WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MYRON ABNEY, ***Applicant,*** **vs.** **AERA ENERGY; and LIBERTY MUTUAL INSURANCE COMPANY,** ***Defendant(s).***	**Case No. GRO 024430** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law. Because of the important legal issue presented as to the meaning and application of Senate Bill (SB) 899 (Stats. 2004, ch. 34) enacted April 19, 2004, to the penalty issues in this case under Labor Code section 5814,[1] and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[2]

For the reasons discussed below, we hold that section 5814, as enacted by SB 899 and operative June 1, 2004, applies to unreasonable delays or refusals to pay compensation that occur prior to the operative date where the finding of unreasonable delay is made on or after June 1, 2004. We also conclude that section 5814(c), involving the conclusive presumption of the resolution of accrued penalty claims, applies as of the June 1, 2004 operative date of section 5814, and that the statute of limitations set forth in section 5814(g) applies to actions to recover penalties brought on or after the June 1, 2004 operative date.

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges (WCJ). (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also, Govt. Code, §11425.60(b).)

BACKGROUND

The relevant facts of this case do not appear to be in dispute. In a Findings and Award issued on April 14, 2003, it was determined that applicant, while employed as a reliability specialist from 1996 to September 21, 2000, sustained industrial injury to his hands and wrists, causing temporary disability from January 16, 2001, to date and continuing, and the need for further medical treatment. The parties stipulated that applicant's compensation rate for temporary disability indemnity was maximum.

On March 26, 2004, applicant filed a petition for penalty under section 5814, alleging that defendant unreasonably delayed increasing his temporary disability benefit rate as required by section 4661.5 and *Hofmeister v. Workers' Comp. Appeals Bd.* (1984) 156 Cal.App.3d 848 [49 Cal.Comp.Cases 438], which provide that payment of temporary disability indemnity two or more years after the date of injury is to be made at the rate in effect on the date of payment. Following a July 26, 2004 hearing on the issue, the WCJ issued a Findings and Award on August 5, 2004. The WCJ determined that defendant unreasonably delayed adjustment of the applicant's temporary disability indemnity rate from $490.00 to $602.00 per week beginning April 15, 2003, and $602.00 to $728.00 per week beginning January 1, 2004. In accordance with new section 5814, which became operative on June 1, 2004, the WCJ found the defendant liable for a penalty in the amount of $658.00 (25% of the delayed payment), less credit to defendant for $263.20 in section 4650(d) penalty payments, for a net payment of $394.80.

Applicant timely petitioned for reconsideration from the WCJ's decision, contending that it was error to apply the newly enacted section 5814 to this case because the legislation revising that section, SB 899, does not contain a retroactivity clause, and there is no evidence that the Legislature intended the new penalty provision to apply to delays that had occurred prior to June 1, 2004. Therefore, applicant argues that he is entitled to a 10 percent increase on all past, present and future temporary disability indemnity under section 5814 as it existed prior to the enactment of SB 899.

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DISCUSSION

A. SECTION 5814, AS ENACTED BY SB 899 AND OPERATIVE JUNE 1, 2004, APPLIES TO UNREASONABLE DELAYS OR REFUSALS TO PAY COMPENSATION THAT OCCUR PRIOR TO THE OPERATIVE DATE WHERE THE FINDING OF UNREASONABLE DELAY IS MADE ON OR AFTER JUNE 1, 2004.

At the time of the unreasonable delays in this case, section 5814 provided as follows:

> "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision, or award shall be increased by 10 percent. Multiple increases shall not be awarded for repeated delays in making a series of payments due for the same type or specie of benefit unless there has been a legally significant event between the delay and the subsequent delay in payments of the same type or specie of benefits. The question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts. This delay or refusal shall constitute good cause under Section 5803 to rescind, alter, or amend the order, decision, or award for the purpose of making the increase provided for herein."

Section 5814, as enacted by SB 899, now provides:

> "(a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), 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.
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> "(b) If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this section, the employer, within 90 days of the date of discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount unreasonably delayed or refused, along with the amount of the payment delayed or refused. This self-imposed penalty shall be in lieu of the penalty in subdivision (a).
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> "(c) Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims of penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. Upon the submission of any issue

> for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.
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> "(d) The payment of any increased award pursuant to subdivision (a) shall be reduced by amount paid under subdivision (d) of Section 4650 on the same unreasonably delayed or refused benefit payment.
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> "(e) No unreasonable delay in the provision of medical treatment shall be found when the treatment has been authorized by the employer in a timely manner and the only dispute concerns payment of a billing submitted by a physician or medical provider as provided in Section 4603.2.
>
> "(f) Nothing in this section shall be construed to create a civil cause of action.
>
> "(g) Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due.
>
> "(h) This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section.
>
> "(i) This section shall become operative on June 1, 2004."

The phrase "the full amount of the order, decision, or award shall be increased by 10 percent" in the pre-SB 899 section 5814 had been interpreted as applying to the entire specie or class of benefit, e.g., temporary disability indemnity, unreasonably delayed or refused. (See, e.g., *Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal.4th 1213 [58 Cal.Comp.Cases 172, 175, 183]; *Gallamore v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321, 326-329].) Thus, if the pre-SB 899 version of section 5814 were applied in this case, as argued by applicant, his entire award of temporary disability benefits, past, present and future, would be increased by the 10 percent penalty, and would not be reduced by any payments made under

section 4650(d).[3] Under the newly enacted section 5814, however, a penalty is assessed only against the amount of the payment unreasonably delayed or refused (up to 25 percent or $10,000.00, whichever is less), and is reduced by any amount paid under section 4650(d) on the same unreasonably delayed or refused benefit payment. As applied to this case, 25 percent of the delayed payments amounted to $658.00, from which the $263.20 defendant paid under section 4650(d) is deducted, while the ten percent penalty under the "old" section 5814 would be calculated on almost four years of temporary disability indemnity at maximum rates, and defendant would not have been allowed credit for the $263.20 in section 4650(d) payments.

For the reasons discussed below, we find that the WCJ properly calculated the penalty amount under section 5814 as enacted by SB 899 and operative June 1, 2004.

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183, 185].) Thus, the WCAB's first task is to look to the language of the statute itself. (*Ibid.*) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan v. Workers' Comp. Appeals Bd*. (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*) (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*)

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[3] Section 4650(d) provides an automatic increase of ten percent for payments of temporary and permanent disability indemnity not timely made under that section.

(1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*), *supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases 359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*), *supra*, 76 Cal.App.4th at 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

When construing any particular statutory provision, however, we may also consider it in light of the entire statutory scheme of which it is part and harmonize it with related statutes, to the extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 388; *Moyer v. Workmen's Comp. Appeals Bd*., *supra*, 10 Cal.3d at pp. 230-231; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236]; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626, 1639 [60 Cal. Comp. Cases 559].)

Subsection (i) of section 5814 provides that the section becomes operative on June 1, 2004. It therefore indisputably applies to all unreasonable delays or refusals to pay compensation occurring on or after that date. In this case, however, although the finding of penalty issued after June 1, 2004, the unreasonable delays in temporary disability payments occurred before the operative date. We conclude that the language of section 5814 itself, the stated purpose and intent of SB 899, as well as relevant case law, support our conclusion that the remedy afforded by the current rather than the prior version of section 5814 applies in cases where the alleged unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative date.

Subsection (h) of section 5814 specifically provides that "[t]his section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section." This inclusive language is nowhere qualified or limited to unreasonable delays or refusals occurring only on or after the June 1, 2004 operative date, either in section 5814 itself or

elsewhere in SB 899. (To do so would effectively negate its application to "all injuries," contrary to the specific intent of the Legislature.) Furthermore, Section 49 of SB 899 provides:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:
> In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately."

This section supports the application of the new section 5814 remedy to cases where the alleged unreasonable delay or refusal to pay compensation occurred prior to the June 1, 2004 operative date.

If we were to interpret the remedy afforded by the newly enacted section 5814 to take effect only as to alleged unreasonable delays or refusals on or after its operative date, we would ignore the "clear, unambiguous, and plain meaning" of Section 49 requiring that the act take effect "immediately" and provide relief "at the earliest possible time."

Moreover, interpreting section 5814, operative June 1, 2004, to apply here, and to those cases where the alleged unreasonable delays or refusals to pay compensation occurred before the operative date, is consistent with existing case law regarding the nature of the workers' compensation system and changes in its remedies. The right to workers' compensation benefits is wholly statutory, i.e., not derived from common law. (*DuBois v. Workers' Comp. Appeals Bd., supra,* 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 290]; *Le Parc Community Ass'n v. Workers' Comp. Appeals Bd*. (2003) 110 Cal.App.4th 1161, 1171 [68 Cal.Comp.Cases 1049]; *Northstar at Tahoe v. Workers' Comp. Appeals Bd*. (1996) 42 Cal.App.4th 1481, 1484 [61 Cal.Comp.Cases 175]; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002-1003 [51 Cal.Comp.Cases 408, 411].) It is well settled that where a right or a right of action depending solely on statute is altered or repealed by the Legislature, in the absence of contrary intent, e.g., a savings clause, the new statute is applied even where the matter was pending prior to the enactment of the new statute. (See, e.g., *Younger v. Superior Court of Sacramento* (1978) 21 Cal.3d 102, 109; *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819,

829-830; *Southern Service Co., Ltd. v. County of Los Angeles* (1940) 15 Cal.2d 1, 11-12; *Penzinger v. West American Finance Co.* (1937) 10 Cal.2d 160, 170-171; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68.) "The justification for this rule is that all statutory remedies are pursued with the full realization that the Legislature may abolish the right to recover at any time." (*Governing Bd. of Rialto Unified School Dist. v. Mann*, *supra*, 18 Cal. 3d at p. 829, quoting *Callet v. Alioto*, *supra*, 210 Cal. at pp. 267-268.)

As stated by the Court in *Graczyk*, *supra*, concerning the right to workers' compensation benefits:

> "This statutory right is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees. [Citations omitted.] Rights, remedies and obligations rest on the status of the employer-employee relationship, rather than on contract or tort." [Citations omitted.] (184 Cal.App.3d at p. 1003 [51 Cal.Comp.Cases at p. 411].)

Applying this principle to the facts before it, the *Graczyk* Court further explained:

> "Moreover, applicant's inchoate right to benefits under the workers' compensation law is wholly statutory and had not been reduced to final judgment before the Legislature's 1981 addition of subdivision (k) [of section 3352] further clarifying the employee status of athletes. Hence, applicant did not have a vested right, and his constitutional objection has no bearing on the issue. (See *Johnson v. Workmen's Comp. App. Bd*. [1970] 2 Cal.3d [964, 972]; *Ruiz v. Industrial Acc. Com* [1955] 45 Cal.2d [409, 414]. . ." (184 Cal.App.3d at p. 1006 [51 Cal.Comp.Cases at p. 414].)

In *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App. 4th 913, 917-918 [69 Cal.Comp.Cases 199, 202],[4] the Court of Appeal quoted the Appeals Board's opinion with approval regarding the distinction between a procedural statute, which may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect (see, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288; *Kuykendall v. State Bd. of Equalization*

[4] In *Pebworth*, the Court held that the January 1, 2003 amendment to section 4646, allowing parties to settle prospective vocational rehabilitation services for a lump sum not to exceed $10,000, applied to injuries occurring prior to January 1, 2003.

(1994) 22 Cal.App.4th 1194, 1211, fn. 20), and a substantive statute:

> "[A] statute is 'procedural where it merely provides a new remedy for the enforcement of existing rights [citations omitted], where it neither creates a new cause of action nor deprives defendant of any defense on the merits [citation omitted]…. It has also been said that a statute is 'substantive' when it " 'imposes a new or additional liability and substantially affects existing rights and obligations.' " [citations omitted.]

The Court, however, then took issue with the Appeals Board's characterization of the amendments in question as "substantive," concluding that "whether a statute is procedural or substantive does not depend on the degree it changes prior law. The test is whether the statute imposes a new or additional liability or affects existing vested or contractual rights on the one hand or merely changes the manner in which established rights or liabilities are invoked in the future." (116 Cal.App.4th at p. 918 [69 Cal.Comp.Cases at p. 202].)

Here, section 5814, as enacted by SB 899, does not alter an injured worker's existing right to seek penalties in the form of increased compensation on the basis of an unreasonable delay or refusal to pay benefits to which he or she are entitled, but simply changes the remedy available, i.e., the amount or calculation of the penalty, for enforcing those rights. Nor does it create a new cause of action or deprive the defendant employer or carrier of any defense on the merits. Moreover, as set forth previously, because the right to workers' compensation benefits is wholly statutory, a party does not have vested right in any remedy or cause of action not reduced to a final judgment.

Accordingly, based on the language of the statute itself, the stated intent and purpose of SB 899, the wholly statutory nature of the workers' compensation system and existing case law, we find that section 5814, as enacted by SB 899 and operative June 1, 2004, also applies to alleged unreasonable delays or refusals to pay compensation that occurred prior to the operative date. As our Decision After Reconsideration, we will therefore affirm the WCJ's Findings and Award of August 5, 2004.

Finally, in light of our holding that section 5814 applies to unreasonable delays or refusals

to pay compensation that occur prior to June 1, 2004, we also address the procedural issues raised by subsections (c) and (g) of section 5814.

B. SECTION 5814(c), INVOLVING THE CONCLUSIVE PRESUMPTION OF THE RESOLUTION OF ACCRUED PENALTY CLAIMS, APPLIES FROM THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.

Section 5814(c) provides:

> "(c) *Upon the approval* of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims of penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. *Upon the submission* of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted" (emphasis added).

As set forth previously, the Appeals Board's fundamental purpose in construing a statute is to determine and effectuate the Legislature's intent, and its first task is to look at the language of the statute itself. The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language, and when the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms.

Here, section 5814(c) expressly states the conditions under which accrued claims for penalty shall be conclusively presumed resolved, either "[u]pon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board," or "[u]pon the submission of any issue for determination at a regular trial hearing." As the approval or submission conditions are the specific "triggers" for the conclusive presumption and those "triggers" did not become operative until June 1, 2004, we believe that the clear, unambiguous and plain meaning of this statutory language is that section 5814(c) applies only to the approval of compromise and releases, the issuance of findings and awards, stipulations and orders, and the

submission of any issues at trial, on or after June 1, 2004.[5] (See *Martinez v. Jack Neal & Son, Inc.* (2004) 69 Cal.Comp.Cases 775, 779 (Appeals Board en banc).)

C. THE STATUTE OF LIMITATIONS SET FORTH IN SECTION 5814(g) APPLIES TO ACTIONS TO RECOVER PENALTIES BROUGHT ON OR AFTER THE JUNE 1, 2004 OPERATIVE DATE OF SECTION 5814.

Section 5814(g) provides:

> "(g) Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due."

As noted previously, SB 899 is urgency legislation, with most of its provisions to take effect "immediately," i.e., on its enactment date of April 19, 2004. The Legislature specified, however, that new section 5814 would not become operative until June 1, 2004. The most reasonable explanation for this is that section 5814 now contains a statute of limitations.[6]

As noted by the California Supreme Court in *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123, the Legislature may modify the statute of limitations period and apply the changed period to pending proceedings if the affected parties are allowed a reasonable time to pursue their remedy before the statute takes effect:

> "… The retrospective application of a statute may be unconstitutional if … it deprives a person of a vested right; or it impairs the obligation of a contract. But a statute which merely effects a change in civil procedure may have a valid retrospective application. [Citations omitted.] In accordance with this principle it has been specifically held that the legislature may shorten or extend the period of the statute of limitations, or similar statutes relating to procedure, and that the changed period may be made applicable to pending proceedings. [Citations omitted.] There is, of course, one important qualification to the rule: where the change

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[5] Of course, a party may avoid the conclusive presumption under the specific exceptions provided in section 5814(c): having the claim for penalty expressly excluded in the findings and award, etc., and either submitting or expressly excluding the claim for penalty as an issue at trial.

[6] Until the enactment of SB 899, there was no time limitation in which to bring an action for unreasonable delay or refusal to pay compensation. Under new section 5814, such actions must be brought within two years from the date of the alleged unreasonable delay or refusal.

> in remedy, as, for example, the shortening of a time limit provision, is made retroactive, there must be a reasonable time permitted for the party affected to avail himself of his remedy before the statute takes effect. If the statute operates immediately to cut off the existing remedy, or within so short a time as to give the party no reasonable opportunity to exercise his remedy, then the retroactive application of it is unconstitutional as to such party. (*Coleman v. Superior Court* (1933) 135 Cal.App. 74 … .)"[7]

Thus, in order to provide due process to parties who had not yet filed their penalty claims for alleged unreasonable delays or refusals to pay compensation that would soon be beyond the reach of the new two-year limitations period, the Legislature allowed them until June 1, 2004 to bring such actions. For the reasons stated previously, however, effective June 1, 2004, those newly-brought penalty actions would be subject to the provisions of the new section 5814 enacted by SB 899.

The time period from April 19, 2004 to June 1, 2004, for perfecting soon to be barred penalty claims is further support for our conclusion that new section 5814 is not limited to unreasonable delays or refusals to pay compensation occurring on or after June 1, 2004. If it were so limited, the time period would not be necessary.

Accordingly, we are persuaded that the statute of limitations set forth in section 5814(g) applies to actions to recover penalties brought on or after June 1, 2004, the operative date of section 5814**.**

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[7] *Coleman*, in which a retroactive application of a new limitations period was held to deny the plaintiff a reasonable time in which to exercise his remedy, was distinguished by the Court in *Rosefield Packing*, at 4 Cal.2d p. 123, because in *Coleman*, the five-year period from the filing of the complaint had elapsed before the amendment to the law became effective, and thus, the amendment *immediately* cut off the plaintiff's cause of action.

For the foregoing reasons,

IT IS ORDERED that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), the Findings and Award issued by the workers' compensation administrative law judge on August 5, 2004, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

WILLIAM K. O'BRIEN, Commissioner

JAMES C. CUNEO, Commissioner

JANICE JAMISON MURRAY, Commissioner

FRANK M. BRASS, Commissioner

(NOT PARTICIPATING)
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

12/08/04

SERVICE BY MAILTO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD EFFECTED ON ABOVE DATE.