WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT JAN, *Applicant*

vs.

MENLO COLLEGE,
NORTH RIVER INSURANCE COMPANY,
administered by CRUM & FORSTER, *Defendants*

Adjudication Number: ADJ10808328
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

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."

According to Events, the case was transmitted to the Appeals Board on September 16, 2024, and 60 days from the date of transmission is November 15, 2024. This decision is issued by or on November 15, 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.

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 16, 2024, and the case was transmitted to the Appeals Board on September 16, 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 September 16, 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 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.) 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. Based on our review of the record, we find no reason to disturb the WCJ's findings.

In regard to applicant's contention that they are entitled reimbursement for self-procured medical expenses, we note that the WCJ has specifically ordered further development of the record on the issue. To the extent that applicant seeks review of a non-final order, removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155*]; Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez*, supra; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, for the reasons stated in the WCJ's report, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD , COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 15, 2024

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

JAN ROBERTS
COLEMAN CHAVEZ
RICHARD BLAKEWELL, ESQ.
EMPLOYMENT DEVELOPMENT DEPARTMENT, STATE DISABILITY INSURANCE

LN/md/mc

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

Introduction

On August 29, 2024 applicant, through his attorney of record, filed a Petition for Reconsideration of my August 16, 2024 Findings and Award, served on August19, 2024.

Petitioner asserts that that the evidence does not justify the findings of fact, the findings of fact do not support the decision, the decision was unreasonable and that there was a judicial misunderstanding. [The last two grounds are not among the 5 exclusive grounds for reconsideration enumerated in Labor Code section 5903.] The petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). To date, I am not aware of an answer having been filed by defendants.

Facts

Robert Jan, [..] while employed on November 20, 2016 as a golf coach, Occupational Group Number 290, at Atherton, California, by Menlo College, sustained an injury arising out of and in the course of employment to the right knee and right shoulder.

The applicant underwent a right shoulder arthroscopic surgery on March 10, 2017, followed by a second right shoulder arthroscopic surgery on May 12, 2017.

The parties entered into a Stipulation on August 2, 2017 were defendant accepted injury to the right knee and right shoulder and agreed to pay temporary disability benefits at the rate of $608.98 per week retroactively to the last day of work and ongoing. The Stipulation also stated that the weekly rate was subject to revisions following additional discovery into additional benefits, including housing and utilities, paid to the applicant.

Applicant underwent a right knee arthroscopic surgery on September 20, 2017. He was evaluated by Charles Sonu as the PQME on July 17, 2018, who declared his condition to be at maximum medical improvement at the time of the evaluation. Applicant underwent a second right knee surgery on December 11, 2018, followed by a right knee meniscus transplant on March 26, 2019 and a right total knee replacement on December 21, 2021.

Andrew Pedkte replaced Dr. Sonu as the panel QME, and evaluated the applicant on two occasions, ultimately declaring the applicant's condition to have reached

maximum medical improvement in his January 18, 2023 win which he also addressed impairment.

The matter proceeded to trial on July 2, 2024. After carefully considering the documentary evidence, the applicant's testimony, and the relevant case law, I issued my decision and found that the applicant's earnings were $1,432.38 per week, the applicant's injury resulted in temporary disability over various periods and awarded 104 weeks of temporary total disability, less benefits paid by EDD, and permanent partial disability of 35%. In addition, I found that the applicant's May 30, 2017 petition for penalties was conclusively resolved by the August 2, 2017 stipulations, that the defendants unreasonably delayed payment of temporary disability and awarded a Labor Code section 5814 penalty. I awarded applicant's attorney a fee of 10% of the temporary and permanent disability awarded, and ordered further development of the record on the issue of self-procured medical expenses. It is from that Findings of Fact and Award that the petitioner seeks reconsideration.

Applicant is seeking an order for reimbursement for travel costs incurred in connection with the three QME evaluations. In addition, applicant's attorney is challenging my awarding a fee of 10% on the temporary disability and permanent disability, as well as seeking a 15% fee of the the lien of EDD.

Discussion

A. The issue of reimbursement for expenses to the panel QME evaluations was not raised as an issue for the July 2, 2024 trial.

In his petition for reconsideration, applicant is seeking an order that the he be reimbursed for out of pocket expenses to travel from his home in Illinois to California in connection with the three panel QME evaluations in this case. This issue was not raised on either the pretrial conference statement or at the time of the July 2, 2024 trial.

Applicant failed to raise this issue at trial. No evidence of the amount of self-procured expenses incurred for the trips to the PQME evaluations were presented. Therefore, the request that an order for reimbursement issue as part of this petition for reconsideration is inappropriate.

As part of my August 16, 2024 Findings, Award and Order, I did order further development of the record on the issue of applicant's claim for reimbursement for self- procured medical expenses. Labor Code section 4600(e) provides for reasonable expenses for transportation, meals, and lodging incident to a medical-legal examination, along with payment for each day of lost wages in connection with the examination. To the extent that the transportation expenses are self-procured medical expenses, I have already ordered further development of the record on the issue.

B. Substantial evidence supports my award of a 10% attorney fee in this matter.

In determining the applicant's attorney's fee in this matter, I considered both the complexity of the issues in this case and the care exercised in representing the injured worker when contemplating the fee to be awarded. (Title 8, Cal. Code of Regulations section 10844.) The parties entered into a stipulation regarding temporary disability in 2017 but defendant failed to comply with that stipulation. Applicant's attorney did not return to the board to enforce the terms of the stipulation or pursue penalties and sanctions until the entire case was set for trial, leaving the applicant without any temporary disability benefits for 7 years. Applicant's counsel failed to file a specific penalty petition under Labor Code section 5814 for the failure to pay the 2017 Stipulation, instead only raising it as an issue for trial.

In my decision, I pointed out that the applicant testified the defendants did not pay for his travel expenses from Illinois to California for three PQME appointments, despite defendant's legal obligation under Labor Code section 4621 to pay for travel and lodging in connection with those exams. I factored this as well in my decision on the fee to be awarded. It appears that it was only after receiving my decision that applicant's attorney attempted to seek reimbursement of these expenses for his client. The cost of travel from Illinois to California for three appointments is not insignificant, compounded by the fact that the injured worker was not able to work for the majority of his claim due to this injury.

A major issue for trial was the applicant's average weekly wage. Although applicant's counsel asserted that the value of lodging, meals and fuel should be used in the calculation of the average weekly wage, he did not present the evidence to support his arguments. Under direct examination, applicant testified that he received from his employer what he believed was subsidized housing, along with a gas card and some meals. (Summary of Evidence, pages 8:46-9:13.) However, the value of the gas card was introduced through defendant's cross examination of the applicant, not by applicant's counsel. (Summary of evidence, 13:17-19). Likewise, the value of the subsidized house was introduced by defendant on cross- examination. (Summary of Evidence, 16:30-33.) The evidence regarding the housing as applicant's exhibit 16 was impossible to read even when magnified and therefore of no probative value. No evidence was presented by applicant's counsel regarding the value of the subsidized meals.

Applicant's counsel is under an obligation to notify the board of his client's current address. (Title 8, Cal. Code of Regulations section 10205.5) A review of EAMS shows that applicant's counsel failed to even file a change of address for his client from the address at Menlo College until well after this matter was submitted for a decision.

A review of the record in its entirety supports my award of a fee of 10% of the indemnity as an attorney fee in this matter.

C. Applicant's attorney is not entitled to a fee from the recovery on the EDD lien

Applicant's counsel, in the conclusion to the petition for reconsideration, requested a fee of 15% of EDD's recovery in this matter. Again, this issue was not raised in either the pretrial conference statement or at the time of trial, instead it was raised for the first time on reconsideration. In addition, no arguments were made in support of this contention.

Labor Code section 4903.2 allows for an award of an attorney's fee in the recovery of a lien claim in instances where the lien claimant does not participate in proceedings with respect of their lien. (Labor Code section 4903.2(b).) That is not the case here. EDD participated in the preparation of the September 14, 2023 pretrial conference statement. (EAMS ID 7762963.) EDD was also present at the time of the July 2, 2024 trial, and submitted evidence in support of their lien. As EDD participated in the proceedings, applicant's counsel is not entitled to a fee from the recovery of their lien in this matter.

Recommendation

For the foregoing reasons, I recommend that the August 28, 2024 Petition for Reconsideration, filed on August 29, 2024, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

Date: September 16, 2024

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW
JUDGE