WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

UTILIO HARO, ***Applicant***

vs.

GACHINA LANDSCAPE MANAGEMENT, INC.,
AND CYPRESS INSURANCE administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Numbers: ADJ12062619, ADJ13567550
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Cost petitioner seeks reconsideration / removal of the August 12, 2024 Findings & Order (F&O), wherein a workers' compensation administrative law judge (WCJ) found in relevant part that cost petitioner did not meet its burden of proof and ordered that cost petitioner's petition for reimbursement be denied.

Cost petitioner contends that it met its burden to show that a contested claim existed and that its services were reasonable and necessary.

We received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition (Report) recommending the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant the Petition for Reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

On March 29, 2019, applicant filed an Application for Adjudication (Application), claiming injury to the back while employed on March 7, 2018, by defendant as a maintenance worker. (ADJ12062619.) On September 8, 2020, by way of a Compromise and Release (C&R) as

the case opening document, applicant claimed injury to his shoulders while employed on August 4, 2017, by defendant as a maintenance worker. (Case No. ADJ13567550.)

On December 20, 2019, applicant filed a Notice of Dismissal of Attorney dated December 17, 2019, dismissing Boxer Gerson Olson Oakland as his attorney, and on December 24, 2019, applicant filed a Substitution of Attorney, substituting in David Bonemeyer.

On April 22, 2020, applicant was evaluated by qualified medical evaluator (QME) Ilya Sabsovich, M.D. Dr. Sabsovich concluded that applicant sustained injury to his low back on March 7, 2018, with no apportionment, and that he had whole person impairment of 28% to his lumbar spine with an add-on for pain.

On September 3, 2020, the case in chief settled by way of a C&R, and an Amended C&R was filed on September 8, 2020 to add Case No. ADJ13567550 instead of "unassigned." The WCJ issued a Joint Order Approving Amended Compromise and Release on September 10, 2020.

In Paragraph 9, it states that:

> THIS COMPROMISE AND RELEASE AGREEMENT INTENDS TO SETTLE ALL OF APPLICANTS CLAIMS AGAINST EMPLOYER INCLUDING CLAIM 33098430 (DOI 03/07/2018) AND MEDICAL ONLY CLAIM 33098672 DOI 08/04/2017. CLAIM 33089672 IS DENIED WITHOUT A CORRESPONDING ADJ NUMBER AS OF THE DATE OF THE AGREEMENT BETWEEN PARTIES.

On May 12, 2023, cost petitioner filed a Notice of Representation and the petition for costs. In the petition, it alleged that it served Subpoenas Duces Tecum (subpoenas) on Gachina Landscape Management, Inc.; Clement Jones, M.D.; Peninsula Sports Medicine; Kaiser Hospital / PMG; St. Francis Memorial Hospital; Integrated Pain Care; Clement Jones, M.D.; and Boomerang Health Care; and that its invoices remained outstanding.

On May 26, 2023, defendant substituted Siegel Moreno Sacramento as its attorneys in the place of Gilson Daub.

On June 11, 2024, the parties proceeded to trial on the petition for costs.

On August 12, 2024, the WCJ issued the F&O. As relevant herein, she stated in her Opinion that:

> Cost Petitioner Gemini Legal Support Inc. filed a "Petition for Reimbursement of Medical-Legal Expenses and Request for Penalties, interest and Costs, and in alternative, Petition for Costs per LC 5811" on May 12, 2023. (Cost Petitioner Exhibit 101, admitted for ID only at time of hearing, objection now overruled, and this exhibit is admitted). In that petition, Gemini alleged to have issued subpoenas

> for 8 different locations for dates between 1/16/2020 -6/19/2020, and one several months later on 12/05/2020. Gemini notes that all the documents are "currently outstanding", presumably as of the date of the petition, May 12, 2023. . . .
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> The Petition for Reimbursement (Exhibit 101) notes that the subpoenas at issue were submitted from January 16, 2020, through December 5, 2020. . . . There has been no evidence that the records were procured or that Gemini did anything with these orders at all. Gemini has provided absolutely no evidence of a disputed claim. They meet neither prong of the test, and they have not met their burden of proof.

(Opinion on Decision, pp. 3, 5.)

DISCUSSION

I.

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

Under 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 September 24, 2024 and 60 days from the date of transmission is Saturday, November 23, 2024. The next business day that is 60 days from the date of transmission is Monday, November 25, 2024. (See

Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, November 25, 2024, so that we have timely acted on the petition as required by section 5909(a).

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. 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 September 24, 2024, and the case was transmitted to the Appeals Board on September 24, 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 24, 2024.

II.

Here, cost petitioner filed a Petition for Removal/Reconsideration in response to the WCJ's F&O and denying the petition for costs.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers'

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[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.

compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer*, *supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, it is necessary to consider the petition as one for removal.

Here, the WCJ's decision with respect to her denial of cost petitioner's petition for costs is a final order. Thus, we consider the Petition as one for reconsideration only.[2]

III.

Section 5313 requires the WCJ to state the "reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74].) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in

[2] The WCJ also issued a finding that the issue of defendant's petition seeking discovery was moot. This finding concerns interim discovery, so that had anyone sought review of it, we would have considered it under the removal standard. However, as we are rescinding the entire decision, and defendant did not challenge it, we will not consider it further.

Hamilton, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

Furthermore, the WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10566; *Hamilton*, *supra*, at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10566; *Hamilton*, supra, at p. 476.)

WCAB Rule 10759 (b)(1) (Cal. Code Regs., tit. 8, § 10759(b)(1)) states in pertinent part that:

> Each exhibit listed must be clearly identified by author/provider, date, and title or type (e.g., "the July 1, 2008 medical report of John Doe, M.D. (3 pages)"). Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate "document" and must be listed as a separate exhibit. . .

WCAB Rule 10803(a)(2) (Cal. Code Regs., tit. 8, § 10803(a)(2)) defines the record of proceedings as:

> . . . the pleadings, minutes of hearing, summaries of evidence, certified transcripts, proofs of service, admitted evidence, exhibits identified but not admitted as evidence, notices, petitions, briefs, findings, orders, decisions and awards, opinions on decision, reports and recommendations on petitions for reconsideration and/or removal, and the arbitrator's file, if any. Each of these documents is part of the record of proceedings, whether maintained in paper or electronic form. Documents that are in the adjudication file but have not been received or offered as evidence are not part of the record of proceedings.
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> Further, subdivision (b) states that:
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> Upon approval of a Compromise and Release or Stipulations with Request for Award, all medical reports that have been filed as of the date of approval shall be deemed admitted in evidence and part of the record of proceedings.

Here, the WCJ's Opinion On Decision states that she "admitted" the cost petition as Exhibit 101. But, a petition is part of the record of proceedings, and need not be "admitted" as evidence. At the same time, evidence to be admitted must be separately identified and marked on the record,

and it cannot be "admitted" by way of an attachment to a pleading. Thus, there is no actual evidence in the record with respect to the subpoenas for our review.

IV.

Next, we address the threshold issue when considering reimbursement of a medical-legal expense. *The predominant issue is that there must be a contested claim.* A party's ability to subpoena records is governed by the Labor Code and the WCAB Rules of Practice and Procedure which generally provide "adequate tools to the practitioner for liberal discovery." (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 663 [64 Cal.Comp.Cases 624].) Thus, the public policy favoring liberal pre-trial discovery that may reasonably lead to relevant and admissible evidence is applicable in workers' compensation cases. (*Ibid.*)

A lien claimant holds the burden of proof to establish all elements necessary to establish its entitlement to payment for a medical-legal expense. (See Lab. Code, §§ 3205.5, 5705.5; *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 (Appeals Board en banc).) As we explained in our en banc decision in *Colamonico v. Secure Transportation* (2019) 84 Cal. Comp. Cases 1059 (Appeals Board en banc), section 4622 provides the framework for reimbursement of medical-legal expenses. Subsection (f) of the statute, however, specifically states that "[t]his section is not applicable unless there has been compliance with Sections 4620 and 4621." (Lab. Code, § 4622(f).) Thus, a lien claimant is required to establish that: 1) a contested claim existed at the time the expenses were incurred; 2) the expenses were incurred for the purpose of proving or disproving the contested claim; and 3) the expenses were reasonable and necessary at the time were incurred. (Lab. Code, §§ 4620, 4621, 4622(f); *Colamonico*, *supra*, 84 Cal.Comp.Cases 1059.)

Section 4620(a) defines a medical-legal expense as a cost or expense that a party incurs "for the purpose of proving or disproving a contested claim." (Lab. Code, § 4620(a).) Copy services fees are considered medical-legal expenses under 4620(a). (*Cornejo v. Younique Cafe, Inc.* (2015) 81 Cal.Comp.Cases 48, 55 (Appeals Board en banc); *Martinez v. Terrazas* (2013) 78 Cal.Comp.Cases 444, 449 (Appeals Board en banc).) Lien claimant's initial burden in proving entitlement to reimbursement for medical-legal expense is to show that a "contested claim" existed at the time the service was performed.

Section 4620(b) states that: "A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a

claimed industrial injury and one of the following conditions exists: (1) The employer rejects liability for a claimed benefit. (2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim. (3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity." (Lab. Code, § 4620(b).) The determination of whether a purported medical-legal expense involves a "contested claim" is a fact driven inquiry.

In the present matter, cost petitioner asserts that a contested claim existed when it performed its services, that the claim remained contested up to and including when the C&R was approved by the WCJ on September 21, 2020, and that the claim continues to be disputed. Yet, the WCJ concluded that a contested claim did not exist at the time cost petitioner performed its services. First, filing an Application, which identifies issues that are in dispute, may be sufficient to establish a contested claim. Second, here the parties proceeded to a QME, and a QME evaluation takes place when the parties have a dispute. Third, the language of the C&R makes clear that the cases were disputed. Thus, defendant's tactical decision at the time of trial to stipulate to injury is irrelevant to the issue of whether there was a contested claim at the time the subpoenas were served. Therefore, we agree with cost petitioner that a contested claim appears to have existed at the time it performed its services.

Upon return to the trial court, we recommend that the WCJ hold a hearing, and create a record, including admission of evidence and development of the record as necessary. We note that once the evidence has been admitted, while of course the WCJ will need to make findings as to sections 4620 and 4621, the only real issue remaining is whether cost petitioner is entitled to reimbursement under section 4622.

Accordingly, we grant cost petitioner's Petition for Reconsideration, rescind the WCJ's Order, and return the matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that cost petitioner's Petition for Reconsideration of the Findings & Order issued on August 12, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 25, 2024

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

CHISVIN LAW GROUP
SIEGEL MORENO & STETTLER

DLM/oo

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