18, 2000, the parties appeared. Defendant had not complied with the order of April 17, 2000 by making payment according to the terms of the order. Therefore, Blue Cross claimed an additional penalty. The Stipulations

and Issues were memorialized in the Minutes of Hearing and defendant was given 30 days to respond to lien claimant's supplemental trial brief, as well as to the additional claim of penalty for failure to comply with the April 17, 2000 order. Defendant was also given an opportunity to request an additional hearing to present the testimony of the claims administrator.

Defendant's Liability for Services Unrelated to the Industrial Injury

Although the parties were allowed to raise this issue at trial, it is really framed in the form of a request for an advisory opinion since there is no evidence one way or the other that the lien included charges for services that were unrelated to the industrial injury. Blue Cross believes that this is irrelevant in light of the stipulated award. Nonetheless, defendant has not alleged that Blue Cross has failed to supply it with supporting documents that confirm exactly what the services involved. Defendant would be in a better position than Blue Cross to recognize an unrelated charge. Therefore, it is reasonable to assume that there are no unrelated charges and that the issue is probably moot.

Additionally, in post-trial briefs, defendant reiterated a prior argument that was not raised as an issue at trial, that the stipulated award was somehow invalid because some of the charges were incurred as much as three years prior to the last date of injurious exposure.

Defendant originally objected to the lien on the ground that injury was in issue, not that there might be unrelated charges and not that some of the services predated the injury. It had an opportunity to file a supplemental objection after the AME's opinion invalidated its objection, but did nothing. It later stipulated to pay the lien of Blue Cross in the full amount, although the lien was listed as a medical-legal expense.

After the award issued, defendant neither filed a Petition for Reconsideration nor sought to be relieved of its stipulation. It simply ignored the award and waited until Blue Cross forced it to come down to the Board. Under these circumstances, it is far too late for defendant to suddenly decide that some of these charges might possibly be unrelated to the injury or that the date of injury to which it stipulated is somehow problematic in connection with the Blue Cross lien.

It is found that applicant obtained medical treatment reasonably required to cure or relieve from the effects of the injury herein in connection with the lien of Blue Cross, in the amount of \$6,553.9, payable to Legal Services Bureau on behalf of Blue Cross.

Penalties Under Labor Code §4603.2

Lien claimant is claiming entitlement to multiple penalties under Labor Code §4603.2 for defendant's alleged unreasonable failure to pay its lien.

Labor Code §4603.2 provides, in part, as follows:

"(b) Payment for medical treatment provided or authorized by the treating physician shall be made by the employer within 60 days after receipt of each separate, itemized billing, together with any required reports. Any properly documented amount not paid within the 60-day period shall be increased by 10

percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the bill, unless the employer does both of the following:

- (1) Pays the uncontested amount within the 60-day period.
- (2) Advises...the reasons for contesting these items, and the remedies available to the physician or the other provider..."

As a practical matter, there should not be any difference between the criteria for awarding multiple penalties involving the same specie of benefit to an applicant under §5814, and those involved in awarding multiple penalties to a lien claimant under §4603.2.

Generally, defaults that involve separate, legally significant events justify the imposition of multiple penalties; whereas those that are simply part of the same course of conduct merit a single penalty only. For example, unreasonable delays occurring before and after an award justify the imposition of more than one penalty because an award is a legally significant event. (Gallamore v. WCAB (1979) 44 CCC 321.)

The leading case on the issue of multiple penalties involving the same specie of benefit is Christian v. WCAB (1997) 62 CCC 576, in which a WCJ imposed eleven separate penalties against temporary disability for a carrier's unreasonable conduct in refusing to pay benefits during eleven continuous payment periods where the only medical opinion that disputed applicant's proven entitlement was not admissible into evidence. The Supreme Court reversed and found liability for a single penalty because no separate and distinct acts were involved and the defaults were all part of the same course of conduct, noting that,

"Until the Board has made an award or another legally significant event occurs which unequivocally establishes the employer's or insurance carrier's liability, the employer or carrier may act under a good faith belief that its conduct is justified." (emphasis added)

Here, there were three legally significant events that unequivocally established the defendant's liability. The first was the opinion of the Agreed Medical Examiner. When Dr. Miller reported that the injury was compensable and defendant deposed him, without success, but did not obtain rebuttal evidence, this was the equivalent of an acceptance of liability within the meaning of the term in Title 8, California Code of Regulations (Rules of the Administrative Director) §9792.5(f) which provides, in pertinent part, that:

"...If a claims administrator has denied liability for an injury...a single objection stating that liability has not been accepted shall be sufficient for each provider from whom a bill is received. In the event liability for the injury is later accepted, the sixty-day period to pay or contest the bills received prior to acceptance shall commence on the date liability for the injury is accepted."

At this point, the requirements of Labor Code §4603.2 were once again triggered and it was incumbent on defendant to either make payment or file an objection in compliance with the statute. The fact that it did neither gives rise to liability for penalties and interest under the statute.

The second legally significant event was the approval of the Stipulations With Request for Award whereby defendant stipulated to pay the lien of Blue Cross. Defendant claimed that this was a mistake since the Blue Cross lien related to medical treatment and was not a medical-legal expense. However, defendant could not be relieved of its stipulation absent a showing of good cause and there is none since it was liable for the lien in any event.

The third legally significant event was the order that issued pursuant to defendant's agreement in the minutes of the April 17, 2000 hearing. Defendant as much as concedes liability for a penalty arising out of this default in its pleading of May 22, 2000. It presents no explanation for its failure to comply with the law in connection with the opinion of the AME and the stipulated award.

It is therefore found that defendant violated the provisions of Labor Code §4603.2 and failed to comply with an award and an order of the WCAB, such that Blue Cross is entitled to three ten percent penalties plus interest in connection with its lien claim filed in this matter

Penalties Under Labor Code §5814

Blue Cross also claims penalties under Labor Code §5814 and has filed an extensive brief in support of this claim. The gist of Blue Cross' argument is that there is nothing in the law that specifically precludes a lien claimant from entitlement to penalties under §5814.

Prior to the enactment of §4603.2 which only applies to cases with dates of injury on or after January 1, 1991, a medical provider had no remedy for a failure on the part of a defendant to timely pay medical treatment charges. This is precisely why this section was enacted and why the following language appears in the statute.

"An employer's liability to a physician or another provider under this section for delayed payments shall not affect its liability to an employee under Section 5814 or any other provision of this division."

If it was the intention of the Legislature that lien claimants, also, be able to take advantage of §5814 penalties, it is likely that the statute would have reflected this intent by the added phrase that the statute "shall not affect its liability to an employee *or medical provider* under Section 5814."

Furthermore, as Blue Cross points out, the rights of lien claimants are derivative of those of the applicant. If the applicant could only collect one penalty under §5814 and a provider of medical treatment could collect two penalties under §4603.2 and §5814, the lien claimant would thereby be put in a better position than the applicant. It is doubtful that this result was intended.

It seems fairly clear that where there has been a default in the payment of medical treatment, the defendant may be liable to both the applicant and the lien claimant for penalties, each according to a separate section of the Labor Code. The penalty under §5814 is payable to the applicant and a lien claimant has no standing to raise the issue in absence of a claim on behalf of the applicant.

Therefore, defendant is not liable to Blue Cross for a penalty under Labor Code §5814.

Costs and Sanctions

Blue Cross additionally seeks costs and sanctions under Labor Code §5813 for defendant's conduct in this matter, in general. I do not believe that there would be any liability for costs and sanctions arising out of defendant's actions prior to April 17, 2000 because it was on that date that Blue Cross was joined as a party applicant. Prior to that date, it was not party within the meaning of §5318 which provides that:

"(a) The workers' compensation referee or appeals board may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

Defendant did not comply with the April 17, 2000 order to pay the lien, even in part. The default has been characterized by defendant as a clerical error. In any event, defendant has admitted liability for a penalty arising out of this default and a penalty is being imposed.

Title 8, California Code of Regulations (WCAB Rules of Practice and Procedure) §10561 provides that

"Failing to comply with...an order of the Workers' Compensation Appeals Board...shall be deemed a bad faith action or tactic which is frivolous or solely intended to cause unnecessary delay unless such failure results from mistake, inadvertence, surprise, or excusable neglect."

Defendant's failure to comply with the order probably did not occur in furtherance of a desire to cause unnecessary delay in the proceedings because the matter was coming back on calendar anyway and it was inevitable that such a default would trigger liability for another penalty plus additional interest. It is not apparent that Blue Cross has incurred additional expense in connection with its legal representation. Thus, it is more likely that the default was the result of some type of inadvertence which does not excuse liability for a penalty, but which does not merit the imposition of sanctions.

Attorney's Fees Under Labor Code §5814.5

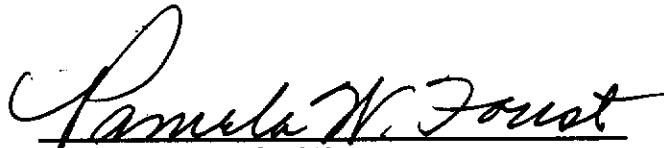
Labor Code §5814.5 provides that in the case of a public employer,

"[w]hen the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award...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."

I do not believe that this Labor Code section was intended to apply to the fees for legal representation incurred by lien claimants, and that it rather applies exclusively to the claims of injured workers.

It is a condition of the statute that the attorney's fees be awarded, *in addition to increasing the order, decision, or award pursuant to Section 5814.*" In this case, it has been found that Labor Code §5814 penalties are not available to a lien claimant which has recourse to the remedies provided by Labor Code §4603.2.

Thus, Blue Cross is not entitled to attorney's fees under Labor Code §5814.5.

A handwritten signature in cursive script that reads "Pamela W. Foust". The signature is written in black ink and is positioned above a horizontal line.

PAMELA W. FOUST
Workers' Compensation
Administrative Law Judge