

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

3
4 **Case No. ADJ1184992 (SRO 077861)**
5 **(Santa Rosa District Office)**

6 **KATHLEEN MURPHY,**

7 *Applicant,*

8 vs.

9 **OPINION AND DECISION AFTER**
10 **RECONSIDERATION**

11 **PETSMART, INC.; CALIFORNIA**
12 **INSURANCE GUARANTEE ASSOCIATION**
13 **For FREMONT INSURANCE COMPANY, In**
14 **Liquidation,**

15 *Defendants.*

16 In order to further study the factual and legal issues in this case, on November 23, 2013, we
17 granted defendant's Petition for Reconsideration of the workers' compensation administrative law
18 judge's (WCJ) Findings and Orders of August 30, 2013, wherein, as relevant to the instant Petition, it
19 was found that defendant unreasonably delayed the provision of dental care from in the form of oral
20 surgery to be provided by oral surgeon William W. Evans, D.M.D., M.D. The WCJ thus assessed a
21 Labor Code section 5814 penalty in the amount of \$6,377.50, which was calculated as 25% of the dental
22 treatment unreasonably delayed by the defendant. In this matter, in a Findings, Award and Orders of
23 October 30, 1996, it was found that, while employed as a cashier on October 10, 1992, applicant
24 sustained industrial injury to her right foot and psyche causing the need for further medical treatment. In
25 a Compromise and Release Agreement approved on October 31, 2001, in exchange for \$20,000.00,
26 applicant settled her claims for disability indemnity, but under the terms of the settlement "defendant
27 remains liable for reasonable medical care so long as said care is related to the industrial injury herein."

28 Defendant contends that the WCJ erred in finding that it unreasonably delayed the provision of
29 dental treatment pursuant to Labor Code section 5814. We have received an Answer,¹ and the WCJ has

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¹ In the Answer, applicant and her counsel argue that the WCJ erred in not awarding attorney's fees pursuant to Labor Code section 5814.5. By not filing their own petition for reconsideration on this matter, applicant and her counsel have waived this issue. In any case, since we find that defendant did not unreasonably delay or deny the provision of dental treatment, this argument is moot.

1 filed a Report and Recommendation on Petition for Reconsideration.

2 As explained below, we will rescind the Findings and Orders of August 30, 2013 and issue a new
3 decision finding that defendant did not unreasonably delay the provision of dental treatment, and thus
4 finding that a Labor Code section 5814 penalty was not warranted in this case.

5 On July 5, 2012, Dr. Evans wrote a letter to defendant's third party administrator, Sedgwick
6 CMS, stating that he was "submitting a request for pre-authorization for oral surgery and implant
7 placement on patient Kathleen Murphy." In the letter, Dr. Evans writes, "[w]e would also like to disclose
8 that our practice's prodical [*sic*] is that we collect our fees upon date of service. With implants and the
9 amount we are placing with this patient, we will need a payment before we can proceed completely with
10 patient's treatment." Enclosed with the two letters were treatment plans which included the exact
11 procedures planned as well as the insurance codes corresponding to the procedures. Dr. Evans sought
12 \$25,600.00. The treatment plan stated, "Surgical Fee and Payment: Payment is expected at the time of
13 surgery." These documents were also forwarded to defendant's counsel.

14 Dr. Evans's request for oral surgery and implant placement was forwarded to the utilization
15 review process implemented by the defendant pursuant to Labor Code section 4610 et seq. On July 19,
16 2012, defendant issued a utilization review decision authorizing "surgical extraction," "extraction of
17 erupted tooth," "endosteal implant placement," "surgical stent," and "cone beam CT." The utilization
18 review certification read that:

19 "After review of a request for authorization, it has been determined that
20 the specific service(s) meets established criteria for medical necessity
21 based on the information presented by the medical provider.

22 The medical provider, injured worker and workers' compensation payor
23 have been notified of this decision.

24 This review applies only to the specific service(s) listed. Additional
25 services require separate review."

26 The utilization review approval letter did not expressly approve payment of any particular sum of
27 money to Dr. Evans, nor did it expressly mention any agreement to pay Dr. Evans in advance for his
services.

1 By October 15, 2012, applicant had still not undergone the requested procedure. She therefore
2 filed a Declaration of Readiness to Proceed on the issue of medical treatment in the form of dental care
3 stating, "defendants have still not provided dental treatment to injured worker." Prior to the settlement
4 conference, on November 20, 2012, defendant's counsel called Dr. Evans' office and was again informed
5 that Dr. Evans would not proceed with the authorized dental surgery without advanced payment. On
6 December 4, 2012, defense counsel wrote to Dr. Evans, stating:

7 "Please be advised that advanced payment is not usual and customary for
8 treatment provided in workers' compensation matters.

9 At this time, we ask that you provide us with an itemized billing
10 statement for the contemplated dental surgery treatment. We ask that
11 you please include all billing codes. Please be advised that all medical
12 treatment rendered in a workers' compensation claim are subject to fee
13 schedule. If you are agreeable with proceeding with the contemplated
14 surgery on the basis of the fee schedule amount, we would recommend to
15 our client that all bills be paid within 60 days of their completion. Please
16 advise whether you are agreeable to this."

17 Dr. Evans wrote back to defense counsel on December 17, 2012. In his letter, he stated:

18 "As stated in your letter it is not usual and customary to collect up front
19 for workers comp cases. It is however usual and customary to collect up
20 front for Implant cases due to the overhead involved. For the extractions
21 the payment within 60 days is acceptable.

22 We are not agreeable to except [sic] fee schedule amounts without those
23 amounts being disclosed. As of yet we have not received any
24 information regarding the allowed fees. Once this information is
25 received we will be able to inform you a to whether we are in
26 agreement."

27 Hearings were scheduled on applicant's Declaration of Readiness to Proceed on December 12,
2012 and January 15, 2013, but both were continued due to the parties' efforts to effectuate a settlement.
On February 4, 2013, defendant issued a check in the amount of \$25,510.00 to Dr. Evans as pre-payment
for the dental services originally requested in June of 2012.

Despite the payment, the parties went to trial on the issue of a Labor Code section 5814 penalty.
The WCJ found defendant liable for a Labor Code section 5814 penalty, stating in the Opinion on
Decision that:

1 "This Judge having reviewed the entire record concludes that defendants
2 were aware of Dr. Evans' request for authorization of treatment issued
3 June 8, 2012 and served on defendants July 11, 2012. Although
4 authorized by defendants on July 19, 2012, actual payment did not issue
5 until February 4, 2013. This Judge finds no medical or legal basis for
said delay and on that basis finds that defendant did unreasonably delay
payment to Dr. Evans and ordered a penalty be paid by defendant less
attorney fees."

6 Labor Code section 5814(a) states:

7 "When payment of compensation has been unreasonably delayed or
8 refused, either prior to or subsequent to the issuance of an award, the
9 amount of the payment unreasonably delayed or refused shall be
10 increased up to 25 percent or up to ten thousand dollars (\$10,000),
11 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."

12 As we stated in our en banc opinion in *Ramirez v. Drive Financial Services* (2008) 73
13 Cal.Comp.Cases 1324, 1331 (Appeals Board en banc):

14 "[S]ection 5814(a) ... provides that a penalty is payable only '[w]hen
15 payment of compensation has been unreasonably delayed or refused.'
16 (Emphasis added.) A delay or a refusal to pay is not 'unreasonable' if the
17 defendant had 'genuine doubt from a medical or legal standpoint as to
[its] liability.' (*Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d
223, 230 [36 Cal.Comp.Cases 152].)"

18 In this matter, defendant did not act unreasonably because it had no obligation to pay for
19 applicant's dental treatment in advance.

20 Labor Code section 4603.2(b)(2) states:

21 "...payment for medical treatment provided or prescribed by the treating
22 physician selected by the employee or designated by the employer shall
23 be made at reasonable maximum amounts in the official medical fee
24 schedule, pursuant to Section 5307.1, in effect on the date of service.
25 Payments shall be made by the employer with an explanation of review
26 pursuant to Section 4603.3 within 45 days after receipt of each separate,
27 itemization of **medical services provided**, together with any required
reports and any written authorization for services that may have been
received by the physician.... Any properly documented **list of services
provided** and not paid at the rates then in effect under Section 5307.1
within the 45-day period shall be paid at the rates then in effect and
increased by 15 percent, together with interest at the same rate as

1 judgments in civil actions retroactive to the date of receipt of the
2 itemization.” (Emphasis added.)

3 Thus, Labor Code section 4603.2 makes clear that a defendant has no obligation to provide
4 payment for medical services until 45 days *after* medical services have been “provided.”² Although we
5 do not wish to belabor the point, “provided” in this context is the past participle of “provide,” and thus
6 indicates an action which has already been completed. Despite Dr. Evans’s office insistence that
7 defendant pay for treatment in advance, there is thus no obligation for the defendant to pay for medical or
8 dental services before they have been provided.³ Labor Code section 4603.2 thus provides defendant
9 with genuine doubt from a legal standpoint as to its obligation to pay for any medical or dental services
10 in advance. Since defendant’s refusal to pay in advance was reasonable, we must reverse the finding that
11 defendant was subject to a Labor Code section 5814 penalty.

12 The WCJ found a 5814 penalty based on the purported fact that they “authorized pre-payment.”
13 Although it is true that Dr. Evans’s office made clear that the office’s protocol was to collect payment at
14 the time of service, the WCJ reads far too much into the defendant’s utilization review approval. Labor
15 Code section 4610(a) defines “utilization review” as “utilization review or utilization management
16 functions that prospectively, retrospectively or concurrently review and approve, modify, delay, or deny,
17 based in whole or in part on medical necessity to cure and relieve, treatment recommendations by
18 physicians....” Thus, in issuing a utilization review approval, defendant was removing any objection to
19 the medical necessity of the proposed treatment. Labor Code section 4610(g)(4) states “Communications
20 regarding decisions to approve requests by physicians shall specify the specific medical treatment service
21 approved.” Here, the utilization review approval, specifically listed the dental treatment approved, but
22 made no mention of Dr. Evans’s office’s protocol of requiring payment in advance. Without a more
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24 ² Labor Code section 4603.2 has been amended since Dr. Evans’s office first demanded payment in advance. At times
25 relevant to the instant dispute, defendants had 45 “working” days to submit payment for services provided, whereas now they
26 have only 45 calendar days. Since this amendment is not material to the issues before us, for ease of reference, we quote the
27 current version of the statute.

³ We need not decide whether the language of Labor Code section 4603.2 precludes a finding that payment in advance may
be required in extraordinary circumstances. Assuming that Labor Code section 4603.2 does leave the WCAB discretion to
order prepayment in extraordinary circumstances, the onus would be on the injured worker or his or her medical provider to
establish a right to prepayment before failure to pay in advance is deemed unreasonable.

1 explicit agreement, we cannot construe a utilization review approval as an agreement to anything other
2 than medical necessity. Defendant still maintained its rights with regard to amounts billed and manner of
3 payment, which is governed by section 4603.2, and not by section 4610.

4 We therefore rescind the Findings and Orders of August 30, 2013 and issue a new decision which
5 reflects that defendant did not unreasonably delay or refuse dental treatment, and which reflects that
6 defendant is not subject to a Labor Code section 5814 penalty.

7 For the foregoing reasons,

8 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
9 Board that the Findings and Orders of August 30, 2013 is hereby **RESCINDED** and that the following is
10 **SUBSTITUTED** therefor:

11 **FINDINGS OF FACT**

- 12 1. Defendant did not unreasonably refuse or delay the
13 provision of dental care.
- 14 2. Defendant is not subject to a Labor Code section 5814
15 penalty.

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1 **ORDER**

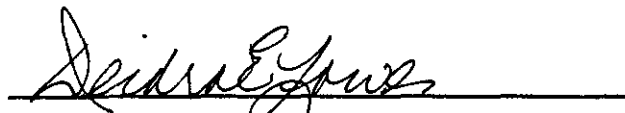
2 IT IS HEREBY ORDERED that applicant take nothing by way of
3 the petitions for penalties at issue at the May 23, 2013 hearing on this
4 matter.

5 **WORKERS' COMPENSATION APPEALS BOARD**

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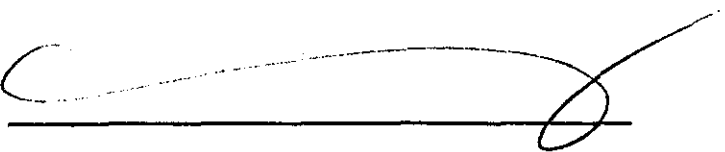
7 **RONNIE G. CAPLANE**

8 **I CONCUR,**

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10 **DEIDRA E. LOWE**

11 **I DISSENT (See Attached Dissenting Opinion)**

12 

13 **MARGUERITE SWEENEY**



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

15 **FEB 10 2015**

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

18 **KATHLEEN MURPHY
19 LAW OFFICE OF RICHARD J. MEECHAN
20 LAUGHLIN, FALBO, LEVY & MORESI**

21 

22 **DW:bgr**

1 **DISSENTING OPINION OF COMMISSIONER MARGUERITE SWEENEY**

2 I respectfully dissent. I would have affirmed the WCJ's finding of unreasonable delay in the
3 provision of medical treatment for the reasons stated by the WCJ in his Report and Recommendation on
4 Petition for Reconsideration.

5 As noted in the majority opinion's recitation of the relevant facts, prior to approving Dr. Evans's
6 requested treatment both defendant's third party administrator and counsel were clearly notified that
7 payment in advance was required for treatment due to the high up-front cost required for this type of
8 treatment. Defendant approved the treatment even in the face of the requirement for pre-payment, and
9 after authorization did nothing to retract or clarify this authorization for months, until after applicant filed
10 a Declaration of Readiness to Proceed (DOR) seeking WCAB intervention on the issue of medical
11 treatment.

12 After the DOR was filed, in December of 2012, defendant belatedly informed Dr. Evans that
13 prepayment was not standard in workers' compensation, and requested the precise procedures and billing
14 codes that Dr. Evans was proposing, even though that information had already been provided six months
15 before.

16 Although I agree that it is generally reasonable for a defendant to withhold payment until after
17 services are rendered pursuant to Labor Code section 4603.2, any confusion in this case was engendered
18 by defendant's approval of the suggested treatment without communicating that it did not agree to
19 payment in advance until almost five months later. Under the specific factual scenario of this case, I
20 would affirm the WCJ's decision that defendant in effect agreed to the treatment and billing terms, and
21 that failure to promptly clarify the matter deprived the applicant of necessary medical treatment for many
22 months.

23 However, although I would have affirmed the finding that defendant unreasonably delayed
24 medical treatment, I would have deferred the issue of the extent of the Labor Code section 5814 penalty.
25 The WCJ did not explain the basis of his imposition of a full 25 percent penalty. Labor Code section
26 5814(a) permits a penalty of "up to 25 percent." (Emphasis added.) The amount of the penalty is
27 discretionary, and the full 25 percent penalty should be reserved for the most culpable conduct on the

1 part of a defendant. In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals
2 Board en banc), we emphasized that Labor Code section 5814 affords a WCJ discretion in determining
3 the penalty which should be assessed, with a primary view towards the goals of encouraging the prompt
4 payment of benefits by making delays costly on defendants, and of ameliorating the effects of any delays
5 on the injured worker. To that end, in *Ramirez*, we listed several factors to be considered by the WCJ in
6 assessing a Labor Code section 5814 penalty. I would have returned this matter to the WCJ so that he
7 could perform a *Ramirez* analysis to determine a proper penalty and to explain the basis of that
8 determination.



WORKERS' COMPENSATION APPEALS BOARD



MARGUERITE SWEENEY, COMMISSIONER

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

15 **FEB 10 2015**

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

18 **KATHLEEN MURPHY**
19 **LAW OFFICE OF RICHARD J. MEECHAN**
20 **LAUGHLIN, FALBO, LEVY & MORESI**

23 **DW/bgr**

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 Case No. ADJ1184992 (SRO 0077861)

4 **KATHLEEN MURPHY,**

5 *Applicant,*

6 vs.

7 **PETSMART, INC.; CIGA for FREMONT**
8 **COMPENSATION in liquidation, adjusted by**
9 **SEDGWICK,**

9 *Defendants.*

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

10
11 Reconsideration has been sought by defendant, with regard to a decision filed on
12 August 30, 2013.

13 Taking into account the statutory time constraints for acting on the petition, and based upon our
14 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
15 opportunity to further study the factual and legal issues in this case. We believe that this action is
16 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
17 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
18 hereinafter determine to be appropriate.

19 For the foregoing reasons,

20 **IT IS ORDERED** that the Petition for Reconsideration is **GRANTED**.

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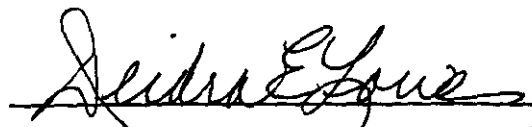
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1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
2 the above case, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 Santa Rosa District Office or any other district office of the WCAB and shall not be e-filed in the
7 Electronic Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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10 _____
11 **MARGUERITE SWEENEY**

11 **I CONCUR,**

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14 _____
15 **DEIDRA E. LOWE**

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17 
18 _____
19 **RONNIE G. CAPLANE**



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

20 **NOV 25 2013**

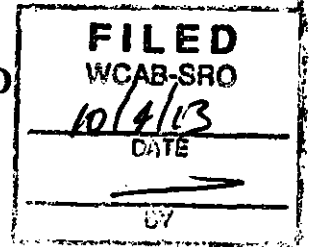
21
22 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
23 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

24 **LAUGHLIN FALBO**
25 **RICHARD J. MEECHAN**
26 **KATHLEEN MURPHY**



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



Case Nos. ADJ1184992

KATHLEEN MURPHY

v. PETSMART; SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. C/O CIGA for FREMONT COMP. in liquidation

Workers' Compensation
Administrative Law Judge
MICHAEL J. HURLEY

DATE: October 4, 2013

**REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

I

INTRODUCTION

This matter originally came before this judge for a Mandatory Settlement Conference on April 25, 2013. The parties were unable to resolve their disputes and the matter was set for trial. On May 23, 2013, the matter came on for trial, and the issues of need for dental treatment and penalties were submitted. On the same date, this judge issued a Findings of Fact, finding that the dental treatment requested by Drs. Skoy and Evans was reasonable and necessary to cure and/or relieve the applicant from the effects of his industrial injury. This judge then ordered defendants to issue Dr. Skoy a check for \$35,928.00 for his part of the medical treatment to be provided. On the issue of penalties, the record was left open for defendants to file a response to applicant's Petition for Penalties and the matter was then submitted. There was no appeal to the Findings of Fact and Order, issued May 28, 2013. And on August 30, 2013, this judge issued his Finding and Orders with regard to the issue of penalties. It is from this judge's Findings and

Order that defendant did delay the provision of medical treatment and ordering them to provide a penalty, less an attorney fee, that defendant has filed a timely Petition for Reconsideration. Applicant's counsel has filed an Answer. It is from that Petition for Reconsideration that this Report and Recommendation is made.

II DISCUSSION

Defendant has alleged that this judge erred in finding they unreasonably delay the provision of medical treatment to applicant and awarded a penalty for such delay. Applicant has filed an Answer and questions this judge not awarding attorney fees under Labor Code section 5814.5, in addition to the penalties awarded applicant instead of subtracted from them.

The facts in this case are fairly clear, in May and June of 2012, applicant's treating physician, Dr. Evans, filed a request for authorization for treatment, including notice that payment was expected at the time of surgery. Defendants admit in their Petition for Reconsideration that authorization in fact was provided Dr. Evans. However, no payment was made to Dr. Evans until February 4, 2013, per defendant's Exhibit "R." Defendants knew Dr. Evans would not perform services without payment at the time of services or prior. They knew this based on Dr. Evans' Request for Authorization for Treatment. Defendants did not make payment to Dr. Evans until five (5) months after they authorized pre-payment. Therefore, their delay in providing pre-payment was in fact a delay of medical treatment, not of billing. On that basis, this judge continues to find defendants violated Labor Code section 5814, and unreasonably delayed provision of treatment to applicant and thus the penalties continue to apply.

With regard to applicant's suggestion that this judge award fees under Labor Code section 5814.5, that provision only applies when it is subsequent to the issuance of an

award; and, in this case, there was no prior award with regard to dental treatment and these billings and therefore, this judge could not order payment of attorney fees in addition to amounts received by applicant.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied. It is further recommended that applicant's request for attorney fees, in addition to the amounts owed applicant, be denied.



MICHAEL J. HURLEY
WORKERS' COMPENSATION JUDGE

MJH:kcs

Served on: