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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF CLAIM OF GONZALEZ

NO. 15

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20 Eagle Street  
Albany, New York  
February 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon. The first  
2 case on today's calendar is Matter of Claim of Gonzalez.  
3 Counsel?

4 MR. DELL: Good afternoon. May it please the  
5 court, Alex Dell on behalf of the firm and the injured  
6 worker, Wilfredo Gonzalez. I'm joined today by Ed  
7 Obertubbesing, the author of the brief. And I would like  
8 to reserve two minutes for rebuttal, if possible.

9 CHIEF JUDGE WILSON: Yes, absolutely.

10 MR. DELL: Untimely payment of compensation to an  
11 injured worker in the State of New York is a big issue, and  
12 when those payments are not made timely, Section 25 of the  
13 Workers' Compensation Law allows the board to penalize an  
14 employer and carrier who makes those untimely payments,  
15 whether it's an installment or a lump sum. And prior to -  
16 - -

17 JUDGE RIVERA: Let me - - - Counsel, let me ask  
18 you this. So amended WCL 24(2) is very clear that  
19 regardless of whether or not a request is over 1,000 or  
20 1,000 and under, whether it's written or oral, counsel has  
21 to certify that the amount they've calculated is in  
22 accordance with that fee schedule. So if there's nothing  
23 that covers an award for penalties, how can an attorney  
24 ever make that certification?

25 MR. DELL: Well, the certification is based on

1 the fact that the penalty is a payment of compensation.

2 JUDGE RIVERA: All right. So if we disagree with  
3 you on that, do you lose?

4 MR. DELL: No, I don't believe that we do because  
5 - - -

6 JUDGE RIVERA: Okay. So then, let's get back to  
7 my question. If it's not an award of compensation, if it's  
8 its own separate category, it's an award of a penalty?

9 MR. DELL: Well, but it isn't because the reality  
10 is is that the penalty comes about because of the actual  
11 award that is being made, and if you look, literally, at  
12 the language in section 25, it talks - - -

13 JUDGE RIVERA: Well, that's your argument for why  
14 it's compensation. Before we get to that one, if - - - if  
15 we did not agree with you on that - - - certainly, you can  
16 get to that. I'm sure I and my colleagues have some  
17 questions about that. But let's assume for one moment we  
18 disagree that it would be compensation. How would it,  
19 otherwise, fit within the schedule?

20 MR. DELL: Well, it fits within the schedule  
21 because the board has the authority to award an attorney  
22 fee in that particular situation because it does represent  
23 money payable to the injured worker, and the board has, for  
24 a longstanding period of time, prior to 1/1/2023, literally  
25 treated the penalty as an award of compensation - - -

1 JUDGE RIVERA: Well, if we assume the  
2 legislature's aware of this practice, why wouldn't it  
3 include it in the list since all the other awards,  
4 obviously, have always allowed for an opportunity to get  
5 attorneys' fees?

6 MR. DELL: Well, they did by repeatedly using the  
7 word compensation and repeatedly using the terminology that  
8 this would be payments in addition to or in excess of the  
9 prior payments, and I think that's the key determination  
10 here in terms of why these penalties represent payments of  
11 compensation because the practical reality is they are  
12 money awards payable to an injured worker. And the other  
13 thing to keep in mind - - -

14 JUDGE RIVERA: It's not compensation for the  
15 injury, right? It's compensation for the fact that they  
16 weren't paid in a timely manner.

17 MR. DELL: And they weren't paid in a timely  
18 manner lost wages - - -

19 JUDGE RIVERA: But they're not tied to the injury  
20 is what I'm saying in that way, specifically - - -

21 MR. DELL: Well, I would say that it is because  
22 the reality is is in order to get that money award, that  
23 compensation, lost wages, you would have to first  
24 demonstrate that you were disabled or unable to work as a  
25 result of occupational trauma, so it doesn't come about

1 unless you get to that situation.

2 And the other big takeaway here is that prior to  
3 1/1/2023, the board routinely awarded attorney fees out of  
4 medical settlements. In other words, the fee would  
5 literally come out of the medical portion of a settlement.  
6 The legislature expressly did away with that in section  
7 24(2)(f), but they knew of this practice that attorney fees  
8 were being awarded out of penalties and never took that out  
9 of the particular statute. In fact, I think, when you look  
10 at the actual schedules within section 24, it makes perfect  
11 sense that if we have a penalty imposed, it increases the  
12 compensation owed to an individual.

13 JUDGE GARCIA: Counsel, to turn, a minute, from  
14 the words of the statute, more towards policy of incentive,  
15 let's say, I recall reading in the briefs - - - and I don't  
16 understand how this works well enough, and perhaps you can  
17 help me on this. The idea of counsel who represents  
18 somebody in these proceedings having the incentive to go  
19 and seek these types of penalties if there's not going to  
20 be an award of fees; is that an issue?

21 MR. DELL: I think that it is an issue, and the  
22 problem that I had with the brief on behalf of the board  
23 was this notion that an injured worker will come to someone  
24 at the outset of their claim, and from there, obviously,  
25 the attorney takes on the full responsibility of making

1 certain that this individual gets all the benefits.

2 But here's where that misses the point. Yes,  
3 people do hire people at the outset of when they get  
4 injured, but there's a great majority of New Yorkers that  
5 wait to hire an attorney, and they don't do that until  
6 something bad happens to them, and when something bad  
7 happens to them - - -

8 JUDGE GARCIA: Well, what do you mean by  
9 something bad happening?

10 MR. DELL: It means they went to a hearing. They  
11 tried to handle the claim on their own. They didn't get  
12 paid timely or at all, for that matter, and now, the  
13 question is - - -

14 JUDGE RIVERA: You mean there is a compensation  
15 award?

16 MR. DELL: Yes. In other words, they went to a  
17 hearing on their own, they got a decision, if there was no  
18 hearing, and now, they did not get paid.

19 JUDGE HALLIGAN: So you're saying that - - - that  
20 your experience is that attorneys are not retained until  
21 there is a late payment?

22 MR. DELL: I would say that people in the State  
23 of New York generally hire someone either at the outset of  
24 their claim or when something bad has happened to them.  
25 For example - - -

1 JUDGE HALLIGAN: And presumably, when you hire  
2 someone at the outset, if you're the attorney, you have no  
3 way of knowing how the case will proceed, so it seems a  
4 little hard for me to see how this concern could color an  
5 attorney's view about whether to take a case at the outset.

6 MR. DELL: Well, I think it's not so much at the  
7 outset but at the point where an individual operates pro se  
8 and then says, I need help, I'm not getting paid.

9 JUDGE CANNATARO: So you're saying financially,  
10 there would be no incentive for the attorney to help  
11 because there's no promise of any form of compensation if  
12 they come in late?

13 MR. DELL: I think that's a big concern, and - -  
14 - and that can - - -

15 JUDGE HALLIGAN: But help - - - help me  
16 understand that, if you will. I thought the board was  
17 arguing that the attorney can't collect a fee on the  
18 underlying award, which, I take it, is what you're saying  
19 would be late in the circumstances you're identifying,  
20 until there is some payment made on that award, and I take  
21 the board to be arguing that that creates incentive enough  
22 to vigorously litigate the claim. Can you address that?

23 MR. DELL: Sure. Well, what happens,  
24 practically, is if we agree to represent an individual in  
25 the State of New York, it is taken on a contingency basis.

1 JUDGE HALLIGAN: Right.

2 MR. DELL: And if there is an award which gets  
3 made for lost wages, for example, or permanency, then the  
4 attorney fee, pursuant to section 24, can be awarded a  
5 lawyer fee. But what we're talking about here - - -

6 JUDGE HALLIGAN: But I thought that the board was  
7 suggesting that that is exactly the structure that gives  
8 rise to an incentive for the attorney to make sure that  
9 payment is made and that's incentive enough. Maybe you  
10 could address that point?

11 JUDGE GARCIA: I thought your point was, and  
12 maybe I misunderstood it, that the attorney might not be  
13 involved in the initial award, so there is nothing owed as  
14 a contingency on the initial award. They're retained later  
15 independently to enforce the award.

16 MR. DELL: And that's exactly correct. The award  
17 - - -

18 JUDGE RIVERA: But that's not this case.

19 MR. DELL: Well, this case has a great set of  
20 facts, which I would like to illustrate, because I think -  
21 - -

22 JUDGE RIVERA: No, but just - - - just to clarify  
23 - - -

24 MR. DELL: No, in this particular case - - -

25 JUDGE RIVERA: - - - I see what you're pointing

1 out, a - - -

2 MR. DELL: Yes.

3 JUDGE RIVERA: - - - a potentially serious  
4 problem - - -

5 MR. DELL: We - - -

6 JUDGE RIVERA: - - - of course, but that's not  
7 this case.

8 MR. DELL: Right. We represented Mr. Gonzalez  
9 from the beginning, and we were able to get him a penalty,  
10 which was additional - - -

11 JUDGE RIVERA: Right.

12 MR. DELL: - - - compensation over and above what  
13 he received. But the problem is, just as you point out,  
14 Judge Garcia, that you could be in a situation where there  
15 is no monetary incentive, and this is where injured workers  
16 in the State of New York really need representation because  
17 when they go into a hearing, they're going to be there pro  
18 se. They're going to be against a skilled defense lawyer.

19 The other byproduct of allowing this access to  
20 justice, allowing a law - - - an attorney to be involved in  
21 these situations is that it limits the possibility that a  
22 law judge is going to be put in the unenviable, awkward,  
23 and frankly, inappropriate position of trying to advocate  
24 for a pro se claimant.

25 JUDGE RIVERA: But what about - - - let's stay

1 with that group that you're talking about. A pro se  
2 claimant gets an award. Might not be a very big award if  
3 they're pro se. Maybe they didn't make the best argument.  
4 But in any event, let's - - - let's say they've got their  
5 award, and now, they say, I need a lawyer because I'm not  
6 getting my money, I'm not getting paid. Isn't the - - -  
7 the fees on the penalty, though, rather small?

8 MR. DELL: So - - -

9 JUDGE RIVERA: Does it really attract a lawyer to  
10 take on that battle?

11 MR. DELL: So I would say that it is not small.

12 JUDGE RIVERA: Okay.

13 MR. DELL: It represents a significant sum of  
14 money to the injured worker, first and foremost. I think -  
15 - -

16 JUDGE RIVERA: Well, certainly, to the worker.  
17 No, I don't - - -

18 MR. DELL: Yes.

19 JUDGE RIVERA: - - - disagree with you there.  
20 Absolutely. But I mean with respect to the lawyer.

21 MR. DELL: No, I would disagree. I would say  
22 that - - -

23 JUDGE RIVERA: I mean, how much was it here?

24 MR. DELL: - - - it would - - - well, in this  
25 case, the fee was 480 dollars, which we rounded down below

1 fifteen percent, but the - - - the practical reality is is  
2 when you look at Mr. Gonzalez's situation and what happened  
3 to him - - -

4 JUDGE RIVERA: Yeah.

5 MR. DELL: - - - was that he was owed over 13,000  
6 dollars - - -

7 JUDGE RIVERA: Yes.

8 MR. DELL: - - - in awards - - -

9 JUDGE RIVERA: Yes.

10 MR. DELL: - - - and - - -

11 JUDGE RIVERA: Yes.

12 MR. DELL: - - - it was not paid timely - - -

13 JUDGE RIVERA: Right.

14 MR. DELL: - - - meaning within ten days of the  
15 filing of the decision.

16 JUDGE RIVERA: Well, that's why there's a penalty  
17 in the statute.

18 MR. DELL: Right. But where the lawyer is  
19 effective and where an individual in New York should have  
20 that ability to get a lawyer is what comes into play upon  
21 the expiration of that ten-day period because the practical  
22 reality is is one might think, payment is owed to me after  
23 that ten-day period, but there's a thirty-day window in  
24 which the carrier can appeal, and so - - -

25 JUDGE HALLIGAN: So I take it you're drawing our

1 attention not to circumstances like what we have here but  
2 to circumstances where someone proceeds pro se, and the  
3 only point at which a lawyer is retained is after an award  
4 has been made, and so the contingency fee may not be an  
5 incentive as it might be if an attorney is retained at the  
6 outset.

7 So if that's the right set of circumstances, if  
8 that's what you're asking us to look at, is there any  
9 evidence in the legislative history that the legislature  
10 focused on that very specific question about what happens  
11 when someone proceeds pro se initially but then doesn't  
12 timely receive payment?

13 MR. DELL: I think that's the entire purpose of  
14 this legislation because it - - -

15 JUDGE HALLIGAN: Well - - - well, what,  
16 specifically, in the legislative - - -

17 MR. DELL: Well - - -

18 JUDGE HALLIGAN: - - - history can you point us  
19 to?

20 MR. DELL: - - - specifically having skilled  
21 lawyers get involved to represent people. The percentage  
22 going from ten to fifteen percent created uniformity. No  
23 doubt about it.

24 JUDGE HALLIGAN: But I take it you're drawing - -  
25 -

1 JUDGE SINGAS: If they're aware of that - - - I'm  
2 sorry. If they're aware of all of that in all these policy  
3 considerations, wouldn't it have just been easier to put it  
4 into the fee schedule? I mean, how do we get around that?

5 MR. DELL: I think you look specifically at the  
6 word compensation, and you - - -

7 JUDGE SINGAS: And what about the words written  
8 and submitted fee application? Like, what are we to do  
9 with that - - - those words?

10 MR. DELL: The written and submitted fee  
11 applications really only deal with the total amount of the  
12 fee. In other words, the board will allow an attorney to  
13 make an oral fee application so long as the fee is 1,000  
14 dollars or less. If it is more than 1,000 dollars, what  
15 you point out is that there needs to be a written fee  
16 application, so that really is something, I believe, is  
17 separate and distinct from specifically why the - - -

18 JUDGE SINGAS: This fee application was made  
19 orally, so what are we to do with that?

20 MR. DELL: Well, it was permissible to be made  
21 orally because it was less than 1,000 dollars, so I don't  
22 see that as an issue that impacts the basis for why an  
23 attorney fee can be awarded out of that particular penalty.

24 JUDGE SINGAS: Yeah, but isn't it - - - doesn't  
25 it make more sense that the fee schedule just doesn't apply

1 at all to oral applications?

2 MR. DELL: Well, I think the fee schedule gives  
3 guidelines in terms of what can be awarded so long as  
4 compensation is being paid to the client. And I think the  
5 - - - the last point I really want to make on that is that  
6 if an attorney fee is paid late, solely an attorney fee,  
7 that penalty goes to the injured worker, and that is even  
8 more reason why we want to have attorneys advocating for  
9 injured workers at that particular moment, and this is  
10 compensation over and above what they've already received.

11 JUDGE RIVERA: Right. But could not the  
12 legislature have been interested, based on that legislative  
13 history, based on the text, in ensuring that there are  
14 attorneys up front for complicated cases, right? So that -  
15 - - there's the - - - an appropriate, full award which is  
16 diminished by the legal fees that the statute allows for.

17 The fees are a lien on the award, and that  
18 incentivizes the lawyer to ensure that these awards are  
19 made timely, and when they're not, to file to seek a  
20 hearing, to submit documentation, to then get the penalty,  
21 but the legislature might have decided, you know, we don't  
22 want to diminish any more the money that the injured worker  
23 gets by now diminishing the penalty, and it's not big  
24 enough to incentivize any lawyers. The legislature could  
25 have decided that. No?

1 MR. DELL: Well, no, I think that the word  
2 compensation was intended to include penalties just as it  
3 had been the longstanding practice of the board to pay  
4 attorney fees out of these penalties. And there's really  
5 nothing in the legislative history whatsoever that says, we  
6 want to do away with this. And in fact, when the board  
7 weighed in on this - - -

8 JUDGE RIVERA: But it requires - - -

9 MR. DELL: - - - they didn't have an issue with  
10 it, either.

11 JUDGE RIVERA: - - - it requires a separate  
12 award. It's not part of the compensation. It's a separate  
13 award. You're not being compensated for the injury.  
14 You're being compensated for the untimeliness. And it's  
15 incentivizing, of course, right, the carrier, the employer,  
16 to pay in a timely manner.

17 MR. DELL: But what it does is it increases the  
18 compensation awarded - - -

19 JUDGE RIVERA: Well, it increases the money that  
20 the individual gets. You are correct about that.

21 MR. DELL: And the board has - - -

22 JUDGE RIVERA: But you're not being compensated  
23 for the injury.

24 MR. DELL: Well, you're being compensated in  
25 relationship to that because you wouldn't have gotten the

1 lost wages but for your injuries at work. And the idea  
2 behind the plain language of the statute demonstrates that  
3 you're increasing the amount of compensation owed. It's  
4 payments in excess of the prior payments.

5 And I think, when you look at that and you  
6 consider the economic and humanitarian objects of the act,  
7 it makes perfect sense to interpret the statute in a way  
8 that is going to help level the playing field for injured  
9 workers and give them the access to justice they need.

10 So for that reason, I would just respectfully  
11 request that the decision of the Third Department be  
12 reversed. Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. WOODS: Good afternoon. May it please the  
15 court, Patrick Woods on behalf of the Workers' Compensation  
16 Board.

17 This is a very straightforward - - -

18 JUDGE GARCIA: Counsel, before you start - - -  
19 I'm sorry to interrupt you, but could you address that last  
20 scenario that your opposing counsel raised where somebody  
21 comes in only at the award stage, and what would be the  
22 incentive for someone to take that case?

23 MR. WOODS: I mean, there is some monetary  
24 incentive to take the case. A 480-dollar award is not a  
25 massive attorney's fee, but it's also not, at that stage,

1 what - - -

2 JUDGE GARCIA: I mean, big law wouldn't take it,  
3 but let's say some law firm, let's say, assuming - - -

4 MR. WOODS: Big law wouldn't take it, but - - -  
5 but a - - - you know, somebody who's hung up a shingle  
6 might be interested in taking that case because all that  
7 needs to be happen - - - all that needs to happen at that  
8 point - - -

9 JUDGE GARCIA: But under your rule, they wouldn't  
10 be able to get paid?

11 MR. WOODS: They wouldn't - - -

12 JUDGE GARCIA: If they hadn't been in at all - - -  
13 -

14 MR. WOODS: That - - -

15 JUDGE GARCIA: - - - they would get nothing?

16 JUDGE RIVERA: Is it that they could enter some  
17 separate agreement?

18 MR. WOODS: I mean, I'm not - - - I'm not  
19 entirely sure how - - - whether they would be entitled to a  
20 piece of the original award or not under the statute in  
21 those circumstances. That's - - -

22 CHIEF JUDGE WILSON: How often does that happen  
23 that somebody appears in front of the board without  
24 representation?

25 MR. WOODS: I do believe it happens fairly



1 commonly that people appear in front of the board without  
2 representation. I'm not sure how common it is that at the  
3 point that they're not getting paid, that they, then,  
4 secure new representation for the first time.

5 CHIEF JUDGE WILSON: So let me ask more  
6 precisely, then. How frequent is it that someone appears  
7 before the board and secures an award without the  
8 assistance of a lawyer?

9 MR. WOODS: I don't have that figure in front of  
10 me.

11 CHIEF JUDGE WILSON: I mean, it almost never  
12 happens, it happens some of the time, it happens half the  
13 time?

14 MR. WOODS: I would say it happens some of the  
15 time. I don't think it's a majority of the time, but  
16 again, I don't have those figures, so I don't want to - - -

17 CHIEF JUDGE WILSON: And in those cases - - - so  
18 I appear by myself. I am not a lawyer. I get an award.  
19 At that point, if it's not paid - - - I just want to be  
20 clear. If it's not paid, and I, then, engage counsel to  
21 help me, you're not sure whether counsel would be entitled  
22 to a fee statutorily?

23 MR. WOODS: That's correct, Judge. I am not sure  
24 under that - - -

25 JUDGE TROUTMAN: What - - -



1 JUDGE RIVERA: Because the - - - it - - - because  
2 it might be tied to the original award as opposed to the  
3 penalty?

4 MR. WOODS: Correct.

5 JUDGE RIVERA: Because I know your position is  
6 they're not going to get the penalty.

7 MR. WOODS: Correct.

8 JUDGE GARCIA: But would that be a better policy  
9 to have them, then, take some percentage of the original  
10 award rather than a fairly modest percentage of the  
11 penalty?

12 MR. WOODS: I don't think I should speak on  
13 whether I - - - whether that's a better policy question or  
14 not. That's not for the board to decide.

15 JUDGE TROUTMAN: What, in Section 24(2),  
16 disempowers the board from granting attorneys' fees on late  
17 penalties?

18 MR. WOODS: The fact that there is a statutorily  
19 enumerated list that does not have a catch-all provision  
20 for things that are not on the list.

21 JUDGE TROUTMAN: But does it specifically say  
22 they are disempowered to do so?

23 MR. WOODS: I would say that it does under  
24 24(2)'s general language. If you look at the very end  
25 before we get to the list, it says that, any of the awards

1 have to, quote, "be in accordance with each applicable  
2 provision of the following schedule". It can't be in  
3 accordance with the provision of the following schedule if  
4 there is no provision of the following schedule that  
5 authorizes that award.

6 I would also say that the structure of the  
7 individual award provisions reinforces that conclusion.  
8 Each of those provisions gives you a different method of  
9 calculating - - -

10 JUDGE TROUTMAN: So you agree that the board did  
11 previously have the ability to award such fees, correct?

12 MR. WOODS: That - - - that's absolutely correct.  
13 There's - - -

14 JUDGE TROUTMAN: Do you, likewise, agree there is  
15 nothing that specifically says they, hereinafter, no longer  
16 have that authority?

17 MR. WOODS: There's no - - - other than the  
18 language that I just quoted you - - -

19 JUDGE TROUTMAN: As you interpret it.

20 MR. WOODS: As I interpret it, when the  
21 legislature takes a broad, general, granted authority - - -

22 JUDGE TROUTMAN: But they could have specifically  
23 said there are no longer fees available for late penalties,  
24 correct?

25 MR. WOODS: They could have, but there's no

1 reason that the legislature should need to do that.

2 JUDGE TROUTMAN: And are you suggesting that the  
3 lawyer has to work for free to get a late penalty?

4 MR. WOODS: Under these scenarios, yes, a lawyer  
5 would have to make what is a fairly modest amount of work  
6 in order to - - -

7 JUDGE HALLIGAN: Wait. So you're saying, in  
8 response to Judge Troutman's question, that the lawyer is  
9 entitled to no compensation if the lawyer comes in only for  
10 purposes of securing a late payment?

11 MR. WOODS: I'm saying I don't - - - I don't know  
12 the answer to that question.

13 JUDGE HALLIGAN: Because most lawyers - - - okay.  
14 It seems unlikely to me that any lawyer who is not  
15 proceeding pro bono would take on a representation for  
16 which there is zero compensation.

17 MR. WOODS: I would agree with that, Judge.

18 JUDGE HALLIGAN: Okay. And so what recourse is  
19 there for someone who proceeds pro se, is given an award,  
20 and then no payment is made, in terms of securing legal  
21 representation?

22 MR. WOODS: There - - -

23 JUDGE HALLIGAN: I take it you're saying - - - if  
24 I'm understanding you correctly, although I will say, it's  
25 a little surprising, the board has no position on whether

1 or not the lawyer is entitled to, essentially, a  
2 contingency slice of the underlying award? You have no  
3 position on that?

4 MR. WOODS: If they - - - I do not have a - - - I  
5 - - - I don't know the - - -

6 JUDGE HALLIGAN: If they're only retained after  
7 the - - -

8 MR. WOODS: - - - I'd be happy to submit a post-  
9 argument letter after consulting with the board on that  
10 point, but what I'm saying is I don't know - - - in the  
11 scenario where they did no work - - -

12 JUDGE HALLIGAN: Yes.

13 MR. WOODS: - - - to secure the underlying award,  
14 they come in only - - -

15 JUDGE HALLIGAN: So you have no position on that?

16 MR. WOODS: - - - to file the form for the  
17 penalty - - -

18 JUDGE HALLIGAN: And I take it you have no  
19 position, either, on whether the claimant and the lawyer  
20 can reach some agreement as to payment that would allow for  
21 a slice of the contingency separate and apart from whatever  
22 the regulatory framework provides?

23 MR. WOODS: That - - - that's correct. I don't -  
24 - -

25 JUDGE HALLIGAN: So - - - so in that circumstance

1 - - -

2 JUDGE RIVERA: I'm sorry. Just to clar - - -  
3 you're saying that they cannot enter, or you don't know if  
4 they can enter?

5 MR. WOODS: I have not discussed that with the  
6 board. I don't know - - - I don't want to tell you  
7 something that's incorrect here. I would be happy to give  
8 a post-argument letter - - -

9 JUDGE HALLIGAN: So under your - - -

10 JUDGE RIVERA: Well, it's hard to do that since  
11 this is not the scenario - - -

12 MR. WOODS: Certainly, that is not this - - -

13 JUDGE RIVERA: - - - in this case.

14 MR. WOODS: Certainly, that is not this case.

15 JUDGE HALLIGAN: But under your - - -

16 MR. WOODS: That is a hypothetical case that I  
17 don't think is very common.

18 JUDGE GARCIA: But the rule would require it.

19 JUDGE HALLIGAN: I appreciate it's a  
20 hypothetical, but under - - - in that scenario, under your  
21 reading, I take it, there's no source of compensation that  
22 you can identify other than the claimant paying out of  
23 pocket for the lawyer at that point; is that right?

24 MR. WOODS: Yes, but again, the lawyer's services  
25 at that point are pretty minimal. At that point, it's

1 filing a form with the board, and if they call and ask for  
2 advice on how to file that form, the board will give them  
3 advice on how to file that form.

4 CHIEF JUDGE WILSON: Could I ask you a more  
5 general question?

6 MR. WOODS: Yes.

7 CHIEF JUDGE WILSON: Could a client engage a  
8 lawyer and - - - with an agreement that entitled the lawyer  
9 to greater fees than are authorized by the statute?

10 MR. WOODS: I don't believe so - - -

11 CHIEF JUDGE WILSON: Okay.

12 MR. WOODS: - - - Judge. I think that would be  
13 contrary to public policy. Given that there is a formal  
14 statutory schedule that has to be approved by the board, I  
15 would think the answer to that is certainly no.

16 JUDGE GARCIA: Based on public policy?

17 MR. WOODS: Based on - - - contrary to express  
18 statutory provisions governing the amount of fees available  
19 in these kinds of cases.

20 JUDGE HALLIGAN: So when you say this doesn't  
21 occur very frequently, do you mean that it's not often that  
22 someone proceeds pro se and secures an award, or that it's  
23 not often that payment is late?

24 MR. WOODS: That it's not often that someone  
25 proceeds pro se at the outset, secures an award before

1           securing counsel, doesn't get paid, at that point, secures  
2           counsel for the very first time.

3                   JUDGE RIVERA: Well, do you know if, in the  
4           legislative history, there's any indication if the - - - if  
5           that was ever raised in the - - -

6                   MR. WOODS: That - - -

7                   JUDGE RIVERA: - - - legislative debates?

8                   MR. WOODS: In - - - I am not aware of any  
9           discussion of either that hypothetical scenario or this  
10          issue with - - - in general - - -

11                   CHIEF JUDGE WILSON: By this issue - - -

12                   MR. WOODS: - - - talking more specific - - -

13                   CHIEF JUDGE WILSON: By this issue, you mean  
14          fees?

15                   MR. WOODS: By this issue, I mean fees on a late  
16          payment penalty.

17                   CHIEF JUDGE WILSON: Right.

18                   MR. WOODS: Certainly, there's legislative  
19          history with supports that the legislature intended to  
20          curb the board's previously broad authority to make awards  
21          under the statute.

22                   JUDGE RIVERA: Can I just clarify your  
23          understanding of amended 24 - - - WCL 24(2)? Excuse me.  
24          So is it your understanding that under 24(2), fees are  
25          mandatory?

1 MR. WOODS: If the application is made, this - -  
2 - the method that's calculating them is set forth in the  
3 statute, and now, the board has to follow that.

4 JUDGE RIVERA: And before this, was - - -

5 MR. WOODS: Before this, all the - - -

6 JUDGE RIVERA: - - - was it also mandatory or  
7 purely within the board's discretion?

8 MR. WOODS: I think it was largely within the  
9 board's discretion. I'm not aware of scenarios where fees  
10 were outright denied, but the range of fees was within the  
11 board's discretion.

12 JUDGE RIVERA: Yes. No, I understand that part.  
13 My question was about whether or not fees must be granted.

14 MR. WOODS: I - - -

15 JUDGE RIVERA: So before the amendment, you're  
16 not sure, or that was also within the discretion of the  
17 board, they could deny fees?

18 MR. WOODS: I believe there are scenarios where  
19 they denied fees and it was upheld, but I couldn't give you  
20 the case today.

21 JUDGE RIVERA: Well, okay. And then with respect  
22 to the penalty, I assume it's - - - well, you tell me. The  
23 board can also deny the fee on the penalty even though it  
24 had that practice?

25 MR. WOODS: I believe it could. If It could deny

1 it on awards in general, I wouldn't see any reason it could  
2 not deny it on - - -

3 JUDGE RIVERA: And had it in the past - - -

4 MR. WOODS: Not - - - I am not aware of a  
5 scenario - - -

6 JUDGE RIVERA: - - - denied on penalties?

7 MR. WOODS: I'm not aware of a scenario where  
8 they denied it on a penalty and not on a general award.

9 JUDGE CANNATARO: And do you have any information  
10 about the prevalence of private agreements before - - -  
11 between clients and their attorneys back in the time when  
12 this was all very discretionary? Could an attorney make an  
13 agreement with a client for a guaranteed payment, say?

14 MR. WOODS: I don't believe that attorneys were  
15 permitted to make a separate agreement that would give them  
16 something separate than what the board aff - - -  
17 authorized. They didn't - - -

18 JUDGE CANNATARO: So they were entirely - - - I'm  
19 talking about the days before the amendment. They were  
20 entirely at the discretion of the board as to what their  
21 compensation was going to be and couldn't seek a fee from  
22 their own client?

23 MR. WOODS: Not without the board's approval.  
24 Prior, 24(2) read, claims of attorneys and counselors-at-  
25 law for legal services in connection with any claim arising

1 under this chapter - - - I'm going to skip to the end - - -  
2 shall not be enforceable unless approved by the board. So  
3 - - -

4 JUDGE SINGAS: And do you agree with your  
5 adversary's definition of compensation? Do you view it  
6 that broadly?

7 MR. WOODS: I don't think the court needs to even  
8 resolve the question of whether this falls under the  
9 statutory definition of compensation because it doesn't  
10 fall under the kind of compensation that is fee-able under  
11 24(2). There's specific categories of compensation for  
12 specific kinds of awards under 24(2). They're tied to the  
13 statutory provisions from which those awards are coming.

14 JUDGE RIVERA: But I thought his argument was if  
15 you are - - - if you have a claimant who received - - -  
16 take any of them - - - an award directing the continuation  
17 of weekly compensation benefits for temporary total or  
18 partial disability - - - I'm just reading (a) - - - the  
19 attorney fee shall be one-third of one week's compensation.

20 I thought his position was, yes, and if that  
21 award is not timely paid and a lawyer is able to  
22 successfully argue for the penalty to be applied that the  
23 claimant would get, that then that's part of the  
24 compensation because they're getting this money from the  
25 penalty that - - - I - - - I think what he's trying to say



1 is - - - falls into that prior award.

2 MR. WOODS: I think that is their argument, but  
3 it requires them to read out the other language in those  
4 subsections. So for example, I think, specifically, it's  
5 in (2) - - - (2) (b) - - - (2) (b) - - -

6 JUDGE RIVERA: Okay.

7 MR. WOODS: - - - that they were talking about  
8 the amount of compensation awarded or paid for a previous  
9 period or periods of temporary total or temporary partial  
10 disability. The compensation being paid is for temporary  
11 total or temporary partial disability, not for a late  
12 payment penalty, which comes from an entirely different  
13 statutory provision that has an entirely different purpose  
14 behind it - - -

15 JUDGE HALLIGAN: I take - - -

16 MR. WOODS: - - - as you pointed out when you  
17 were asking my co - - - counsel - - - brother at the bar  
18 here - - - on that issue.

19 JUDGE HALLIGAN: I take you to be making, if  
20 we're talking about the text, essentially, you know, an  
21 exclusio unius argument, right? So that's an inference  
22 that we would draw. And as I think you acknowledged and  
23 your adversary pointed out, the practice was, otherwise,  
24 before these amendments, so why should the inference carry  
25 that much weight in light of the prior practice?

1 MR. WOODS: Because of the legis - - - the  
2 overall legislative purpose of this amendment to begin  
3 with, which was to limit the board's discretion to create a  
4 stable and predictable way in which these compensation  
5 payments for attorneys' fees are awarded. And again, this  
6 was - - -

7 JUDGE TROUTMAN: But wasn't that for the original  
8 award and not necessarily a penalty? Because before, you  
9 could get a really small award. They want to incentivize  
10 attorneys to take cases, correct?

11 MR. WOODS: That's correct.

12 JUDGE TROUTMAN: So they were looking at the  
13 overall awards, not necessarily a penalty.

14 MR. WOODS: I mean, I - - - they were looking at  
15 incentivizing attorneys to take complex cases at the  
16 outset.

17 JUDGE TROUTMAN: Correct. And you're saying that  
18 somehow encompasses, also, the aspect of a late penalty.

19 MR. WOODS: Well, because the thing that they  
20 were trying to correct is that they believed that the  
21 amount that the board was regularly awarding in these types  
22 of cases was insufficient to motivate members of the  
23 claimants' bar to take on complex cases. These changes do  
24 represent a general increase in compensation for claimants'  
25 attorneys over what it had been before the amendment.

1 CHIEF JUDGE WILSON: Would you sort of explain  
 2 the changes related to the board's desire to promote  
 3 predictability and stability, I think, were the words you  
 4 used, but I don't understand why the claimant's position  
 5 here wouldn't do the same thing. It just provides a bit  
 6 more money, but still subject to the same predictable and  
 7 stable calculations.

8 MR. WOODS: Well, I would say that it's not.  
 9 One, becau - - - for several different reasons, but the - -  
 10 - the first one is that an attorney can't know at the  
 11 beginning of taking on the representation whether or not  
 12 there's going to be a late payment penalty fee other than  
 13 in this - - - this - - -

14 CHIEF JUDGE WILSON: The attorney can't know what  
 15 the award's going to be at the beginning of taking on the  
 16 representation, either, or even whether there's going to be  
 17 an award.

18 MR. WOODS: No, although - - - but you could - -  
 19 - you could at least have an idea of what the ballpark is  
 20 if the claim is successful based on the injury that's in  
 21 front of you. There's no way to know whether the opposing  
 22 party is going to - - - whether the claimant or the carrier  
 23 is going to pay it late or not at the outset of the case.

24 The other thing that I think affects  
 25 predictability and stability here is how do we calculate

1 what the percentage should be.

2 JUDGE RIVERA: You mean on the penalty?

3 MR. WOODS: On the penalty, right, because there  
4 is no statutory guidance on what the penalty should be  
5 because there is no enumerated category for it here. That  
6 - - - then we're - - - we're back in the exact place that  
7 the legislature did not want the board to be where it's  
8 making that decision based on its own discretion. I see -  
9 - -

10 JUDGE CANNATARO: Well, (2)(b) speaks to that a  
11 little bit, doesn't it? Because (2)(b) is about increases  
12 to compensation, and it says awards on increases to  
13 compensation shall be fifteen percent of the increase. So  
14 that's some indication - - - if you view the penalty as  
15 compensation, and you say that that's not really a question  
16 we need to decide, so let's assume for a second it is, and  
17 there's a provision there that describes an award on an  
18 increase, so why shouldn't it be that?

19 MR. WOODS: Well, because that provision applies  
20 only to a small subset of compensation, to the temporary  
21 awards of compensation. The other subsections around it  
22 contain no such increase language. I don't think that it  
23 makes a lot of sense to read that statute as wanting to  
24 provide an award on a late payment penalty for a temporary  
25 award but not on any of the permanent disability awards.

1                   JUDGE CANNATARO: No, I don't think it would, but  
2                   it would at least speak to, I think, how the board viewed  
3                   the appropriate amount of compensation - - - the  
4                   appropriate amount of award for an increase in  
5                   compensation.

6                   MR. WOODS: I think you would be extrapolating  
7                   from one type of award to another type of award in the  
8                   scenario where it's a late payment on, say, a Schedule Loss  
9                   of Use award that I - - - I think is not - - - doesn't make  
10                  a whole lot of sense considering the legislature made a  
11                  choice not to give the underlying award on the same  
12                  calculation for those different types of awards.

13                  CHIEF JUDGE WILSON: Well, subsection (c), which  
14                  covers the Schedule Loss of Use, also has the same fifteen  
15                  percent in it. No?

16                  MR. WOODS: I - - - I don't have it in front of  
17                  me, but I - - -

18                  CHIEF JUDGE WILSON: I mean, it seems to me that  
19                  there are a lot of guideposts in the sections all the way  
20                  through that would give you some - - - some either firm  
21                  guidance or at least a suggestion about how the board ought  
22                  to operate.

23                  MR. WOODS: Well, again, I - - -

24                  JUDGE RIVERA: It's pretty much one-third or  
25                  fifteen percent of one week of something.

1 CHIEF JUDGE WILSON: Yeah.

2 JUDGE RIVERA: So the question is, which one  
3 would the board be able to choose, or can it choose someone  
4 else when there is no guidance?

5 MR. WOODS: Well, and I - - - and I think that's  
6 the problem because, remember, we were coming back to the  
7 question about whether stability and predictability - - -  
8 whether there is firm guidance within the statutory  
9 structure for this type of award which is not expressly  
10 authorized. The court would have to both read it in, and  
11 hopefully, provide guidance for the board on how it's going  
12 to calculate it.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. DELL: So for over thirty years, I've had the  
15 privilege of representing injured workers before the  
16 Workers' Compensation Board, and I will tell you,  
17 definitively, there are no separate agreements that are  
18 made with an individual that you're representing. Section  
19 24 prohibits that type of agreement.

20 JUDGE CANNATARO: And there never have been?

21 MR. DELL: And there have never been. And if  
22 there is a situation where there is a potential award,  
23 compensation for either a lost wage or a penalty, all of  
24 that must be approved by the Workers' Compensation Board.

25 JUDGE RIVERA: But where in 24 does it prohibit

1 such agreements? What's the language I can turn to to help  
2 me - - -

3 MR. DELL: The specific language in the statute  
4 in the beginning talks about how it must be approved by the  
5 board, and it talks about the various ways in which money  
6 moves to an individual, and - - -

7 JUDGE RIVERA: So you mean - - - you mean 24(2)  
8 because it says all - - - I don't have it exactly in front  
9 of me. I'm quickly scanning. But anyway, says that any of  
10 these claims have to be approved by the board.

11 MR. DELL: Exactly.

12 JUDGE RIVERA: They shall not be enforceable  
13 unless approved by the board.

14 MR. DELL: That's the exact language.

15 JUDGE RIVERA: Okay. So then I'll ask you the  
16 same thing I asked him. Is it your understanding that  
17 24(2) mand - - - if you fit within this schedule - - -  
18 let's just stay with this for one moment. The attorney's  
19 claim for legal fees fits within the schedule, it is  
20 mandatory - - - the board has no choice but to grant the  
21 fee and to grant the amount within the requirements of the  
22 schedule. Is that your position?

23 MR. DELL: Yes, and - - -

24 JUDGE RIVERA: Okay. Was that true before this?

25 MR. DELL: What was true?



1 JUDGE RIVERA: Whether or not the board could  
2 simply den - - - obviously, they could choose the range.  
3 That's part of the problem that the legislature is  
4 addressing with 24(b) by having a specific schedule, but  
5 could the board simply deny legal fees - - -

6 MR. DELL: Yes.

7 JUDGE RIVERA: - - - like, zero?

8 MR. DELL: Yes, and that was done on a case-by-  
9 case basis. They had the discretion to do that.

10 JUDGE RIVERA: Also true for penalties?

11 MR. DELL: Yes, because it was payment of  
12 compensation.

13 JUDGE RIVERA: Oh, an award on penalties, just to  
14 be clear. Okay.

15 MR. DELL: And if I could just add briefly, I  
16 just take exception of the word - - - of the use of the  
17 word modest in terms of advocating for a penalty on behalf  
18 of an injured worker. There are many penalty cases which  
19 are heavily fought, postal records, lay witnesses, the mail  
20 didn't come, someone took my mail, the electronic deposit  
21 didn't work, and those are litigated, and they're litigated  
22 in front of a skilled defense lawyer who, if you're an  
23 injured worker, should have a level playing field to be  
24 able to say - - -

25 JUDGE CANNATARO: Counsel, can I just go back to

1 the last question and the line of questioning I was asking  
2 your adversary before about the - - - about (2) (b), which  
3 speaks of increases, but he - - - your adversary pointed  
4 out correctly that the other provisions, like (c) and (d)  
5 and (e), those are just - - - they involve, like, Schedule  
6 Loss of Use or a death benefit. It's just a flat fee on a  
7 - - - on a set award. Those sections don't speak to  
8 increase. So it's kind of hard to under - - - it's a  
9 little bit easier to understand your argument for a fee on  
10 a penalty in a (2) (b) context, but it's very out of context  
11 on (c), (d), and (e).

12 MR. DELL: If you look at each of those  
13 provisions that you just referenced - - -

14 JUDGE CANNATARO: Yeah.

15 MR. DELL: - - - they use specific terminology,  
16 in excess of the prior payments, and that in excess of the  
17 prior payments includes compensation that would be awarded  
18 for a penalty.

19 JUDGE CANNATARO: But it's a fixed amount of  
20 compensation.

21 MR. DELL: Well, the award is fixed, even in the  
22 situation of a temporary partial disability or a temporary  
23 total disability. It may be for a defined period of time,  
24 but it still creates the same issue. If I pay this lump  
25 sum late, now I'm entitled to compensation - - -

1 JUDGE RIVERA: You know, this is just - - -

2 MR. DELL: - - - in excess of that.

3 JUDGE RIVERA: - - - this is just such a  
4 convoluted way to read this statute. To intuit that these  
5 particular words that you're pointing to mean that the  
6 legislature intended to include penalties rather than - - -  
7 if you look at it, each of those sections aligns with a  
8 particular provision or provisions of the Workers' Comp  
9 Law. Why would you not just have another section that also  
10 aligns - - - because there are particular provisions for  
11 penalties, to just set it out in that way? It seems - - -

12 MR. DELL: Yeah.

13 JUDGE RIVERA: It seems particularly challenging  
14 to get through this, although I agree that laws are not  
15 always so clear.

16 MR. DELL: Right. And I would say, with all due  
17 respect to the court - - -

18 JUDGE RIVERA: Yeah.

19 MR. DELL: - - - the use of the word compensation  
20 - - -

21 JUDGE RIVERA: Yes.

22 MR. DELL: - - - is synonymous with the word  
23 penalty. It has been the way the board has practiced for  
24 years.

25 JUDGE RIVERA: Is there - - - other than - - -

1 other than your argument based on what 24(2) says, is there  
2 somewhere else in WCL that would lead to - - - that would  
3 evince exactly what you're saying, that penalties have  
4 always been compensation?

5 MR. DELL: Yes. I mean, in our brief, we cite  
6 numerous decisions that talk about how the board repeatedly  
7 - - -

8 JUDGE RIVERA: No, no, no. Provisions of the  
9 statute.

10 MR. DELL: Well, they - - - they base that on  
11 Section 2, subdivision (6) of the Workers' Compensation  
12 Law, which talks about the money allowance payable to an  
13 injured worker, and this court in - - -

14 JUDGE RIVERA: But money allowance - - - once you  
15 say money allowance, that's much broader than a  
16 compensatory award.

17 MR. DELL: Well, and I think that's one of the  
18 main points is that this is to be liberally construed to  
19 help injured workers. When you look at the economic and  
20 humanitarian objects of the act, when you look at the Keser  
21 decision, they talk about this being even beyond the money  
22 allowance payable to an injured worker. It helps you - - -

23 JUDGE RIVERA: How - - - why - - - why wouldn't  
24 it benefit the injured worker not to diminish the award for  
25 the penalty by a lien of a legal fee?

1 MR. DELL: Because the reality is is many of  
2 those penalties would never be obtained. And remember, in  
3 this case with Mr. Gonzalez - - -

4 JUDGE RIVERA: Well - - - well, only in that one  
5 hypothetical you gave because, otherwise, an attorney is  
6 completely invested in having these payments timely made  
7 because they have the lien on the award itself.

8 MR. DELL: Right. But that penalty - - -

9 JUDGE RIVERA: And they need the claimant to get  
10 paid so that they can collect.

11 MR. DELL: And that penalty that they get for a  
12 late attorney fee literally goes to the claimant as well,  
13 and there's even - - -

14 JUDGE RIVERA: No, I know that. Of course.

15 MR. DELL: - - - an award itself to help the  
16 injured worker. And so I think that's the main point is  
17 that we really have this legislation to make it easier for  
18 injured workers to have skilled representation. This was  
19 not a way to eliminate lawyer fees. It was a way to say we  
20 recognize this is a nuanced area of law.

21 JUDGE RIVERA: So why is it nowhere discussed in  
22 the legislative history? Because you agree it's not - - -  
23 you can't point to anything in the legislative history  
24 that's specifically dealing with this, right?

25 MR. DELL: Well, when I - - -



1 JUDGE RIVERA: Is it because, as you say, it's  
2 folded into the compensation?

3 MR. DELL: Yes. And when I read the statute, I  
4 can demonstrate that in each of those provisions, whether  
5 it's a schedule award, a death benefit, a permanent total  
6 award, there's compensation being paid, and when it's paid  
7 late, there's no question that that increases the amount of  
8 compensation owed. And in addition to Section 2,  
9 subdivision (6), section - - -

10 JUDGE RIVERA: Then why call it a penalty?

11 MR. DELL: Well, that's - - -

12 JUDGE RIVERA: If you're right, why call it a  
13 penalty?

14 MR. DELL: That's what the Section 25 discusses.  
15 But in Section 25, which also supports this argument, they  
16 use the word compensation, and they tie the penalty  
17 directly into the compensation awarded.

18 JUDGE RIVERA: That's what I'm saying. Why  
19 wouldn't you just write it will be an additional  
20 compensation by charging X, Y, and Z? I mean, it has  
21 particular percentages in all sections.

22 MR. DELL: Well, I don't like to use this word,  
23 but I would honestly say that it's redundant to say penalty  
24 when we're dealing with compensation because it is  
25 compensation. It's the money allowance payable to an

1 injured worker.

2 JUDGE RIVERA: Okay.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. DELL: Yes. Thank you.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Claim of Gonzalez, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Donna Gould*

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