WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT FOSTER, ***Applicant***

vs.

PERFORMANCE HOLDINGS, INC.;
GALLAGHER BASSETT SERVICES, ***Defendants***

Adjudication Number: ADJ13379668
Van Nuys District Office

OPINION AND ORDERS DENYING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR DISQUALIFICATION

Applicant, while still represented by an attorney of record, filed a timely Petition for Reconsideration, in pro per, on April 15, 2024 of the Findings and Orders issued by the workers' compensation administrative law judge (WCJ) on March 26, 2024. In addition to requesting reconsideration, applicant appears to request disqualification of the WCJ. Therefore, we will treat the petition as one jointly seeking reconsideration and disqualification. In the March 26, 2024 Findings and Orders, the WCJ found:

> 1. Applicant, Scott Foster, failed to object to the March 4, 2022, Order Approving Compromise and Release, the same which then became a Final Order approving an applicant's attorney's fee in the amount of $69,750.00.
>
> 2. As Mr. Foster is not an attorney, the only party who may lawfully make a claim to any portion of the approved applicant's attorney's fee of $69,750.00 is lien claimant, the LAW OFFICES OF ROWEN, GURVEY & WIN.
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> 3. Based on the criteria regarding reasonable attorney fees set forth in Title 8, Cal. Code of Regs., §10775 and Index Number 1.140 of the WCAB Policy and Procedural Manual, on the merits, it is reasonable to award an attorney fee of $69,750.00 to the LAW OFFICES OF ROWEN, GURVEY & WIN.

4. Applicant has not demonstrated that sanctions should be imposed against lien claimant, the LAW OFFICES OF ROWEN, GURVEY & WIN.

5. As explained in detail in the Opinion on Decision, the issue of any sanctions to be imposed against Mr. Foster is deferred.

Based on these findings, the WCJ ordered defendant to release the $69,750.00 attorney fee to applicant's former attorney.

Applicant makes the following contentions: (1) "Withholding the attorney fees until a determination of their reasonableness had been made is not a final order nor does it prevent the applicant from receiving the remaining amount that are determined not to be reasonable." (Petition for Reconsideration, at p. 3:3-5, original in all caps and bold.) (2) "The lien claimant failed to meet his burden of proof regarding his entitlement to attorney fees." (Petition for Reconsideration, at p. 3:24-26, original in all caps and bold.) (3) "Allegations of [manipulation] of the evidence by the applicant are unwarranted." (Petition for Reconsideration, at p. 9:1-2, original in all caps and bold.) and (4) "Lien claimants request for sanctions and costs should be denied and the sanctions against the lien claimant should be imposed." (Petition for Reconsideration, at p. 9:14-15, original in all caps and bold.) Finally, in the petition's conclusion, applicant appears to request disqualification of the WCJ due to bias.

Applicant's former attorney/lien claimant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that reconsideration and disqualification be denied.

We have considered applicant's Petition, the Answer, the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny applicant's petition for reconsideration and disqualification.

We adopt and incorporate the WCJ's Opinion on Decision as quoted below:

OPINION ON DECISION

BACKGROUND

This matter concerns the breakdown of the attorney-client relationship between applicant Scott Foster, and his former attorney, Alan Gurvey, of the Law office of Rowen Gurvey and Win. Summarized as succinctly as possible,

applicant's underlying claim was resolved by Compromise and Release dated March 4, 2022, in the gross amount of $465,000, with an approved attorney's fee of $69,750. This section is reproduced below:

LESS APPROVED APPLICANT'S ATTORNEY'S FEE **$69,750.00**
to be withheld by the Defendant pending written agreement between Applicant and Applicant's attorneys or further order of the court

Mr. Gurvey alleges that he negotiated a Compromise and Release agreement for the identical gross amount of $465,000, and that applicant terminated his services in an effort to avoid paying the attorney fee, only to enter into this approved agreement less than three months later for the same gross sum. Applicant alleges that Mr. Gurvey did not actually negotiate an agreement for $465,000, and that he and his firm made misrepresentations about the settlement to induce him to accept it. Applicant argues that Mr. Gurvey's firm performed minimal work in prosecution of his case, and that the claimed $69,750 attorney fee was not earned.

LIEN CLAIMANT'S MOTION TO STRIKE APPLICANT'S EXHIBITS

This case has had an extremely unusual procedural history. Relevant to the issue of whether applicant's exhibits should be admitted into the record, following return from Recon, this matter came on for trial before the undersigned on July 5, 2023. At this time, applicant was still in pro per. The Court noted that as of that trial date, the only pre-trial conference statement available to the Court in the EAMS system was EAMS Document I.D. No. 42205832, the same which was not signed by applicant and contained no list of exhibits to be proffered by applicant. Despite this, at the time of trial, applicant indicated that he had exhibits that he wished to offer, and the same were listed on the record.

Mr. Gurvey lodged an objection to the admission of these exhibits, stating that applicant had not listed them on the pretrial conference statement, nor had they been served in advance. Applicant responded that Mr. Gurvey was aware of the documents, that Mr. Gurvey had drafted three quarters of same, and that there would be no prejudice to Mr. Gurvey if the documents were to be admitted. At the time, the Court sustained Mr. Gurvey's objection, and the exhibits were ordered excluded from evidence.

In response, prior to the issuance of the decision in the underlying matter, Applicant in pro per filed a petition for removal[1], arguing in pertinent part that he was ignorant of trial procedure, that the WCJ had a duty to make a decision based upon a complete record, and that lien claimant Mr. Gurvey would not be prejudiced by the admission of his own correspondence. Responsive thereto, and particularly in consideration of the fact that applicant is not an attorney and was representing

[1] EAMS doc ID# 76946691

himself in pro per, the undersigned issued an order[2] vacating submission, rescinding his order excluding applicant's evidence, and resetting the matter.

When the matter came back before the undersigned for trial, Mr. Gurvey renewed his objection to the consideration of the exhibits, and the ruling on that objection was deferred pending the decision in the underlying matter.

In considering the purpose of the procedural rule that all exhibits must be listed with particularity on the pretrial conference statement and served as of the time of the Mandatory Settlement Conference, this rule exists so as to place all parties on notice of the evidence that each intends to use in support of its case, so that the opposing party may appropriately prepare to respond to that evidence, either by way of introduction of other evidence, or the listing of appropriate trial witnesses. The purpose of this is to avoid prejudice to either party by allowing presentation of evidence that the party was not prepared to confront. Accordingly, while an argument can be made for the rigid application of this rule in all circumstances, an argument can similarly be made that as the purpose of the rule is to avoid surprise and undue prejudice, a party's exhibits can still be admitted despite non-compliance with the rule, so long as the allowance of admission of those exhibits does not prejudice the opposing party by forcing them to respond to surprise evidence. Particularly in a case where the offending party is an applicant in pro per, and the evidence in question consists wholly of documents that the opposing party either generated themselves or clearly should have had within their possession, the admission of those exhibits would be less offensive than their exclusion.

Accordingly, in the interest of accomplishing substantial justice, the Court declines to bar these exhibits and instead admits them into evidence over lien claimant's objection. Applicant Mr. Foster's Exhibits 1-12 are admitted into evidence over lien claimant's objection.

ATTORNEY FEE

With respect to the attorney fee previously ordered approved as of the Order Approving Compromise and Release dated March 4, 2022, as stated above, the Order contains the following language:

LESS APPROVED APPLICANT'S ATTORNEY'S FEE $69,750.00
to be withheld by the Defendant pending written agreement
between Applicant and Applicant's attorneys or further order of the court

[2] EAMS doc ID# 76961685

In other words, as per the language of the Order, $69,750.00 was previously approved as the "applicant's attorney's fee". This was done responsive to the following language in the Compromise and Release:

[$69,750.00 requested as applicant's attorney's fee.

TO BE WITHHELD BY DEFENDANTS UNTIL SIGNED AGREEMENT REACHED BY PRIOR AA/PRO PER APPLICANT AND /OR ISSUANCE OF COURT ORDER.]

As applicant admits[3] in his Offer of Proof, he did not formally object to the Order approving the $69,750.00 attorney fee. This is particularly significant in light of applicant's testimony on cross-examination that he *did* object to the approval of the attorney fee, and that the Order approving the attorney fee issued over his objection.[4] In applicant's own words,

21 A. I made clear that I had an objection with the attorney
22 fee. I didn't use the proper language or object within 30
23 days.

(Official Transcript of Record, 10/05/2023, EAMS doc ID# 77364866, at 96:21-23)

In essence, applicant confirmed in open court that he knew the significance of the Order approving the $69,750.00 "applicant's attorney's fee", that he "objected to it", and that he took no further action thereafter. Despite this, applicant "ha[s] no intention of claiming entitlement to an 'attorney fee'." Applicant contends that he is "entitled to [] the residual compensation after the deduction of any amounts that are determined to be due to Mr. Gurvey for a reasonable attorney fee"[5]

While applicant may have believed that the inclusion of the qualifying language which ordered defendant to withhold the attorney fee pending written agreement would still operate to reserve the issue of the attorney fee for later adjudication, applicant was mistaken. The language of the Order specifically approves the $69,750.00 as an "applicant's attorney's fee". Had applicant intended to "carve out"[6] the $69,750.00 for a later adjudication of whether or not *any* attorney fee should be awarded, applicant could have crafted language in the first instance that ordered the amount withheld without approving it as an attorney's fee, or applicant could have Petitioned for Reconsideration of the Order approving the fee. Applicant did neither. Instead, accepting applicant's representations in his offer of proof as true, applicant believed that $69,750.00 was a reasonable attorney's fee, and he intended to engage in subsequent litigation to force Mr. Gurvey to prove his entitlement to the whole of that fee, under the theory that he could keep the rest for himself. As applicant continues [7] thereafter in the offer of proof, and as he testified

[3] Offer of Proof ¶117, pgs 7 and 8.

[4] 10/05/23 MOH/SOE at 19:10-12.

[5] Offer of Proof ¶118, pg 8.

[6] Offer of Proof ¶117, at 8:3.

[7] Offer of Proof ¶l9, pg 8.

in open court on cross-examination, he actually believes that Mr. Gurvey is not entitled to anything, and that he should therefore be able to keep the entire balance of the settlement.

As to the significance of applicant's knowing failure to formally object to the Order approving the attorney's fee, after the expiration of the time allowed pursuant to Labor Code §5903, this Order became final. Thus, the $69,750.00 was finally approved as an applicant's attorney's fee by issuance of the March 4, 2022 Order Approving Compromise and Release, and this determination cannot now be disturbed. Therefore, by operation of law, the only party who can make a claim for the $69,750.00 applicant's attorney's fee is lien claimant, the law office of Rowen Gurvey and Win. Applicant, a non-attorney, is statutorily prohibited[8] from sharing in an awarded attorney fee.

Notwithstanding lien claimant's entitlement to the awarded attorney fee on procedural grounds, lien claimant has also proven that he is entitled to the entirety of the awarded fee on the merits. Based on the criteria regarding reasonable attorney fees set forth in Title 8, Cal. Code of Regs., §10775 and Index Number 1.140 of the WCAB Policy and Procedural Manual, it is reasonable to award an attorney fee of $69,750.00 to the law office of Rowen Gurvey and Win. As demonstrated by applicant's own testimony[9], prior to his formal engagement of the law office of Rowen Gurvey and Win, defendant made him a settlement offer in the amount of $250,000 and did not willingly agree to engage in any further discovery. At that point, he reached out to Alan Gurvey and solicited advice without formally retaining Mr. Gurvey's office. The record is unclear as to exactly when this took place, however, this tracks with applicant's testimony elicited on cross-examination that he remembered meeting with Ginger Volz "as colleagues" on July 20, 2018, and that it would not surprise him to learn that he contacted Mr. Gurvey's office in some fashion more than 15 times between July 20, 2018, and November 18, 2020 when he executed the retainer agreement. [10]

This is relevant in consideration of the factor of the amount of time that the attorney was involved; Mr. Foster clearly solicited and received legal advice from Mr. Gurvey's office for a substantial period prior to his formal retention of counsel. The August 8, 2021 e-mail[11] applicant introduced into evidence makes substantial reference to this. The Court finds that the date of retention of Mr. Gurvey's office does not accurately reflect the date that the office of Rowen Gurvey and Win first began providing counsel to applicant, and it appears to the Court that Mr. Foster was guided by and benefited from that counsel, even before the retention was formally effectuated.

When Mr. Gurvey formally undertook applicant's representation, he drafted extremely detailed correspondence[12] relating to the resolution of applicant's case

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[8] *See* Labor Code §4903(a); *see* also Acosta v. Med-Legal, 2023 Cal. Wrk. Comp. P.D. LEXIS 187

[9] 10/05/23 MOH/SOE at 8:12-16.

[10] 10/05/23 MOH/SOE at 18:10-15.

[11] See applicant's Exhibit "12"

[12] *See Lien Claimant's* Exhibits 6-11,

and demanded settlement, at applicant's own insistence[13]. Applicant has provided the Court with draft settlement agreements[14] in the gross amount of $465,000, negotiated during the period of his representation by Mr. Gurvey's office. The aforementioned August 8, 2021 e-mail[15] that applicant introduced into evidence shows Mr. Gurvey spending at least three whole paragraphs responding to "points" made about the requested attorney's fee and why he is unwilling to reduce it. Shortly thereafter, although no dismissal was ever filed, Mr. Foster severed the attorney-client relationship.

Although Mr. Foster testified that he did not want a structured agreement and that he only went along with it because he felt that he had no choice[16], the Court cannot reconcile this with the fact that Mr. Foster ultimately did enter into a structured settlement agreement while in pro per for the gross amount of $465,000.00.

From the evidence introduced at trial, it is clear that not only did Mr. Gurvey's office "bring value"[17] to the case, but Mr. Gurvey's involvement was instrumental in securing a gross structured settlement of $465,000.00, an amount that is nearly double the value of the settlement that defendant offered prior to his involvement. In such a case, the WCJ would routinely award a fee of 15% of gross, which is exactly what happened here.

On the merits, the Court finds that the reasonable value of services rendered to applicant by the law office of Rowen Gurvey and Win is $69,750.00. This sum is awarded to the law office of Rowen Gurvey and Win. Defendant is Ordered to release these funds and remit same forthwith to the law office of Rowen Gurvey and Win.

SANCTIONS/COSTS

Both applicant and Lien Claimant seek sanctions and costs against each other, applicant alleging fraud and misrepresentation on the part of his former attorney, and lien claimant on the basis that applicant unduly delayed the disbursement of the attorney fee by forcing the adjudication of the issues without legal basis. The bases for imposing sanctions and costs are found in Labor Code §5813(a) and Regulation 10421.

In the instant case, applicant Mr. Foster presented evidence and offered testimony suggesting substantial confusion regarding the issue of whether defendant would receive credit for permanent disability advances in his settlement. The communication between Mr. Foster and the office of Rowen Gurvey and Win demonstrates that, at a minimum, there was miscommunication[18] regarding the

[13] 10/05/23 MOH/SOE at 18 :3-8.

[14] *See* applicant's Exhibits 5 and 7.

[15] *See* applicant's Exhibit 12

[16] 10/05/23 MOH/SOE at 12:4.

[17] 10/05/23 MOH/SOE at 15:15-16.

[18] Applicant's Exhibit "11"

permanent disability advances. Having reviewed the evidence[19] and testimony of Mr. Foster as to the discussion of the permanent disability advances, the Court is not convinced that Mr. Foster severed the attorney client relationship with Rowen Gurvey and Win with the express purpose of denying the office an attorney fee on the settlement that they purported to negotiate on his behalf.

However, in significant other respects, the Court finds that Mr. Foster has misled the Court, the same which has resulted in substantial delay in the adjudication of the proceedings. To wit, while· Mr. Foster was in pro per, at the trial on July 5, 2023, as reflected on the official transcript of the proceedings[20], following the Court's initial ruling excluding his exhibits, Mr. Foster stated that he had no witnesses, that he rested his case, argued further with the Court about its ruling excluding his exhibits, and then repeated that he rested his case and was ready for a disposition. Up until after the record was closed, Mr. Foster made no indication that he was confused as to what was happening, and he did not seek any clarification or request that the Court define any language used, such as "rest" or "disposition".

Thereafter, when the Court re-opened the record to note that it was taking physical copies of applicant's proffered exhibits, Mr. Foster claimed that he was ignorant of trial procedure and did not realize that the case was being taken under submission for all purposes. Then, within 12 days of the ruling excluding his exhibits, Mr. Foster, still in pro per, filed a Petition for Removal of that ruling, again pleading ignorance of trial procedure and arguing that the exclusion of his exhibits amounted to a denial of due process.

The Court accepted these representations at face value, rescinded its Order of exclusion, and allowed Mr. Foster another opportunity to present his case. In the interim, Mr. Foster retained an attorney, and the matter proceeded on the merits on October 5, 2023, over the vehement objection of lien claimant. As stated supra herein, the Court then decided, in the interest of justice, to admit applicant's exhibits into the record, again over the vehement objection of lien claimant.

Mr. Foster admitted that he "holds himself out as a hearing rep for workers' compensation matters".[21] The demand letter[22] Mr. Foster drafted while in pro per reveals that he has a level of knowledge and sophistication about the Worker's Compensation system that is beyond that of many experienced, licensed attorneys. That Mr. Foster knew that he should immediately file a Petition for Removal to challenge the exclusion Order without waiting for the decision to issue again demonstrates a level of knowledge and sophistication that would be surprising to find in many experienced practitioners, let alone an applicant in pro per.

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[19] *See* e.g. Applicant's Exhibit "9"

[20] (Official Transcript of Record, 07/05/2023, EAMS doc ID #77363989, at pgs 17-18)

[21] 10/05/23 MOH/SOE at 7:13-19.

[22] Applicant's Exhibit "l"

Notwithstanding his failure to comply with procedural requirements regarding evidence, the Pre-Trial Conference Statement, and the fact that he rested his case and allowed the record to be closed, in the public interest of allowing for a full hearing on the merits, the Court gave Mr. Foster the benefit of the doubt and allowed him to present his evidence and testimony. Having now reviewed that evidence and Mr. Foster's testimony and behavior in Court, including raising actual form objections[23] to questions on his own behalf while on the witness stand, the Court does not find Mr. Foster's earlier claims of ignorance to be credible. Such behavior is not consistent with Mr. Foster's self-portrayal as a neophyte.

The Court believes that Mr. Foster has misrepresented his level of experience in an attempt to receive more leeway from the Court and relief from procedural rules that would have otherwise negatively impacted his ability to present his case. The Court finds that Mr. Foster's behavior was manipulative, with an aim to use his knowledge of the worker's compensation claims adjudication system to his advantage when it suited him, and to simultaneously emphasize his status as a non-attorney injured worker when he believed that doing so would afford him greater latitude.

The Court also believes that Mr. Foster presented misleading testimony on direct examination regarding Mr. Gurvey's alleged lack of engagement as to any issue other than settlement of the case; as further supported by Mr. Foster's later testimony[24] elicited on cross examination, the Court believes that Mr. Gurvey's efforts and emphasis on resolution rather than further development of the case were specifically at Mr. Foster's direction. Were Mr. Foster a licensed attorney, such conduct would be undoubtedly worthy of the imposition of sanctions.

However, the Court is separately most concerned by the introduction of applicant's exhibit "10", an alleged e-mail conversation between Mr. Foster and defense attorney Sahel Wasseluk, wherein Mr. Foster allegedly asked Ms. Wasseluk if defendant had ever actually offered to resolve his case for $465,000.00, and Ms. Wasseluk allegedly responded in a single word e-mail back, "No." This document has multiple remarkable features. First, the presence of what purports to be a signature line from the firm of Colantoni Collins at the very top of the document, without any content above it, suggests that there was an email that went along with it that has been removed from the document. Second, there is an abundance of empty space underneath Mr. Foster's initial inquiry. Third, there are two lines on the left-hand side of the page, which suggests that this document was copied and pasted from one source into something else. Fourth, the top of the second page appears as follows:

[Image omitted here. But see applicant’s Exhibit 10.]

For some unexplained reason, the one word response from Ms. Wasseluk, supposedly emailed on January 24, 2022, appears on an entirely different page of the PDF document, within a September 13, 2022 e-mail from

[23] 10/05/23 MOH/SOE at 17 :22-25

[24] 10/05/23 MOH/SOE at 18 :3-28

"fosterbiodevice@grnail.com" to efosterlaw@gmail.com, with the subject line, "Re: Foster C&R ***ISC on 2/7@ 10:30a***". The Court infers from this that Mr. Foster has emailed himself this content from one of his own Gmail addresses to another also under his control.

What the Court does not understand is why, if Mr. Foster had indeed e-mailed defense counsel asking her if defendant ever conveyed an offer for $465,000, and defense counsel had responded, "No.", Mr. Foster would not have proffered that unadulterated e-mail chain as evidence, consisting of two e-mails, one being his original email to defense counsel going from "fosterbiodevice@gmail.com" to "swasseluk@ccmpt.com", and the second being her response, "No.", going from "swasseluk@ccmpt.com" to "fosterbiodevice@gmail.com". Instead, Mr. Foster provided a document that shows an obvious extraction from a chain of emails, with his question on one page, the response on the other, and that response being pasted from a different email that he clearly sent to himself. Applicant presented no testimony from Ms. Wasseluk which would serve to confirm the contents of the e-mail.

This document, standing in isolation, is highly suspicious; the Court is concerned that this document has either been altered in some material aspect, or that it has been fabricated. In either scenario, if applicant introduced manufactured evidence in an effort to convince the Court that defendant never actually extended a settlement offer for $465,000, such conduct would certainly be worthy of sanctions, if not more serious consequences. The Court does not have enough evidence at this time to make any such determination.

The Court finds that Mr. Foster has failed to prove that sanctions should be imposed against lien claimant. The Court does not have sufficient evidence at this time to determine whether sanctions should be imposed against Mr. I: ester, and if so, in what form or amount. The issue of any sanctions to be imposed against Mr. Foster is therefore deferred.

DISCUSSION

Preliminarily, we note that applicant has made no request to rescind or set aside the March 4, 2022 Order Approving Compromise and Release (OACR). Instead, applicant asserts that the OACR "is not a final order nor does it prevent the applicant from receiving the remaining amount [of the attorney fees] that are determined not to be reasonable." (Petition for Reconsideration, at 3:3-5, original in full caps, bold, and underlined.)

However, the March 4, 2022 OACR is a final order. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534–535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal. App.3d 39, 45 [43 Cal. Comp. Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Applicant did not seek reconsideration of the March 4, 2022 OACR.

As relevant here, the OACR states: "Award is made in favor of the above named Applicant against the above named Defendant(s) payable as follows: GROSS AMOUNT OF THE COMPROMISE & RELEASE $465,000.00 … LESS APPROVED APPLICANT'S ATTORNEY'S FEE $69,750.00 to be withheld by the Defendant pending written agreement between Applicant and Applicant's attorneys or further order of the court…."

The Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys. (*Vierra v. Workers' Comp. Appeals Bd. (Vierra)* (2007) 154 Cal.App.4th 1142, 1149 [72 Cal.Comp.Cases 1128]; Cal. Code Regs., tit. 8, § 10840.) In calculating attorney fees, our basic statutory command is that the fees awarded must be "reasonable." (Lab. Code, §§ 4903, 4906(a), (d).) Pursuant to Labor Code[1] section 4906, in determining what constitutes a "reasonable" attorney fee, the Appeals Board must consider four factors: 1) the responsibility assumed by the attorney; 2) the care exercised by the attorney; 3) the time expended by the attorney; and 4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.) Additionally, although not binding legal authority, WCAB/DIR Policy & Procedure Manual,

[1] All further statutory references are to the Labor Code, unless otherwise noted.

section 1.140, referred to by the WCJ in the Opinion on Decision and the Findings and Orders, also provides guidance in our analysis of this matter. Under section 1.140, we may also consider the complexity of the issues, whether the case involved highly disputed factual issues, and whether detailed investigation, interrogation of prospective witnesses, and/or participation in lengthy proceedings are involved.

For the reasons stated in the Opinion on Decision, we agree with the WCJ that the $69,750.00 attorney fee withheld in the OACR and ultimately awarded to lien claimant is reasonable pursuant to section 4906(d) and WCAB Rule 10844, and, for the reasons stated above, is final. Moreover, we note that applicant is statutorily prohibited from receiving any attorney fee in this case, as he is not an attorney, but rather a pro-per litigant. (Lab. Code, § 4903(a)["No fee for legal services shall be awarded to any representative who is not an attorney … ."].)

Next, we turn to the issue of sanctions. The WCJ deferred the issue of sanction against applicant because there was not sufficient evidence in the record. Without an adjudication, that issue is not before us and we will not address it. Upon this matter's return, the WCJ may hold further proceedings as the WCJ determines appropriate on this issue.

Regarding the issue of sanctions against lien claimant, we note that the burden of proof rests on the party holding the affirmative of an issue. (Lab. Code, § 5705.) In this case, it was applicant who raised a claim for the imposition of sanctions against lien claimant. However, applicant did not file a petition asserting the specific allegations in accordance with our rules. (Cal. Code Regs., tit. 8, §§ 10421(a), 10510.) Nevertheless, because applicant is seeking the imposition of a sanction under section 5813, he carried the burden of proof on that issue. To meet that burden, applicant was required to prove each fact supporting the claim by a preponderance of the evidence. Moreover, WCAB Rules provide, in relevant part: (1) that "[e]very petition for reconsideration … shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration … shall be separately stated and clearly set forth" (Cal. Code Regs., tit. 8, § 10945 and (2) that "a petition for reconsideration … may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved." (Cal. Code Regs., tit. 8, § 10972.)

In his Petition for Reconsideration, lien claimant alleges lien claimant "manipulat[ed] the settlement agreement, lying about permanent disability advances not being waived." (Petition for Reconsideration, at p. 9:17-18.) It was applicant's burden to prove these allegations by a

preponderance of the evidence and with specific references to the record. He did not make any references to the record. In addition, for the reasons stated in the Opinion on Decision, we do not find applicant's exhibit 10[2] persuasive and like the WCJ question its authenticity. We have also given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

To the extent applicant requests disqualification of the WCJ, we deny it. Section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification … ." (Cal. Code Regs., tit. 8, former § 10452, now § 10960 (eff. Jan. 1, 2020), italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored," and that "[w]here no facts are set forth in the statement there is no issue of fact to be determined." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

WCAB Rule 10960 provides that when the WCJ and "the grounds for disqualification" are known, a petition for disqualification "shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known."

Here, the Petition does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960,

[2] Applicant's Exhibit 10 consists of two pages of what appears to be an incomplete email chain. The first page contains an email from applicant to defense counsel on January 21, 2022, stating "I know there have been a few C&Rs floated around, was there a settlement offer of $465,000?" It is not clear that the second page is a continuation of the first page, but it contains a purported response from the defense attorney on January 24, 2022 simply stating "No." (Applicant's Exhibit 10.)

and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the request for disqualification is denied.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Disqualification is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 14, 2024

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

SCOTT FOSTER
LAW OFFICES OF SHELLEY A. WEINSTEIN
LAW FIRM OF ROWEN, GURVEY & WIN
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

PAG/abs

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