

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

SALVADOR MAGALLON, *Applicant*

vs.

**AMERI-KLEEN BUILDING SERVICES;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ7800884
Santa Barbara District Office**

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on May 8, 2024. By the F&A, the WCJ found that cost petitioner established her market rate of \$350.00; cost petitioner is owed an additional \$193.44 for each service on February 26, 2021, and on March 9, 2021; cost petitioner is owed costs in the amount of \$237.50; and cost petitioner's attorney is owed attorney's fees in an amount to be adjusted by the parties with jurisdiction reserved in the event of a dispute.

Defendant contends that cost petitioner failed to provide sufficient evidence to establish a market rate, and if there is no market rate agreement or established market rate then the judicial council's fee schedule of \$156.56 applies, and that no Labor Code¹ section 5813 attorney's fees are owed because the court did not make a finding of bad faith.

We have received an Answer from the cost petitioner. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have reviewed the allegations of the Petition, the Answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons

¹ Unless otherwise stated, all statutory references are to the Labor Code.

discussed below, we will grant reconsideration, amend the WCJ's decision to find that cost petitioner did not establish that defendant acted in bad faith and is not entitled to costs and attorney's fees, and otherwise affirm the F&A.

BACKGROUND

The parties stipulated that while employed on March 25, 2009 as a laborer by defendant, applicant sustained an injury arising out of and in the course of employment to back, other body systems, and kidney. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 4/3/2024, 2:9-2:11.) On March 11, 2021, the case in chief was resolved by a Compromise & Release (C&R).

On February 26, 2021, cost petitioner alleges that she was present with the applicant and provided interpreting services for settlement discussions at the applicant's attorney's office. Cost petitioner sent defendant an invoice dated March 4, 2021 in the amount of \$350.00 for the February 26, 2021, translation services. (MOH/SOE, 4/3/2024, Exhibit 1, Ortiz Schneider Interpreting & Translation (OSIT) Invoice dated March 4, 2021.)

On March 9, 2021, cost petitioner alleges that she provided translation services for the C&R signing.

On March 19, 2021, defendant issued payment to OSIT in the amount of \$156.56 along with an explanation of review (EOR) disputing the remainder of the amount demanded along with its justification for the dispute and denial of payment of the disputed amount. (MOH/SOE, 4/3/2024, Exhibit 2, Defendant Explanation of Review (EOR) dated March 4, 2021.)

Cost petitioner sent defendant an invoice dated March 19, 2021, for translation services provided for the C&R signing on March 9, 2021. (MOH/SOE, 4/3/2024, Exhibit 5, OSIT invoice dated March 19, 2021.)

Cost petitioner sent defendant a letter dated March 26, 2021, requesting that defendant reconsider paying the remaining amount cost petitioner requested on March 4, 2021, along with updated Market Rate documentation. (MOH/SOE, 4/3/2024, Exhibit 3, Cost Petitioner's Reconsideration of March 4, 2021, invoice.)

On April 5, 2021, defendant issued payment in the amount of \$156.56 and an EOR disputing the remainder of the amount demanded in addition to defendant's justification for the dispute and denial of payment of the disputed amount. (MOH/SOE, 4/3/2024, Exhibit 6, Defendant Explanation of Review (EOR) dated April 5, 2021.)

Cost petitioner sent defendant a letter dated April 8, 2021, requesting that defendant reconsider paying the remaining amount cost petitioner requested on March 4, 2021, along with updated Market Rate documentation. (MOH/SOE, 4/3/2024, Exhibit 7, Cost Petitioner's Reconsideration of March 4, 2021, invoice.)

On May 7, 2021, defendant denied cost petitioner's request for additional payment of the March 9, 2021 C&R signing translation services. (MOH/SOE, 4/3/2024, Exhibit 8, Defendant's denial of cost petitioner's reconsideration request for March 9, 2021, invoice.)

On May 10, 2021, defendant denied cost petitioner's request for additional payment. (MOH/SOE, 4/3/2024, Exhibit 4, Defendant's denial of cost petitioner's reconsideration request for March 4, 2021, invoice.)

On April 3, 2024, the parties proceeded to trial on the issues of attorney's fees, the cost petition, dated December 4, 2023, the petition for penalties by cost petitioner, dated December 4, 2023, and defendant's objection to petition for costs and requests for reimbursement, dated January 19, 2024. (MOH/SOE, 4/3/2024, 2:18-2:22.)

On May 8, 2024, the WCJ issued the F&A, which determined in relevant part that cost petitioner established her market rate of \$350.00, that cost petitioner is owed an additional \$193.44 for each of the following dates of service February 26, 2021 and March 9, 2021, costs are owed to cost petitioner in the amount of \$237.50, and attorney for cost petitioner is owed attorney fees in an amount to be adjusted by the parties with jurisdiction reserved in the event of a dispute.

Defendant contends that cost petitioner did not establish its market rate and it voluntarily paid a reasonable amount for interpreting services rendered and no further amount is due to cost petitioner. Further, defendant contends that since it "acted in good faith there could be no finding of bad faith."

DISCUSSION

I.

This dispute arises out of payment for interpreting services provided by cost petitioner to applicant for which cost petitioner contends defendant is responsible. Defendant contends that it has paid cost petitioner the appropriate amount for the interpreter services provided. Cost petitioner disagrees with defendant's position and asserts it is entitled to the full amount it billed because the interpreting services provided are a civil right which guarantees access to individuals with limited English language abilities.

The interpreter has the burden of proving among other things that the fees charged were reasonable in order to recover charges for interpreter services. (*Gitron v. Santa Fe Extruders*, (2011) 76 Cal. Comp. Cases 228, 234 (Appeals Board en banc).)

The provisions of the Labor Code and the Administrative Director (AD) rules regarding interpreter services needed for medical treatment are different from the provisions as to interpreter services provided in other settings. Also, the billing/payment requirements in section 4603.2 are in regard to “A provider of services provided pursuant to Section 4600, including but not limited to ... interpreters ...” (Lab. Code, § 4603.2(b)(1)(A).)

Labor Code, section 5811 states:

... Interpreter fees that are reasonably, actually, and necessarily incurred shall be paid by the employer under this section, provided they are in accordance with the fee schedule adopted by the administrative director. ¶ A qualified interpreter may render services during the following: ... (D) During those settings which the administrative director determines are reasonably necessary to ascertain the validity or extent of injury to an employee who does not proficiently speak or understand the English language. (Lab. Code, § 5811(b)(2).)

As to the actual amount to be paid for interpreter services, the provisions of AD rule 9795.3 are relevant to the issues herein:

(a) Fees for services performed by a certified or provisionally certified interpreter, upon request of an employee who does not proficiently speak or understand the English language, shall be paid by the claims administrator for any of the following events: ... (6) A conference held by an information and assistance officer ... to assist in resolving a dispute between an injured employee and a claims administrator. (7) Other similar settings determined by the Workers' Compensation Appeals Board to be reasonable and necessary to determine the validity and extent of injury to an employee.

(b) The following fees for interpreter services provided by a certified or provisionally certified interpreter shall be presumed to be reasonable: (1) For an appeals board hearing, arbitration, or deposition: interpreter fees shall be billed and paid at the greater of the following (i) at the rate for one-half day or one full day as set forth in the Superior Court fee schedule for interpreters in the county where the service was provided, or (ii) at the market rate. ... (2) For all other events listed under subdivision (a), interpreter fees shall be billed and paid at the rate of \$11.25 per quarter hour or portion thereof, with a minimum payment of two hours, or the market rate, whichever is greater. ... (Cal. Code Regs., tit. 8, § 9795.3.)

In this matter, it appears that there is no dispute that OSIT is entitled to payment for the interpretation services provided to applicant. The issue is the amount owed. It is important to note

that the quoted portions of section 5811(b)(2) and AD rule 9795.3 apply to interpreter services that are not related to medical treatment.

Pursuant to *Cruz v. Benu LLC*, 2023 Cal. Wrk. Comp. P.D. LEXIS 45, defendant contends that cost petitioner must provide evidence of what other interpreters accepted as payment for similar services in the same geographic area, and cost petitioner failed to provide sufficient evidence to establish a market rate. (*Cruz v. Benu LLC*, 2023 Cal. Wrk. Comp. P.D. LEXIS 45; Petition For Reconsideration, 5/30/2024, 4:8-4:12.) Further, defendant asserts in its Petition that cost petitioner testified that she did not research what other similar companies charged for these services. (Petition For Reconsideration, 5/30/2024, 4:14-4:16, MOH/SOE, 4/3/2024, 9:2-9:6.) Cost petitioner contends that SCIF has always paid her fees.

In *Cruz*, the WCJ applied the analysis in the *en banc* case of *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases, 1588 (Appeals Board en banc) to interpreter services. In *Kunz, supra*, we stated that:

In determining the reasonableness of a facility fee (as with any medical treatment charge that is not subject to the Official Medical Fee Schedule), the Board *may* take into consideration a number of factors, including but not limited to the medical provider's usual fee, the usual fee of other medical providers in the geographical area in which the services were rendered, other aspects of the economics of the medical provider's practice that are relevant, and any unusual circumstances in the case.

In the absence of persuasive rebuttal evidence from the defendant, the outpatient surgery center's billing, by itself, will normally constitute adequate proof that the fee being billed is what the outpatient surgery center usually accepts for the services rendered (and that the fee being billed is also consistent with what other medical providers in the same geographical area accept). The defendant, however, may present evidence that the facility fee billed by the outpatient surgery center is greater than the fee the outpatient surgery center usually accepts for the same or similar services, both in a workers' compensation context and a non-workers' compensation context, including contractually negotiated fees. Similarly, the defendant may present evidence that the facility fee billed by the outpatient surgery center is greater than the fee usually accepted by other providers in the same geographical area, including in-patient providers.

(*Kunz, supra*, 67 Cal.Comp.Cases at pp. 1598 – 1599 (Emphasis added).)

However, as explained in *Kunz, supra*, once the lien claimant produces evidence as to the usual fee that is accepted, the burden shifts to defendant to produce evidence in rebuttal. Here,

defendant did not provide rebuttal testimony at trial, thus we agree with the WCJ that cost petitioner established that its fees are reasonable.

II.

Pursuant to section 5813,

(a) The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, a workers' compensation referee or the appeals board. In its sole discretion, may order additional sanctions not to exceed two thousand five hundred (\$2,500) to be transmitted to the General Fund.

(b) The determination of sanctions shall be made after written application by the party seeking sanctions or upon appeal board's own motion.

Section 5813 sanctions must be based on "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813.) WCAB Rule 10786 contains specific provisions applicable to this dispute and set forth the procedure for determinations regarding medical-legal expense disputes.

WCAB Rule 10786 states in relevant part,

(i) Bad Faith Actions or Tactics:

(1) If the Workers' Compensation Appeals Board determines that, as a result of bad faith actions or tactics, a defendant failed to comply with the requirements, timelines and procedures set forth in Labor Code sections 4622, 4603.3 and 4603.6 and the related Rules of the Administrative Director, the defendant shall be liable for the medical-legal provider's reasonable attorney's fees and costs and for sanctions under Labor Code section 5813 and rule 10421. The amount of the attorney's fees, costs and sanctions payable shall be determined by the Workers' Compensation Appeals Board; however, for bad faith actions or tactics occurring on or after October 23, 2013, the monetary sanctions shall not be less than \$ 500.00. These attorney's fees, costs and monetary sanctions shall be in addition to any penalties and interest that may be payable under Labor Code section 4622 or other applicable provisions of law, and in addition to any lien filing fee, lien activation fee or IBR fee that, by statute, the defendant might be obligated to reimburse to the medical-legal provider. (Cal. Code Regs., tit. 8, § 10786(i)(1).)

The WCJ retains the discretion to determine whether, as a result of bad faith actions or tactics, a defendant failed to comply with the requirements, timelines, and procedures set forth in the Labor Code and in the Rules of Administrative Director.

Here, the record does not reflect that defendant acted in bad faith, and an award of costs and fees is premised on a finding that the party acted in bad faith. Thus, since there has not been a showing of bad faith with respect to defendant's denial of the remainder of the payment to cost petitioner, cost petitioner is not entitled to costs and attorney's fees.

Accordingly, we amend the F&A, and find that cost petitioner did not establish that defendant acted in bad faith and is not entitled to costs and attorney's fees. We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the F&A issued by the WCJ on May 8, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 8, 2024 Findings & Award, is **AFFIRMED** except that is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Cost petitioner did not establish that defendant acted in bad faith.
6. Cost petitioner is not entitled to costs and attorney's fees.

AWARD

* * *

- d. Cost petitioner is not entitled to an award of attorney's fees.
- e. Cost petitioner is not entitled to an award of costs.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 29, 2024

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

**SALVADOR MAGALLON
MEGAN MEYER LAW
STATE COMPENSATION INSURANCE FUND**

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