

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: October 15, 2004
RE: **MAY A LABOR CODE §4060(d) PENALTY BE IMPOSED IF
BENEFITS ARE DISPUTED?**

In its *en banc* decision in *James L. Leinon v. Fishermans Grotto*, 69 CCC 995 the Board has answered this question with a resounding "NO."

Since the enactment of Labor Code §4650, as part of the Margolin Reform Act of 1989, our clients have asked this question on numerous occasions, but until the Board's decision in *Leinon*, we have not had a definitive decision on this issue.

The client questions which we have fielded throughout the years have generally been as follows:

1. We have a case going to Trial and our medical rates 20% and the applicant's medical rates at 50%. Although we have advanced up to our defense medical, will we be liable for a Labor Code §4650 penalty on permanent disability if the Workers' Compensation Judge finds on the applicant's medical report and awards a 50% permanent disability award?
2. We have now received a 50% award from the Workers' Compensation Judge and we think that the award should be 20% pursuant to the defense QME report. Will we be liable for a Labor Code §4060 penalty should we take a Petition for Reconsideration and lose?
3. The Appeals Board has now affirmed the decision of the Workers' Compensation Judge, awarding the applicant 50% permanent disability. We still think that the proper award should be 20% on the defense medical report. Will we be liable for a Labor Code §4650 penalty with respect to permanent disability should we elect to take a Petition for Writ of Review and lose?

The Board was faced with similar type issues in its *en banc* decision in *Leinon* as follows:

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... we hold that the penalty under section 4650(d) applies only to periodic payments, including accrued period payments, where liability is accepted or where liability is ultimately imposed and the determination becomes final. An award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them ...

As the *Leinon* case is an *en banc* decision of the Board, it is binding on all Workers' Compensation Judges. Therefore, we will not be liable for a Labor Code §4650(d) penalty until a decision becomes final and a decision does not become final until we have exhausted all of our appellate rights.

WJT/sr