WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT JONES, *Applicant*

vs.

**CITY OF SOUTH PASADENA;
CALIFORNIA JOINT POWERS INSURANCE AUTHORITY, administered by SEDGWICK,
*Defendants***

Adjudication Number: ADJ9425183
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the Answer, the Supplemental Petitions,[1] 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.

[1] Applicant's current attorney filed a "Supplemental Answer to Petition for Reconsideration" on April 20, 2024; and applicant's former attorney filed a Request to file a Supplemental Petition, and a document entitled "Supplemental Petition/ Request for Sanctions" on April 30, 2024 (collectively, Supplemental Petitions). Pursuant to our authority, we accept the pleadings and have reviewed the Supplemental Petitions herein. (Cal. Code Regs., tit. 8, § 10964.) We decline to impose the sanctions requested by applicant's former attorney. We remind applicant's current attorney that "[a] party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading." (*Id.*) We expect applicant's current attorney to comply with this requirement in the future.

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 30, 2024

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

ROBERT JONES
COOKSEY & MARENSTEIN
LEWIS MARENSTEIN
ROBERT ROBIN
SIEGEL, MORENO & STETTLER

LN/pm

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Robert Jones, age 52 on the date of injury, while employed during the period January 25, 1986, through July 20, 2011, as a fire investigator/engineer, Occupational Group Number 490, at South Pasadena, California, by the City of South Pasadena, sustained injury arising out of and in the course of employment to his skin in the form of skin cancer, and to his brain in the nature of radiation necrosis.

The applicant's claim proceeded to trial and a findings and award issued in which it was found that applicant was permanently totally disabled. A reasonable attorney's fee was found to be $266,496.88 and was ordered to be commuted by way of the uniformly increasing reduction method as set forth in the attorney's fee calculation by Mary Kazarian, dated February 8, 2023. Her calculation found a total basis for an attorney's fee of $1,776,645.86. Based on a dispute between Applicant's present and prior counsel, the attorney's fees were ordered held in trust by Defendant pending written agreement between Applicant's present and prior attorneys or further order of the court. They were unable to reach agreement on fee division and the matter proceeded to trial on the issue of division of attorney's fees. A findings of fact issued on March 25, 2024 in which it was found that the reasonable value of services performed by applicant's present counsel was $138,844.87 and the reasonable value of the services performed by applicant's prior counsel was $127,652.01. Defendant was ordered to distribute the attorney's fees it was holding in trust to applicant's present and prior counsel in accordance with the findings of fact.

Applicant's prior counsel filed a timely verified petition for reconsideration. Petitioner contends the WCJ erred by awarding a greater share of the attorney's fee to applicant's present counsel when petitioner contends it that it took a greater responsibility to obtain medical legal evidence and that the results obtained by applicant's present counsel were a result of the work performed by petitioner. In making this argument petitioner asserts factual statements that are not part of the evidentiary record in violation of Appeals Board Rule 10945.

II. FACTS

The case in chief in this matter proceeded to trial and a findings and award issued in which it was found that applicant is permanently totally disabled. A

reasonable attorney's fee was found to be $266,496.88. Based on a dispute between Applicant's present and prior counsel, the attorney's fees were ordered held in trust by Defendant pending written agreement between Applicant's present and prior attorneys or further order of the court. With no agreement regarding division of fees having been reached, the matter proceeded to trial on this issue on February 5, 2024. Neither party offered any exhibits. Petitioner offered the testimony of Robert Sherwin. His testimony was limited to the fact that his office started work on the file on March 24, 2014, prior to the application having been filed, and further, that he discussed the case with applicant's subsequent counsel who indicated that they made a conscious decision not to have the applicant testify, and it was part of their strategy. (See February 5, 2024 Minutes of Hearing and Summary of Evidence, page 3, lines 15 through 20). Applicant's present counsel offered the testimony of Vanessa Cooksey. Her testimony was limited to when she began work on the file, and her strategic decision not to call the applicant as a witness. (See February 5, 2024 Minutes of Hearing and Summary of Evidence, page 4, lines 9 through 21).

At trial present and prior counsel stipulated that: 1) the handling attorney at both applicant's present and prior attorneys firms was Vanessa Cooksey, who assumed the same level of responsibility, albeit for different amounts of time, at both firms; 2) Ms. Cooksey exercised the same level of care in representing the applicant while handling the case at both firms, albeit for different amounts of time; 3) Prior counsel Lewis, Marenstein, Wicke, Sherwin & Lee filed the application for adjudication of claim in this matter on April 9, 2014. Present counsel, Cooksey and Marenstein filed a substitution of attorney on March 8, 2022, and the case proceeded to trial on the regular issues on November 28, 2022 with a findings and award issuing on February 8, 2023; and 4) Prior to the substitution of attorney there was a tentative settlement offer for a compromise and release for $249,000 for which defendant had not secured authority.

The matter was tried on the issue of division of attorney's fees between applicants prior and present counsel. This judge found that the reasonable value of the services performed by applicant's prior counsel, Lewis, Marenstein, Wicke, Sherwin & Lee, was $127,652.01 and the reasonable value of the services performed by applicant's present counsel, Cooksey & Marenstein, was $138,844.87. Prior [counsel's] Petition for Reconsideration followed.

III. DISCUSSION

A
Attorney's Fees Properly Divided Pursuant to Labor Code § 4906 (d) and CCR § 10844

This judge divided the awarded attorney's fees between applicants past and present counsel based upon the factors that a workers compensation judge should consider in establishing a reasonable attorney's fee as outlined in Labor Code § 4906 (d) and California Code of Regulations § 10844. These factors were evaluated based upon the facts to which the parties stipulated at the time of trial, i.e. that: 1) the handling attorney at both applicant's present and prior attorneys firms was Vanessa Cooksey, who assumed the same level of responsibility, albeit for different amounts of time, at both firms; 2) Ms. Cooksey exercised the same level of care in representing the applicant while handling the case at both firms, albeit for different amounts of time; 3) the length of time each firm handled file; and 4) Prior to the substitution of attorney there was a tentative settlement offer for a compromise and release for $249,000 for which defendant had not secured authority. The result obtained by present counsel was a permanent total disability award, which per the Disability Evaluation Unit, resulted in a total basis for an attorney's fee of $1,776,645.86.

In its petition for reconsideration petitioner makes factual assertions that are not part of the evidentiary record in violation of Appeals Board Rule 10945. Furthermore, petitioner's factual assertions are in conflict with facts to which they stipulated at the time of trial. For example, petitioner seems to argue that applicant's prior attorney firm assumed a greater responsibility than applicant's present attorney firm. In making this argument petitioner asserts that ". . . many staff members, legal secretaries and assistants . . . were instrumental in the building of this case while at LMWSL " (Petition for Reconsideration dated April 9, 2024, page 7, lines 27 through 28). There is no evidence in the record for this factual assertion. Even Ms. Cooksey's trial testimony to the effect that the application for adjudication of claim was prepared by office staff, (See February 5, 2024 Minutes of Hearing and Summary of Evidence, page 4, line 15), does not support petitioner's contention that many staff members, legal secretaries and assistants were working on applicant's case. Furthermore, petitioner stipulated that "the handling attorney at both applicant's present and prior attorneys firms was Vanessa Cooksey, who assumed *the same level of responsibility*, albeit for different amounts of time, at both firms. (See February

5, 2024 Minutes of Hearing and Summary of Evidence, page 2, line 15, emphasis added).

Similarly petitioner seems to argue that applicant's prior attorney firm exercised a greater level of care in representing the applicant than applicant's present attorney firm. In support of this argument petitioner states that "Not once in those eight years did applicant express any dissatisfaction with the representation nor did LMWSL fail to act or lack care." (Petition for Reconsideration dated April 9, 2024, page 8, lines 6 through 7). Once again, petitioner makes factual assertions that are not in the record and are thus in violation of Appeals Board Rule 10945. Additionally petitioner appears to confuse the care exercised and the time involved. These are separate factors as outlined in California Code of Regulations § 10844. This judge considered the time involved in the handling of this case by both applicant's past and present counsel as indicated on page 3 of the March 25, 2024 Opinion on Decision under the heading "TIME INVOLVED".

Petitioner makes further improper factual assertions on the issue of the results obtained by applicant's past and present counsel. Petitioner argues that "While a 'tentative offer' was discussed, it was never conveyed or offered to the applicant for either acceptance or rejection." (Petition for Reconsideration dated April 9, 2024, page 7, lines 7 through 8). While the parties did stipulate that prior to the substitution of attorney there was a tentative settlement offer for a compromise and release for $249,000 for which defendant had not secured authority, there is nothing in the record as to whether it was conveyed or offered to the applicant for either acceptance or rejection.

Petitioner does not appear to dispute this judge's analysis of the relative time spent in handling this case by applicant's past and present counsel. However, petitioner argues that it was retained to represent the applicant on this claim as well as an orthopedic claim. There is nothing in the record in the present case about the orthopedic claim. Petitioner also contends that during the period they represented the applicant they conducted significant discovery including "three depositions of Applicant, six medical legal reports in multiple specialties, and two cross examinations of medical legal evaluators." (Petition for Reconsideration dated April 9, 2024, page 2, line 25 through page 3, line 3). This is another factual assertion that is not part of the evidentiary record in violation of Appeals Board Rule 10945. The record in this matter does include medical legal reports in multiple specialties. However, it only includes a transcript of one cross examination of a medical legal evaluator and no depositions of applicant. If in fact applicant's prior counsel represented applicant

on one or more orthopedic claims some of the discovery they claim to have conducted may have pertained to such orthopedic claim or claims. However, it would also follow that not all of the time spent by applicant's prior counsel in representing the applicant would have been dedicated to this case. Presumably some of it would have been dedicated to their representation of applicant in his orthopedic claim or claims. Furthermore, petitioner contends that applicant's orthopedic claim was settled on February 21st 2018. (Petition for Reconsideration dated April 9, 2024, page 2, footnote 2, line 28). Ostensibly applicant's prior counsel would have been separately compensated for time spent in connection with applicant's orthopedic claim or claims as a part of that settlement.

Petitioner also infers that applicant's present counsel exercised little care and spent minimal time in handling this case when petitioner argues that the minutes of hearing from the November 28, 2022 trial show that the parties were on the record from 2:25 PM to 2:37 PM. (Petition for Reconsideration dated April 9, 2024, page 3, line 25 through page 4, line 4). This argument fails to recognize that this matter was set for trial at 8:30 AM, and fails to recognize that the parties may have (and in fact did) engage in lengthy and detailed discussions of all aspects of the case with this trial judge prior to going on the record. It also fails to recognize that applicant's present counsel may have spent extensive time reviewing the file and preparing for trial. Again, these arguments are all contrary to the stipulations of the parties.

Case Law Cited by Petitioner

Petitioner cites *Hughes v. WCAB* (2001) 66 CCC 1560, a writ denied case. In the *Hughes* case the trial judge awarded the majority of the attorney's fee to applicant's first attorney. Petitioner contends that the trial judge's reasoning was that the award obtained by the subsequent attorney ". . . was based upon the first attorney's efforts in medical evidence obtained " However the *Hughes* case is distinguishable from the present case. The California Compensation Cases Summary indicates that in the *Hughes* case:

> ". . . an MSC was held at which a tentative settlement was reached. The original attorney confirmed the discussions in a letter shortly after the hearing, stating that Applicant would settle all of his claims for a guaranteed life annuity of $350,000,
> $100,000 of which was to be attributable to the S&W petition. In addition to this amount, Defendant was to reach an agreement with Medicare and fund an annuity that would provide medical benefits equal to, or greater than, those to which Applicant was entitled under the Labor Code."

Hughes v. Workers' Comp. Appeals Bd., 66 Cal. Comp. Cases 1560 (Cal. App. 3d Dist. October 25, 2001) (emphasis added).

The summary goes on to indicate that:

> "The WCJ noted that [a]t the time of the substitution, it appeared that the case
> was in effect resolved and that the only issue left was the appropriate method for closing the file. . . . The second attorney did not show any real effort to obtain anything more than was already, as a practical matter, in effect at the time of the substitution." *Hughes v. Workers' Comp. Appeals Bd*., 66 Cal. Comp. Cases 1560, at 1561 (Cal. App. 3d Dist. October 25, 2001) (emphasis added).

In the present case the parties stipulated that a tentative settlement offer for a compromise and release was discussed. However defendant had not secured authority for the settlement. Furthermore, petitioner admits that "While a 'tentative offer' was discussed, it was never conveyed or offered to the applicant for either acceptance or rejection." (Petition for Reconsideration dated April 9, 2024, page 7, lines 7 through 8). This is not in any way analogous to the *Hughes* case in which the WCJ found that the settlement negotiated by prior counsel was "already, as a practical matter, in effect at the time of the substitution." *Hughes v. Workers' Comp. Appeals Bd*., 66 Cal. Comp. Cases 1560, at 1561 (Cal. App. 3d Dist. October 25, 2001).

As respondent aptly points out in her Answer to Petition for Reconsideration, *Bentley v. Industrial Acci. Com.*, 11 Cal. Comp. Cases 204 (Cal. App. 2d Dist. July 31, 1946), cited by petitioner, is inapplicable to the present case. It does not involve the issue of division of attorney's fees between successive counsel.

Petitioner also cites *Ghitterman & Ghitterman v. WCAB (OKeefe) (1999)* 64 CCC 910 (writ denied). Petitioner seems to argue that the case stands for the proposition that where the first attorney conducts all discovery they should be awarded the majority of the fee. This is not what formed the basis of the WCJ's decision in *Ghitterman*. The California Compensation Cases Summary indicates that in the *Ghitterman* case:

> "Applicant's case was settled by way of C&R in the amount of $58,850. The WCJ awarded a total attorney fee of $8,827.50, which represented 15 percent of the C&R The WCJ ordered [subsequent counsel] to pay [prior counsel] the sum of $6,000, whereby [subsequent counsel] would keep the balance of $2,827.50. During the period [prior counsel] represented

> Applicant, the offer to settle had increased from $10,000 to $35,000. A counter demand of $50,000 was conveyed to Defendant by [prior counsel] on Applicant's behalf. All the attorney fee on the $8,850.00 difference between final demand by [prior counsel] and settlement went to [subsequent counsel], being the sum of $1,327.50. On the remaining balance of $7,500.00, having conducted no discovery or made no contact with Defendant during his representation, [subsequent counsel] was given a premium for appearing to sign the compromise and release, being the sum of $1,500, with the balance of the fee going to [prior counsel] for having made the settlement possible." *Ghitterman & Ghitterman v. WCAB (OKeefe)* (1999) 64 CCC 910 through 911 (writ denied).

The WCJ in *Ghitterman* focused on the results obtained. The WCJ gave applicant's subsequent counsel the full fee on the difference between the final demand by prior counsel and the actual settlement amount, plus a premium for appearing at a hearing to sign a compromise and release. The balance of the fee went to prior counsel for having made settlement possible.

If the rationale in the *Ghitterman* case was applied to this case, applicant's present counsel would have received 15% of the difference between the $250,000 tentative settlement offer for which defendant had not secured authority and the $1,776,645.86 total basis for an attorney's fee as determined by the DEU, plus a premium for appearing on the date of trial and resolving the case.

Thus, present counsel would have received $228,996.88 plus a premium for appearing and closing the case. The balance, (less than $37,500) would have been payable to applicant's prior counsel. This judge does not believe that the method adopted by the WCJ in the *Ghitterman* case would have resulted in a fair division of attorney's fees between applicant's present and prior counsel in this case. However this WCJ believes that the method outlined in his March 25, 2024 Opinion on Decision was fair and reasonable to all parties.

IV. RECOMMENDATION

It is respectfully recommended that prior [counsel's] Petition for Reconsideration be denied.

Date: April 24, 2024

Randal Hursh
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE