Lister, Martin & Thompson's

WORKERS' COMPENSATION COMMENTARY

March 2001 **Volume 8 Issue 1**

§4650(d) SELF IMPOSED PENALTIES: WHAT IS AN "UNTIMELY" PAYMENT?

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A number of our clients have called us recently, concerned about establishing or modifying their procedures when dealing with the "self imposed" penalty provided for in Labor Code §4650(d) in order to avoid the imposition of a penalty under Labor Code §5814. They were particularly concerned with the application of the self-imposed penalty pursuant to Labor Code §4650(d) in several different scenarios in which, they have been told, the self imposed penalty is payable:

1) The defendant misses the 14 day notification requirement but does send out a delay letter. At day 85, they conclude from their investigation that the case is compensable and temporary total disability benefits are picked up retroactive to the first day off work.

2) The defense QME says zero, the applicant's treating physician's report rates 50% and, for whatever reasons, the parties proceeded to an AME whose findings include a period of temporary disability not previously paid, as well as permanent disability. In this situation, they have been told that an additional 4650(d) payment is appropriate on payment of both species of benefit.

3) In an admitted injury case where defendant's QME report is worth 10% and applicant's QME is worth 40%, a Findings and Award issues for 40%. The defendant then pays the difference between what was previously advanced in permanent disability and the balance of the award to date. They have been told that a 4650(d) penalty is appropriate even though not specifically raised.

4) A contested injury goes to an award and defendants lose; 4650(d) was raised. The judge awards temporary disability, permanent disability and the 4650(d) penalty without specificity. What gets paid? A 4650(d) penalty is appropriate on all temporary disability and all permanent disability due up to the time of actual payment by the defendant.

The above contentions as to the applicability of Labor Code §4650(d) are, in our opinion, incorrect.

Labor Code §4650(d) reads as follows: "If any indemnity payment is not made timely..." The question of timeliness of a payment must reasonably take into account reasonable defenses that a defendant may assert in withholding payment. In the second scenario posited above, the defendant has a QME report that rates zero, so that defendant might reasonably withhold payment of any permanent disability advances based upon the defense QME. The temporary disability and permanent disability awarded pursuant to the report of the AME were not due until the parties had received the AME's findings. Thus, if the defendant timely paid the temporary disability and permanent disability advances indicated

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by the AME report upon receipt of such report, it is our position that such payments were timely within the meaning of Labor Code §4650. Since the payments were timely, no penalty pursuant to Labor Code §4650(d) is due because until that time defendant had a reasonable and legal basis upon which to withhold such payments.

Likewise, in the third scenario, the defendant was legally required to advance only 10% permanent disability and, thereafter, was legally permitted to withhold permanent disability advances. When the award of 40% permanent disability issued, if the defendant timely pays that incremental permanent disability, we again contend that no penalty under §4650(d) is due because the permanent disability payments were "timely paid". This is because, until the award, the defendant was not obligated to issue the payment of the incremental permanent disability.

Our position is similar in the other scenarios so long as the defendant is reasonably withholding benefits and pays benefits in a timely fashion once it becomes reasonably clear that such benefits are due. A penalty pursuant to Labor Code §4650(d) only arises if the payment is untimely at the time it is made.

Recent citations have been advanced in supposed support of the contention that the penalty is payable under each of the circumstances outlined above. We believe that each of these decisions, to the contrary, support our position. The first is a board panel decision *Vang v SCIF* 23 CWCR 43. In that case, the board panel held that an unreasonable failure to pay a 4650 penalty results in a 5814 penalty against the entire class of benefit. That holding is not inconsistent with the opinion expressed by this firm. The entire thrust of the case is that the unreasonable failure to pay the 4650 penalty, when it is properly due, results in a 5814 penalty against the entire class to which the 4650 penalty should have attached.

This is also the holding of the WCAB [en banc] in *Farris v Industrial Wire* Products at 2 Workers' Compensation Appeals Board Reporter 10, 279 and in *Moulton v WCAB* a Court Appeals decision at 65 Cal.Comp.Cases 1259 (2000).

None of these three cases suggests that the 4650(d) penalty attaches to monies reasonably withheld but otherwise timely paid once an award is made which finds, based on evidence other than that relied upon by defendants, that benefits are due. *Farris* is an unfortunate case. In that matter, the defendant failed to advance permanent disability based on the applicant's treating physician's report. The record, however, does not specify whether or not the defendant had a report indicating lesser disability upon which it relied to support its failure to advance permanent disability. Also, the defendant did not petition for reconsideration stating that its failure to advance permanent disability in accordance with the applicant's treating physician's report was not unreasonable.

It was the uncontested finding of the Workers' Compensation Judge that the failure of defendants to advance permanent disability on the applicant's treating physician's report was unreasonable that rendered such failure subject to the imposition of a penalty pursuant to Labor Code §4650(d).

In *Davis v WCAB* 2 WCAB Reporter 10, 337, the applicant had received a Findings and Award that had been fully paid in timely fashion by the defendants. On a petition to reopen, the applicant alleged development of fibromyalgia and the nature and extent of permanent disability was raised as an issue. The defendant contended that the medical evidence required apportionment to non-industrial factors.

At trial on the petition to reopen on January 19, 1999, the Workers' Compensation Judge found that the applicant was permanently and totally disabled and that there was

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no reasonable apportionment to non-industrial factors. There was a petition for reconsideration that was denied and the defendant finally issued payments pursuant to the Findings and Award following the denial of their Petition for Reconsideration. The applicant then claimed penalties under Labor Code §§4650 and 5814 indicating that proper permanent disability advances had not been made in light of the findings of permanent and total disability.

The Workers' Compensation Judge found that the defendant did not unreasonably delay or refuse payment of permanent total disability indemnity and therefore no penalties were due either under Labor Code §§4650(d) or 5814. Specifically, the WCJ found that :

"Although Labor Code §4650 has been described as a "strict liability" statute, this does not (emphasis added) mean that the penalty is owed automatically every time a payment is made for benefits that accrued more than 14 days prior to the date of payment. Rather, the penalty attaches when a payment that is indisputably owed "is not made timely as required by this section" Where the reasonable estimate of permanent disability indemnity due has already been paid, the employer is not required by this section to make timely indemnity payments which it reasonably believes it may not owe."

Although the California Applicants' Attorneys Association filed an amicus curiae brief urging the opposite position, the WCAB sustained the trial judge and a Petition for Writ of Review was denied.

Therefore, we respectfully submit that defendants are still secure in reasonably withholding temporary disability or permanent disability benefits when they have legally sufficient evidence, medical or otherwise, upon which to base such denial.

CHRISTINE HELY

We are sorry to report that Ms. Hely, who has been an associate in our Glendale office for a number of years is no longer practicing with our firm. Ms. Hely is currently under medical treatment and we wish her the very best for a full recovery.

Help is on the way, however, we have secured a commitment from a highly experienced workers' compensation attorney who will shortly be joining our firm. We will send out an immediate announcement as soon as his move becomes "official".

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.