

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOSE LUIS FLORES, *Applicant*

vs.

EXECUTIVE BUS BUILDERS, INC.;
ARGONAUT-MIDWEST INSURANCE COMPANY;
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

**Adjudication Number: ADJ12805812
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION**

Applicant's attorney (petitioner) seeks reconsideration of the Order Reducing Attorney's Fee (Order) of August 12, 2024, wherein the workers' compensation judge (WCJ) reduced the attorney's fees from 25% to 15%. Petitioner contends that the WCJ reduced the attorney's fees without holding a hearing or allowing the petitioner to address the WCJ's concerns.

We have not received an answer from any party. Petitioner filed a Request to Consider Supplemental Legal Brief and Supplemental Legal Brief on August 29, 2024, which we accept. (Cal. Code Regs., tit. 8 § 10964.) The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Supplemental Legal Brief, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's Order, and return this matter to the WCJ for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved party may timely seek reconsideration.

FACTS

Applicant settled his initial case against his employer by a compromise and release agreement for \$132,500.00, with a joint opinion and order approving compromise and release issuing on November 7, 2022, resolving the case in chief.

On December 12, 2022, applicant filed his application for Subsequent Injuries Benefits Trust Fund (SIBTF) claiming that his unspecified congenital conditions, coupled with his subsequent injuries, rendered him eligible for benefits. Applicant signed a fee disclosure statement dated December 6, 2022, that his attorney would be requesting a 25% attorney's fee in connection with his claim for SIBTF benefits.

The parties submitted a compromise and release dated July 30, 2024, resolving the dispute with SIBTF for \$95,000.00. Petitioner requested an attorney's fee of 25%, or \$23,740.00, of the proffered settlement. The WCJ issued a notice of intention to reduce the requested attorney's fee to 15%, on August 9, 2024. Petitioner filed his objection to the notice of intention on August 9, 2024. On August 12, 2024, the WCJ issued the Order reducing attorney's fee to \$14,250.00, representing an attorney's fee of 15%.

Petitioner filed the petition for reconsideration on August 21, 2024.

DISCUSSION

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on August 21, 2024, and 60 days from the date of transmission is Sunday, October 20, 2024. The next business day that is 60 days from the date of transmission, is Monday, October 21, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)¹ This decision is issued by or on Monday, October 21, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on August 21, 2024, and the case was transmitted to the Appeals Board on August 21, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 21, 2024.

II.

The Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants’ attorneys. (*Vierra v. Workers’ Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1149 (*Vierra*).) In calculating attorney’s fees, our basic statutory command is that the fees awarded must be “reasonable.” (Lab. Code, §§ 4903, 4906(a) & (d).) Pursuant to Labor Code section 4906, in

¹ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

determining what constitutes a “reasonable” attorney’s fee, the Board must consider four factors: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.)

An attorney shall not request, demand or accept any money from a worker for the purpose of representing the worker before the Workers' Compensation Appeals Board or in any related appellate procedure related until the fee has been approved or set by the Workers' Compensation Appeals Board or an appellate court. (Cal. Code Regs., tit. 8, § 10840; see also *Bentley v. Industrial Acci. Com.* (1946) 75 Cal.App.2d 547, 549 [11 Cal.Comp.Cases 204] [Attorneys appearing in workers’ compensation matters may not contract for fees in excess of those awarded by the Appeals Board].)

The issue we face in the instant case is whether substantial evidence supports the WCJ’s Order setting the attorney’s fee at 15%.

All parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) “Due process requires notice and a meaningful opportunity to present evidence in regards to the issues.” (*Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (Baskin) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes (Grace) v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers’ Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797,

802.) The Appeals Board has a constitutional mandate to ensure “substantial justice in all cases.” (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403.) Sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 141-143 (Appeals Bd. en banc).) The Appeals Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers’ Comp. Appeals Bd.*, *supra*, 79 Cal.App.4th at p. 404.)

A WCJ has broad discretion in determining a reasonable fee, and we agree that in exercising that discretion, the WCJ may reduce an agreed upon fee. However, we note that in his Opinion, the WCJ commented that based on “the limited evidentiary record,” petitioner failed to meet their burden, and that petitioner failed to provide any time records of his work on the case. In his Petition, petitioner requests that a hearing may be held so that he may present evidence.

In keeping with due process, we will rescind the Order and return the case in order to afford petitioner the opportunity to develop the evidentiary record on the issue of attorneys’ fees. In the further proceedings, petitioner should present documentary evidence and testimony in an evidentiary hearing so that the WCJ may decide the issue on a more complete record based on the factors set forth in Labor Code section 4906(d) and WCAB Rule 10844. Applicant should be granted notice of the hearing and the notice required by WCAB Rule 10842.

Accordingly, we grant the Petition for Reconsideration, rescind the Order and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the August 12, 2024 Order Reducing Attorney's Fee is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, August 12, 2024 Order Reducing Attorney's Fee is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**JOSE LUIS FLORES
GHITTERMAN, GHITTERMAN & FELD
OFFICE OF THE DIRECTOR LEGAL, LOS ANGELES**

JMR/mc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *MC*