

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. SAC 0346199**

5 **RACHEL ELIZONDO,**

6 *Applicant,*

7 *vs.*

8
9 **STATE OF CALIFORNIA, DEPARTMENT**
10 **OF MOTOR VEHICLES, Legally Uninsured**
11 **and Adjusted by STATE COMPENSATION**
12 **INSURANCE FUND,**

13 *Defendants.*

OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

14 Defendant, State of California, Department of Motor Vehicles, legally uninsured, seeks
15 reconsideration of the Findings and Award and Order, issued November 20, 2007, in which a
16 workers' compensation administrative law judge (WCJ) found applicant entitled to a \$37.50
17 penalty pursuant to Labor Code section 5814, equal to 25% of the amount of a TENS unit, plus
18 25% of the cost of the batteries and electrodes purchased from July 10, 2007 to the date of the
19 WCJ's decision. The WCJ found defendant's denial of the purchase of a TENS unit was
20 unreasonably denied through Utilization Review. Applicant was also awarded attorney fees of
21 \$1,856.00 under Labor Code section 4607, for applicant's efforts to protect her prior award of
22 further medical treatment.¹

23 Defendant contends the WCJ erred in awarding attorney fees under Labor Code section
24 4607, arguing that such fees are not permitted when applicant prevails in enforcing a medical

25 ¹ We note defendant has filed 2 separate petitions for reconsideration, both initially identifying the Findings, Award
26 and Order of October 29, 2007 as the decision from which reconsideration is sought. The October 29, 2007 decision
27 was vacated by the WCJ on November 20, 2007, under Board Rule 10859, and a new decision was issued on the same
date. While defendant's initial petition was filed on November 21, 2007, after the WCJ issued the second Findings,
Award and Order, we recognize that defendant's second petition, filed December 13, 2007 was intended to address the
corrected Findings, Award and Order, while the initial petition addressed the vacated Findings, Award and Order.

1 4607, arguing that such fees are not permitted when applicant prevails in enforcing a medical
2 award after a denial by defendant's Utilization Review (UR). Second, defendant contends the
3 imposition of a penalty under Labor Code section 5814 was in error, as applicant was not deprived
4 of the TENS unit by defendant's denial as she testified that she had begun using a rented TENS
5 unit in November of 2006, which was authorized by defendant in December of 2006. Defendant
6 notes that it was not until its UR denial of the purchase of the TENS unit that applicant was unable
7 to use it because she did not have the necessary electrodes and batteries. Finally, defendant
8 contends the WCJ erred in his calculation of the penalty, noting that applicant would only be
9 entitled to 25% of the cost of the electrodes and batteries purchased beginning July 10, 2007
10 through August 20, 2007, when the parties stipulated that defendant would purchase the TENS unit
11 and provide the electrodes and batteries. Applicant has filed an answer to defendant's petition.

12 While we find no error in the WCJ's determination that applicant is entitled to a penalty
13 pursuant to Labor Code section 5814, the issue of whether defendant may be held liable for
14 attorney fees under Section 4607 is presently under review by the California Supreme Court in
15 *Smith v. Workers' Comp. Appeals Bd.* and *Amar v. Workers' Comp. Appeals Bd.* (2007) 146
16 Cal.App.4th 1032 [72 Cal.Comp.Cases 27]. Accordingly, we shall grant reconsideration to amend
17 the Findings, Award and Order to defer a determination on the award of attorney fees under section
18 4607 and return the matter to the trial level to await the Court's determination of that issue. We
19 shall also amend the award of a penalty on the cost of the electrodes and batteries purchased
20 beginning July 10, 2007 through August 20, 2007, as the parties are in agreement upon that issue.

21 Background

22 Applicant, Rachel Elizondo, sustained an admitted industrial injury on March 29, 2004, to
23 her neck, back, both shoulders, wrists, fingers on both hands, right arm and right knee while
24 employed by the Department of Motor Vehicles as a driver safety manager. A Findings and Award
25 issued on January 18, 2007, awarding further medical treatment to cure or relieve her from the
26 effects of her industrial injuries.

27 Applicant subsequently sought a penalty for defendant's failure to authorize the purchase of

1 timely object to the request for authorization and its subsequent denial through UR on July 10,
2 2007 was untimely and improper.

3 The matter came on calendar on August 20, 2007, at which time the parties stipulated that
4 defendant would purchase the TENS unit and electrodes and batteries. The matter was continued to
5 September 26, 2007, for a hearing on applicant's petition for penalties and attorney fees under
6 Labor Code section 4607.

7 Applicant testified that her primary treating physician, Dr. Barzaga provided her with a
8 TENS unit in November of 2006 on a trial basis to see whether it was helpful. In January of 2007,
9 she told Dr. Barzaga that it was helpful, and he recommended that she purchase one, but he also let
10 her keep the one she had been using. Up until July of 2007, she had been able to obtain a supply of
11 batteries and electrodes to use the TENS unit. At that time, the supplies were stopped and she was
12 unable to use the unit. It was not until the August stipulation with the defendant that it would
13 purchase the unit and provide the supplies that she was able to use it again. It was her
14 understanding that her doctor requested the purchase of the unit in January of 2007.

15 Defendant's assistant claims manager, Barbara Tompkins, testified that defendant
16 authorized a two month rental of a TENS unit on January 2, 2007, after receipt of a request the
17 previous December. Defendant received a request for a purchase in June of 2007, which was
18 denied when a request for additional information from applicant's physician was not forthcoming.
19 Defendant has now purchased a TENS unit at a cost of \$150. She acknowledged defendant's
20 receipt of a January 24, 2007 PR-2 report from applicant's primary treating physician
21 recommending the purchase of a TENS unit. Because it was a recommendation and not a formal
22 written request for treatment, it was not followed. Defendant did not seek additional information
23 from applicant's treating physician regarding the request for the purchase of the TENS unit
24 between January and her receipt of the June 2007 request. Nor did defendant provide an
25 explanation to applicant's treating physician as to the required format of a request for a TENS unit.

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1 Discussion

2 Defendant contends that it should not be found liable for any penalty for an unreasonable
3 denial of medical treatment, under Labor Code section 5814, because applicant was only without
4 medical treatment for a short period of time. Defendant asserts that because applicant possessed a
5 TENS unit the entire time at issue, it should not be liable for a penalty on the cost of the unit plus
6 the cost of the supplies. We note defendant does not challenge the WCJ's finding that applicant
7 was unreasonably denied medical treatment. We are not persuaded that the defendant's admitted
8 failure to provide the necessary supplies for the use of the unit, the absence of which rendered the
9 unit unusable, absolves defendant of liability for a penalty on the cost of the unit. Because
10 defendant unreasonably delayed its authorization for the purchase of the TENS unit, applicant was
11 denied medical treatment for over one month.

12 The only satisfactory excuse for a delay in the payment of a benefit is "genuine doubt from
13 a medical or legal standpoint as to liability for [the] benefit," and the burden is upon the employer
14 to present substantial evidence upon which a finding of such doubt may be based. (*Kerley v.*
15 *Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 230 [36 Cal.Comp.Cases 152, 157], see also,
16 e.g., *Berry v. Workers' Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381, 383 [34 Cal.Comp.Cases
17 507, 508-509]; *Bekins v. Workers' Comp. Appeals Bd. (Garner)* (1980) 103 Cal.App.3d 675, 681-
18 683 [45 Cal.Comp.Cases 256, 258].) Defendant has offered no excuse from a legal or medical
19 standpoint to justify its admitted delay. Had defendant timely authorized the purchase of the TENS
20 unit, there would have been no disruption in the medical treatment to which applicant was entitled.

21 Defendant also contends that the award of a 25% of the cost of the batteries and electrodes
22 purchased from July 10, 2007 to the date of the WCJ's decision is in error, as defendant authorized
23 the purchase of the supplies on August 20, 2007. We note applicant states in her answer to
24 defendant's petition, that she has no objection to the amendment of the Findings, Award and Order
25 to reflect this period. Accordingly, we shall amend the date during which the costs of the supplies

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1 for applicant's medical treatment are subject to the 25% penalty.²

2 Finally, with regard to the issue of attorney fees, both parties agree that the issue of
3 defendant's liability for such fees under Labor Code section 4607 in this case will turn on the
4 Supreme Court's determination in *Smith and Amar, supra*. Accordingly, we shall amend the
5 Findings, Award and Order to defer this issue pending the Court's determination.

6 For the foregoing reasons,

7 **IT IS ORDERED** that Reconsideration of the November 20, 2007 Findings, Award and
8 Order be, and hereby is, **GRANTED**, and as our Decision After Reconsideration, the Findings,
9 Award and Order is **AMENDED** as follows:

10
11 **FINDINGS OF FACT**

12 ...

- 13 2. Applicant is entitled to increased compensation pursuant to Labor Code section 5814, in the
14 amount of \$37.50, plus twenty-five percent of the cost of the batteries and electrodes that
15 have been purchased between July 10, 2007 and August 20, 2007.
- 16 3. Applicant's attorney's entitlement to fees pursuant to Labor Code section 4607 is deferred.

17
18 **AWARD**

19 **AWARD IS MADE** in favor of RACHEL ELIZONDO, and against DEPARTMENT OF
20 MOTOR VEHICLES, as follows:

- 21 a) Payment pursuant to Labor Code section 5814 in the amount of \$37.50, plus twenty-five
22 percent of the cost of the batteries and electrodes that have been purchased between July
23 10, 2007 and August 20, 2007.

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26 ² Additionally, we note the WCJ's recommendation in his Report and Recommendation on Petition for
27 Reconsideration in response to defendant's prior petition that the amount of the penalty on the cost of the TENS unit
should be corrected to reflect a \$125 cost. Defendant concedes that it paid \$150 for the unit and does not challenge the
\$37.50 penalty imposed.

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ORDERS

IT IS ORDERED that:

- a) Defendant shall purchase the durable medical goods in accordance with Finding of Fact number 1(d).
- b) Defendant shall pay the increased benefits to applicant.
- c) The issue of applicant's attorney's entitlement to a fee under Labor Code section 4607 is deferred pending the issuance of a decision by the Supreme Court in *Smith v. Workers' Comp. Appeals Bd.* and *Amar v. Workers' Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1032 [72 Cal.Comp.Cases 27].
- d) Applicant's Motion to Strike defense Exhibit F is denied.

WORKERS' COMPENSATION APPEALS BOARD

F. M. Brass

FRANK M. BRASS

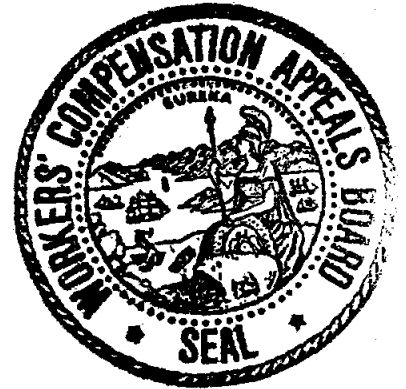
I CONCUR,

R. G. Caplane

RONNIE G. CAPLANE

Alfonso J. Moresi

ALFONSO J. MORESI



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

JAN 22 2008

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

**ABRAMSON & BURNS
STATE COMPENSATION INSURANCE FUND**

SV/jp

SV/jp

ELIZONDO, Rachel