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The New Administrative Penalty Regulations (Reg. 10225 – 10225.2)

LC §5814 & LC §4650

Temporary Disability and The Two Year Cap

Join us for a discussion regarding the new administrative penalties regulations (Reg. 10225 - 10225.2) for violations of Labor Code §5814. We will also discuss Labor Code §4656 by reviewing and interpreting new case law pertaining to the application of the two-year limit on temporary disability.



Presented By
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The New Administrative Penalty Regulations
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Temporary Disability and The Two Year Cap

Presented by
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Bruce K. Wade, Senior Partner, Bakersfield Office

Temporary Disability and
The Two-Year Cap

Labor Code §4656(c)(1)

Aggregate disability payments for a single injury occurring on or after 04/19/04 shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payments.

Temporary Disability and
The Two-Year Cap

When does the two years begin to run?

This question is answered by *Hawkins v. Amberwood* Products, 72 Cal.Comp.Cases 807 (WCAB en banc, 06/13/07).

Temporary Disability and The Two-Year Cap

Facts

1. Date of injury is a CT through 07/16/04.
2. EDD paid SDI Benefits from 07/26/04 through 03/31/05.
3. On 05/03/05 SCIF made its first payment of TD for the period 07/17/04 to 05/02/05.
4. SCIF paid TD 07/17/04 to 07/14/06.
5. At the time of the 08/14/06 trial, the applicant was not permanent and stationary.

Temporary Disability and The Two-Year Cap

Positions

1. SCIF: The date from which you should measure the limitation is **the first day TD is owed, 07/17/04.**
2. Applicant: The date from which you should measure the limitation is **the date TD was first paid, 05/03/05.**
3. If applicant is a maximum wage earner
 - a. SCIF's position = \$87,360.00 in TD
 - b. Applicant's attorney's position = \$124,137.82 in TD

Temporary Disability and The Two-Year Cap

Holding

The date of commencement of temporary disability payment as used in Labor Code §4656(c)(1) means the date on which temporary disability is first paid.

Temporary Disability and The Two-Year Cap

Rationale

1. That's the plain meaning of the statute.
2. The court did not rely on Labor Code §3202 liberal construction.
3. This holding encourages defendants to start TD promptly.
4. This holding protects injured workers from the devastating effects of lost wages during convalescence.

Temporary Disability and The Two-Year Cap

Dissent

1. The term "date of commencement of TD" is ambiguous.
2. The holding is inconsistent with the wording of the statute that aggregate TD should not exceed 104 weeks.
3. The legislature wanted to reduce benefits in response to a crisis in the Workers' Compensation system.

Temporary Disability and The Two-Year Cap

What if the injury is denied, the case is tried, following which AOE/COE is found with an order to pay retroactive temporary disability?

The end result of this holding penalizes a defendant who justifiably denies injury and litigates the issue.

Temporary Disability and The Two-Year Cap

What conditions allow extension of the two-year limitation?

For these conditions, aggregate payments causing temporary disability shall not extend for more than 240 compensable weeks within a period of 5 years from the date of the injury:

Temporary Disability and The Two-Year Cap

1. Acute and chronic Hepatitis B
2. Acute and chronic Hepatitis C
3. Amputations
4. Severe burns
5. HIV
6. High-velocity eye injuries
7. Chemical burns to the eyes
8. Pulmonary fibrosis
9. Chronic lung disease
10. Whining

Temporary Disability and The Two-Year Cap

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Temporary Disability and The Two-Year Cap

AB 338 would extend the 104 week/2 year rule to 104 weeks within 5 years of the date of injury.


Temporary Disability and The Two-Year Cap

What constitutes an amputation?

1. Applicant's Attorneys have argued based on a dictionary definition that an amputation is the "removal of a limb, body part or organ."
2. Defendants have argued based on definitions and common sense that an amputation is the removal of a limb, part of a limb or other body appendage.


Temporary Disability and The Two-Year Cap

WCAB decisions out of the Salinas and San Francisco Boards found spinal surgery included an amputation because it involved the surgical removal of a part of the body.




Temporary Disability and The Two-Year Cap

A decision of the Los Angeles Board found spinal surgery is not an amputation because it is not a removal of a limb, or part of the body or an appendage (i.e. "a body part that sticks out").



Temporary Disability and The Two-Year Cap


Based on a Petition for Reconsideration filed by a Mullen & Filippi attorney, the WCAB has held that a multiple level laminotomy, discectomy and fusion is not an amputation.



Temporary Disability and The Two-Year Cap


Cruz v. Mercedes-Benz, 72 Cal Comp. Cases unassigned (WCAB en banc, 9/5/07)

Mr. Cruz injured his back on 01/04/05. He was off work and received temporary disability from 01/06/05 to 01/17/07. He underwent back surgery on 01/09/06 and 01/10/06, discectomy, partial laminotomy, vertebrectomy, decompression, and fusion at multiple levels. Following an expedited hearing after defendant stopped paying temporary disability, the Workers' Compensation Judge awarded ongoing temporary disability on the basis that the "invasive procedures" of those surgeries constituted amputations.




Temporary Disability and The Two-Year Cap

The WCAB, in its *en banc* decision determined that the term "amputation" means the severance or removal of a limb, part of a limb, or other body appendage, including both traumatic loss in an industrial injury and surgical removal during treatment of an industrial injury. The court reasoned that the "common meaning" attached to this term should be employed to interpret the legal effect of the statute.



Temporary Disability and The Two-Year Cap

Labor Code §4850 provides certain safety officers up to 1 year of salary continuation "in lieu of temporary disability" while disabled from a work related injury.



Temporary Disability and The Two-Year Cap

Are LC §4850 benefits capped by the LC §4656 two year limit on TD?

The Second District Court of Appeal has found that LC §4850 benefits are **not** subject to the LC §4656 two year limit.

City of Long Beach v. WCAB (Weber), 72 CCC 837 (writ denied, 5/16/07).

The Future of LC §4656

1. AB 338 goes into effect for injuries on or after 1/1/08.
2. Watch for appellate decisions in *Hawkins* and *Smith*.
3. Amputation – Is a knee replacement an amputation?
4. What does “single injury” mean?
5. More salary continuation cases.
6. How fast does an object have to be traveling when it hits an injured workers’ eye to be considered “high velocity?”

Penalties

Avoid getting a flag on the play



New Regulation 10225.1

Effective 5/26/07

After more than one LC §5814 penalty has been awarded by the WCAB the following administrative penalties shall be imposed.

The award must be on or after 6/1/04, based on conduct occurring on or after 4/19/04 for the unreasonable delay or refusal to pay compensation within a five year period of time.

The five year period of time shall begin on the date of the issuance of a penalty awarded.

New Regulation 10225.1

Effective 5/26/07

The Division of Workers' Comp shall submit to the audit unit monthly copies of WCAB decisions with LC \$5814 awards.

The audit unit may proceed with an investigation, but does not have to pursue an audit in order to issue the Notice of Assessment.

The penalty audit may be concurrent or independent of an LC \$129 & LC \$129.5 audit.

Amount of Penalties

\$100,000.00 for a Determination of general business practice of knowingly violating LC \$5814, plus additional penalties.

\$ 30,000.00 for each LC \$5814 penalty issued for failure to comply with an existing compensation order.

Failure to Pay TD, VRMA, Life Pension or Death Benefits

\$ 5,000.00 – delay 14 days or less

\$10,000.00 – delay 15 to 42 days

\$15,000.00 – delay over 42 days



Failure to Authorize Medical Treatment

\$ 1,000.00 for retrospective medical treatment;

\$ 5,000.00 for prospective or concurrent medical treatment;

\$15,000.00 for prospective or concurrent medical treatment when a delay or refusal causes the employee to face ***imminent or serious threat to health.***

Failure to Reimburse Self-Procured Medical Treatment Costs

\$1,000.00 for medical treatment \$100.00 or less;

\$2,000.00 for medical treatment more than \$100.00 to \$300.00;


\$3,000.00 for medical treatment more than \$300.00 to \$500.00;

\$5,000.00 for medical treatment for more than \$500.00.

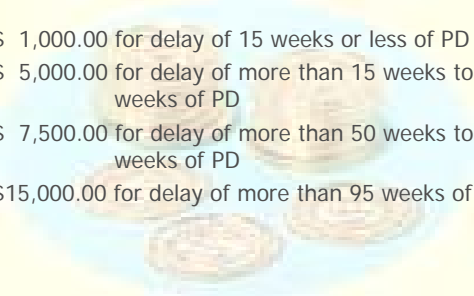
\$2,500.00 Penalty Assessment for Failure to Issue the SJDV

\$2,500.00 penalty for failure to reimburse an injured worker for services pursuant to an SJDV or where failure to pay the training provider causes an interruption in the employees training.






Permanent Disability




\$ 1,000.00 for delay of 15 weeks or less of PD
\$ 5,000.00 for delay of more than 15 weeks to 50 weeks of PD
\$ 7,500.00 for delay of more than 50 weeks to 95 weeks of PD
\$15,000.00 for delay of more than 95 weeks of PD



All Other LC §5814 Violations

\$2,500.00 penalty for any other LC §5814 violation not specified in this section.



Mitigation of Regulatory Penalty

The following may mitigate the penalty imposed:

- Consequences and gravity to violation.
- Good faith of the claims administrator.
- History of previous penalty awards under LC §5814.
- Number and type of violations.
- The time period in which the violations occurred.
- The size of the claims adjusting location.



Repeat Violations

Each administrative penalty assessed under this section shall be doubled upon a second order, and tripled upon a third order by the Administrative Director.

In no event shall the penalty assessed against a single employer in a single stipulated order or final determination after doubling or tripling exceed \$400,000.00.



Workers' Compensation Penalties

Labor Code Section 4650(d)

Self imposed 10% penalty on any undisputed, delayed, retroactive payment of TD or PD.

Labor Code Section 5814

25% penalty, up to \$10,000.00 for any benefit unreasonably delayed or refused.



Labor Code §4650(d) Penalties

Labor Code Section §4650(d)

- If any indemnity payment is not paid timely, the amount of the payment shall be increased 10% and shall be paid, without Application...
 - TD must be paid within 14 days of knowledge of injury unless claim is denied or delayed
 - PD must be paid within 14 days of the last payment of TD, based on a reasonable estimate.
- No increase shall apply to any payment due prior to or within 14 days after claim form submitted.
- No penalty if ER unable to determine if TD or PD due with appropriate delay notice sent.



Labor Code §4650(d)

If the TD or PD benefit is not disputed, and paid after 14 days, an automatic 10% increase on the delayed benefit should be automatically made.



Labor Code §4650(d)


Scenario

1. Case on automatic pay or making periodic payments, payment falls off schedule, increase delayed amount by 10% automatically.
2. Admitted injury with payment of TD; TD ends with no basis to estimate PD from the treater or med/legal; PD delayed.



Labor Code §4650(d)

3. Two months later PD report received; if PD not in dispute, and you paid PD within 14 days of receipt of report, no penalty is due.
4. If PD is not in dispute, and paid PD after 14 days of receipt of report, pay 10% increase on retro PD benefits.



LC §4650 Payment Analysis

When paying retro benefit always consider if a LC §4650d penalty is due.

If there a reasonable basis to dispute the retro benefit, then send the appropriate delay or denial notice.

If no dispute, is benefit being paid within 14 days of knowledge of liability? If paid after 14 days then increase retro amount by 10%.



4650(d) Penalty is not due...

Leinon v. WCAB 69 C.C.C. 995 (8/2004), WCAB en banc, Writ denied by Court of Appeals.

F&A issued 5/30/01 finding injury and ordering retro and ongoing TD.

Defendants filed a recon with the Court of Appeals. On 1/3/02 CA Supreme Court denied review.



4650(d) Penalty is not due...

Defendant paid retro benefits within 14 days of 1/3/02 denial, but no LC §4650 penalty on retro benefits. In their decision denying a penalty the WCAB stated "4650(d) will not apply... when injury or indemnity benefits are disputed, thus taking the matter outside LC §4650(d), until the dispute is resolved."



When to Pay 4650(d) Benefits

Adams v. WCAB Court of Appeals 70 C.C.C. 1348, (8/2005)

- Denied CT claim, treater found AOE/COE on 8/8/02.
- Defense med/legal on 11/26/02 concluded could not determine AOE/COE as needed more records for review.
- On 3/27/03 defense med/legal issue supplemental report saying condition industrial.
- TD not paid until 6/25/03 MSC.
- Applicant filed 5814 penalty for not paying LC \$4650 penalty on delayed benefits.



When to Pay 4650(d) Benefits

- At the penalty hearing the examiner testified she received the 3/27/03 defense QME report on 4/25/03, but did not admit injury and pay benefits until 6/25/03.
- LC \$4650 penalty was due on retroactive payment of TD.
- Failure to pay LC \$4650 penalty is the basis for an LC \$5814 penalty.



Multiple LC \$5814 Penalties

Moulton v. WCAB 65 C.C.C. 1259 (11/2000)

Court of Appeals decision:

- Applicant awarded temporary disability on 5/26/99.
- Defendants made no payments until 7/15/99, and then paid in the wrong amount.

The Court of Appeals confirmed 3 separate penalty awards as follows:

1. LC §4650(d) 10% penalty on the delayed benefit;
2. LC §5814 penalty for failure to self assess the LC §4650 penalty;
3. LC §5814 penalty for paying TD in the incorrect amount.

Labor Code §5814

- a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to an award, the amount of payment unreasonably delayed or refused shall be increased up to 25% or \$10,000.00, which ever is less. And any proceedings under this section, the Appeals Board shall use its' discretion to accomplish a fair balance and substantial justice between the parties.
- b) If the potential violation of this section is discovered by an employer prior to employee claiming a penalty the employer has 90 days within the date of discovery to pay the self-imposed 10% penalty in lieu of any 5814 penalty.

Labor Code §5814

- c) Upon approval of Compromise and Release, F&A, or Stips and Order, it is conclusively presumed that any accrued claim for penalty has been resolved, regardless of whether the petition was filed.
- d) Payment of any increased award pursuant to subdivision (a) shall be reduced by any amount paid under (d) of 4650 on the same unreasonably delayed or refused benefits.



LC 5814/4650

4650 Penalties are deducted from a 5814 penalty, and therefore not awarded simultaneously



Labor Code §5814/§4650

Stackhouse v Cambridge 70 CCC 740 writ denied (2005) Defendants stiped to adjust TD on 8/24/04, on 10/6 penalty petition filed, defendants inquired about status of Social Security benefits and offset. TD paid late. Penalty filed under LC §5814 and §4650. WCAB ruled the request for LC §4650d penalty was moot, since any penalty paid was deductible from 5814. Applicant's attorney had argued only prior 4650 penalties, but not a simultaneous 4650 penalty should be deducted.

WCAB increased 5814 penalty from 15 to 25 percent stating defendants mitigating activities only occurred after the penalty petition was filed.



Labor Code §5814

The revised LC §5814 applies to all cases as of 6/1/2004 – *Green v. WCAB* 70 C.C.C. 294; *McCarthy v. WCAB* (2006) 71 C.C.C. 16

The section applies to any alleged delay, even those prior to 6/1/04 – *Abney v. WCAB* 69 C.C.C. 1552; 70 C.C.C. 4060



Procedure Under LC §5814

- The applicant has the burden of proving a benefit was delayed.
- The burden of then shifts to the defendant to prove that the delay was reasonable.
- Under the new 5814, the WCJ then balances the period of delay, the amount of delay, and the actions of the defendant to calculate the appropriate payments and penalty, if any.



Procedure Under LC §5814

- Determination of whether a given delay is unreasonably depends on the totality of the circumstances presented, not solely on a number of days payment was delayed – *Kamoner v. WCAB*.
- Conditions may explain a delay but do not make the delay reasonable. Factors considered include: shortage of personnel, heavy work load at the employer or carrier with regard to the adjusting of claims, evidence of institutional neglect, such as repeated similar mistakes; inadequate personnel training; an office configuration or business practice that makes errors likely or probable.



Labor Code §5814

A reasonable short delay attributed to human error (entering an incorrect address) cannot, standing alone be considered unreasonable. *Stuart* 18 Cal.4th1209 (1998)

8 day delay in payment of death benefits to the widow of a former employee (checks issued in the name of the deceased) was not considered unreasonable. *Souza* 69 Cal.Ap.4th



Labor Code §5814

Testimony by a claims examiner that he was overworked, inundated, and frustrated, explained repeated delayed and erroneous payments, but cannot be considered reasonable – *Waters v. WCAB* 65 C.C.C. 484 (5/2000)



Miscellaneous Cases

Failure to pay interest on awarded workers' comp benefit is an LC §5814 violation. *WCAB v. Erbia* 66CCC687(2001)

- 100% PD awarded subject to third party credit. On 6/14/97 applicant informed SCIF credit exhausted, on 7/25/97 retro payment was made without interest.
- Applicant claimed LC §5814 for late payment and 2nd LC §5814 for failure to pay interest. The Court of Appeals ruled one course of conduct and issued one LC §5814 penalty.



Miscellaneous Cases

Wyrick v Robinson 33 CWCR 188 (7/05) denied CT claim, applicant obtained medical treatment on lien basis. November 2002 F&A found injury AOE/COE and awarded reimbursement for self-procured medical treatment in an amount to be adjusted by the parties.



Miscellaneous Cases

- February 2004 lien claimant filed a Declaration of Readiness alleging liens had not been adjusted and paid. Applicant filed a 5814 penalty. 5814(e) precludes a penalty where the treatment is authorized, but goes unpaid due to a billing dispute. WCAB ruled, in this case the defendant had not delayed authorizing treatment, but unreasonably delayed in adjusting liens after they had been allowed.
- 5814(e) is not a bar to the penalty.



Miscellaneous Cases

Attorney's fee allowed for Petition to enforce medical treatment.

Smith v WCAB 72 CCC 27, accepted for review by California Supreme Court. 8 years following award of the medical treatment SCIF refused to pay for injections. App's attorney filed a Petition for Penalties, the parties agreed to an AME. AME concluded injections appropriate, SCIF authorized the injections without formal hearing.



Miscellaneous Cases

- App's attorney requested fees for obtaining medical treatment. LC §4607 allows app's attorney's fees where defendants filed a Petition to Terminate award of medical treatment and are unsuccessful. The WC acknowledged "when a carrier formally denies all care the applicant is entitled to attorney's fees to enforce the award. We see no difference when a carrier informally denies some of the treatment that is a necessary part of care previously awarded. This is tantamount to a Petition to Deny medical care even when the carrier continues to provide some treatment of the appl's medical care.



Miscellaneous Cases

- Petition to enforce medical treatment, frequently filed with penalty petition for denial of medical treatment.
- Applicant's attorney's interest in obtaining attorney's fees for pursuing medical treatment will encourage the filing of penalty petitions.