

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

BEATRIZ MORENO, *Applicant*

vs.

**RTJ HOME SWEET HOME, INC., a California Corporation; ROSALINDA GALO,
a substantial shareholder of RTJ HOME SWEET HOME, INC.; TORINO JAVIER, a
substantial shareholder of RTJ HOME SWEET HOME, INC., illegally uninsured,
*Defendants***

**Adjudication Number: ADJ7998608
Van Nuys District Office**

**OPINION AND AWARD OF ADDITIONAL
ATTORNEY'S FEES (Lab. Code, §. 5801)**

In its January 21, 2021 Order (Court's Order) denying defendant's Petition for Writ of Review (B308373), the Second District Court of Appeal, Division Eight, remanded this matter to the Appeals Board to make an award of reasonable attorney's fees to applicant's counsel for services rendered in responding to defendant's Petition for Writ of Review. (Lab. Code, § 5801.) The Court's Order states:

The petition for a writ of review has been read and considered and it is denied. There is no reasonable basis for this petition for a writ of review. (Lab. Code, § 5801.) The case is remanded to the appeals board to determine a supplemental award of attorney's fees to respondent Beatriz Moreno for services rendered in connection with this petition for a writ of review. (Lab. Code, § 5801.)

The Court's Order has become final.

Applicant's attorney Jennifer Ryan submitted a verified petition for attorney's fees pursuant to the Court's Order. (Petition for Attorney's Fees under Labor Code 5801, filed March 17, 2021 (Fee Petition).) The verified petition included an itemization of time spent by Ms. Ryan in connection with its response to defendant's Petition for Writ of Review (Writ). (*Id.*, p. 2; see Answer to Petition for Writ of Review (Answer).) Ms. Ryan requested a rate of \$450.00 per hour

for 37.5 hours, for a total of \$16,897.21, as well as payment for a “cost bill” for filing the Answer in the amount of \$22.20. (*Id.*) Ms. Ryan states that she has represented injured workers in workers’ compensation cases for 11 years, and that she is awarded \$450.00 per hour for her legal services the “majority of the time.” (*Id.*, p. 3, Statement in Support of Requested Fees and Costs.) Ms. Ryan states that she spent 11 hours reviewing the Writ and 493 pages of exhibits; 17 hours reviewing cases and other authorities cited by defendant in the Writ, and researching cases and other authority for the Answer; and, 9.5 hours writing and finalizing the Answer. (*Id.*, p. 2.) Ms. Ryan states the following related to the complexity of the Writ and Answer:

This Answer to Writ required extra care and effort due to the rambling nature of the pleadings and the excessive litigation in this case. It was difficult to assess each and every allegation that was being raised in the Writ Petition which included new issues not raised on reconsideration. These issues included breach of oral contract, analysis surrounding the Willful and Serious Misconduct claim, the stipulation to lifting being inadvertent, and defendant’s attack on the WCJ including calling the WCJ vindictive. (*Id.*, p. 3.)

Defendant opposed the Fee Petition. (Opposition to Applicant’s Petition for Attorney Fees under Labor Code 5801, filed March 26, 2021 (Opposition).) The arguments in opposition included the following: that applicant failed to follow the Board’s instructions related to service of the Fees Petition, and therefore, Ms. Ryan forfeited the right to seek fees; that Ms. Ryan previously sought an unauthorized costs bill against defendant for an erroneous \$412.20 filing fee to answer the Writ; Ms. Ryan failed to justify her request for a \$450.00 per hour fee with citation to case law authorizing that hourly rate, or a detailed explanation of when she was previously awarded that hourly rate; and, that Ms. Ryan misrepresented the number of issues not addressed in defendant’s Petition for Reconsideration. (*Id.*)

In addition, defendant objects to the 11 hours claimed by Ms. Ryan to review the Writ and exhibits; that she should only have spent four hours doing so; and, that regardless, applicant’s counsel were responsible for creating such an extensive record; that five hours was sufficient to review the authorities cited by defendant in the Writ, and three hours to research authorities for the Answer; and, that it should only have taken Ms. Ryan five hours to draft the Answer. (*Id.*, pp. 7-8.) Defendant contends that applicant’s attorney should be awarded \$2,875.00 in fees, or no fees at all:

Thus, the total times spent should have been no more for Respondent's Court of Appeals answer than 2+4+5+3+4+1.5 or 19.5 hours under ANY reasonable standard at \$250/hr. or \$2875 in attorney's fees, which circumstantially is itself more than Applicant deserves, as Mota allowed only \$2500 total despite MANY MORE HOURS claimed as shown above (the accepted time and rate were not shown, though \$500 and \$550 were expressly rejected).

Under Chavez v. City of Los Angeles (2010) 47Cal.4th 970, 990 (which Mota referenced), a "fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (Emphasis added.) [Accord: Ketchum v. Moses (2001) 24 Cal.4th 1122, 1137.] It is submitted that Petitioner's counsel performed unprofessionally, has alleged falsehoods in her statement in handling this issue, and so additional attorneys' fees are thus unwarranted. (*Id.*, pp. 7-8, emphasis in the original.)

Labor Code¹ section 5801 states:

The appeals board in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order payment thereof during the continuance of disability.

In the event the injured employee or the dependent of a deceased employee prevails in any petition by the employer for a writ of review from an award of the appeals board and the reviewing court finds that there is no reasonable basis for the petition, it shall remand the cause to the appeals board for the purpose of making a supplemental award awarding to the injured employee or his attorney, or the dependent of a deceased employee or his attorney a reasonable attorney's fee for services rendered in connection with the petition for writ of review. Any such fee shall be in addition to the amount of compensation otherwise recoverable and shall be paid as part of the award by the party liable to pay such award. (Lab. Code, § 5801, emphasis added.)

"The purpose of section 5801 is to shift the burden of attorney fees to the employer when the reviewing court finds no reasonable basis for the petition. (*Employers Mut. Liab. Ins. Co., supra*, 46 Cal.App.3d at p. 108.)" (*Chevron U.S.A. v. Workers' Comp. Appeals Bd.* (1990) 219

¹ All further references are to the Labor Code unless otherwise noted.

Cal.App.3d 1265, 1273 [55 Cal.Comp.Cases 107]; see *Employers Mut. Liab. Ins. Co. v. Workmen's Comp. Appeals Bd. (Rodriguez)* (1975) 46 Cal.App.3d 104, 108-109 [40 Cal.Comp.Cases 820] ["Section 5801 fees are "in the nature of a *penalty* assessed against the employer if the reviewing court finds that the petition has no reasonable basis. (citation)." (emphasis in the original)].) "When an employer or carrier raises an issue in the petition for writ of review which was not raised by petition for reconsideration before the Board, and thus, an issue which we may not consider, or contends that an award is not supported by substantial evidence, the reviewing court may find that there is no reasonable basis for the petition. (*Id.* at pp. 108-109.)" (*Ibid.*)

The touchstone of a fee awarded pursuant to section 5801 is reasonableness. (2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2019 Update) Judicial Review, § 22.15.) The issue of reasonableness includes consideration of the fact that the fee must be based on services rendered in connection with the petition for writ of review. For instance, a reasonable fee does not include attorney time spent on "inefficient or duplicative efforts" or on clerical tasks. (See *Mota v. Allgreen Landscape* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 272, *34 citing *Ketchum v. Moses* (2001) 24 Cal.4th 1122 [2001 Cal. LEXIS 916].) The Appeals Board has the discretion to award less than what otherwise would be a "reasonable" fee or to award nothing, *if* the fee request appears to be "unreasonably inflated." (*Id.*, *39.)

Defendant urges us to award no fees to applicant's attorney pursuant to *Mota*. In *Mota*, the Board reduced a request for fees because the documentation filed in support of the request was inadequate, and because the hours requested were determined to be unreasonably inflated. The Board concluded that "the declarations [of applicant's three counsel] do not cite to itemized billings or, indeed, anything that might indicate the time expended on (and the dates of) each specific task." (*Id.*, *9.) "[T]he fee request documents make no showing regarding the complexity of the legal or factual issues presented here. Further, the fee request offers nothing to reasonably justify the apparently significant number of hours [100 hours] allegedly rendered in multiple reviews and revisions and, in particular, nothing to justify the multiple meetings allegedly involving all three attorneys..." (*Id.*, *9-10.) Defendant admits that "Applicant's collective actions are not as egregious as in Mota because the court there questioned the authenticity of the hours..." (Opposition, p. 4.) We concur, and therefore decline to deny applicant's Fee Petition as "unreasonably inflated."

We disagree that Ms. Ryan’s averments in the Fee Petition constitute bad faith behavior, let alone bad faith sufficient to deny her section 5801 fees pursuant to the District Court of Appeal’s order to do so. The Court already ordered an award of additional attorney’s fees; the only action left to the Board is the determination of how much the award should be, i.e., what is a “reasonable” fee under the circumstances of the Writ and Answer in this case., Ms. Ryan’s failure to serve the Fee Petition via e-mail in no way constitutes a forfeiture of her right to delineate for the Board the amount of time she spent answering the Writ. Moreover, the Fee Petition was properly filed in EAMS, and served on defendant by mail. There can be no dispute that defendant received the Fee Petition, and that defendant filed the Opposition in a timely manner after receipt of the Fee Petition.

Next, whether or not Ms. Ryan previously sought an unauthorized costs bill against defendant for an erroneous \$412.20 filing fee to answer the Writ is just irrelevant to an assessment of a reasonable attorney fee in this case. In addition, we note that applicant’s counsel did not intentionally mislead defendant or the workers’ compensation administrative law judge (WCJ) regarding the filing fee. (See Amended Petition for Costs under Labor Code 5811, filed December 11, 2020, p. 2 [“Defendant then informed my office that we should not have had to pay the filing fee. My office inquired with TrueFiling and was informed the response fee of \$390.00 was refunded. The cost for filing the answer was actually \$22.20. A copy of the invoice is attached as Exhibit C. The total fee incurred was \$42.20.”].)

We also cannot agree that Ms. Ryan “misrepresented” the number of issues defendant raised in the Writ which were not raised in the Petition for Reconsideration. Ms. Ryan stated that defendant raised issues in the Writ which were not raised below, and then Ms. Ryan summarized the issues raised by defendant in the Writ. While Ms. Ryan’s description of the complexity of the Writ and Answer was not, arguably, comprehensive, it does not appear to be an attempt to misrepresent the Writ to the Board.

Finally, with respect to defendant’s contentions related to Ms. Ryan’s request for \$450.00 per hour,² the Board is not required to determine or specify a reasonable hourly rate in any case,

² In *Mota*, the Board ultimately allowed an hourly rate of \$350.00 to \$400.00 per hour, “the usual rate for applicant’s attorneys in the Anaheim area...” (*Id.*, *11.) We note that Ms. Ryan practices at the Van Nuys District Office, which is also in Southern California, but that the hourly rate quoted was for 2012, and not for 2021. Thus, and assuming for purposes of argument that we were to rely on an hourly rate, which we do not need to do, \$450.00 per hour does not appear to be unreasonable.

but rather considers the attorneys' time, effort, care, experience, skill and results in opposing the writ.

Labor Code section 5801 does not specify how attorney's fees are to be calculated. Instead, it simply provides for "a reasonable attorney's fee for services rendered in connection with the petition for writ of review." (Emphasis added.) Moreover, in *Employers Mutual Liability Ins. Co. v. Workmen's Comp. Appeals Bd. (Rodriguez)* (1975) 46 Cal.App.3d 104 [40 Cal.Comp.Cases 820], the Court of Appeal stated: "Section 5801 ... appears to be in the nature of a penalty assessed against the employer if the reviewing court finds that the petition has no reasonable basis." Therefore, although a section 5801 fee may be based on a reasonable number of hours at a reasonable hourly rate, the Board in setting a section 5801 fee also may take into consideration the attorney's time, effort, care, and experience and the result obtained at the appellate level. (*Lee v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 1082 (writ den.)) (*Iniguez v. Crop Prod. Servs.*, 2011 Cal. Wrk. Comp. P.D. LEXIS 31, *3-4.)

We also consider the complexity of the issues raised by defendant requiring a response by applicant's attorney, the length of the reply, and the number of cases cited. Where the issues are novel, for example involving the interpretation of a new statute requiring an analysis of legislative intent, or an area of law which has published appellate cases containing holdings in opposition, or a complex issue of law intertwined with a complex factual pattern, or where the issues are numerous, a higher fee may be awarded because the case is of above average complexity. Thus, we determine the overall amount of a reasonable appellate attorney's fee based on the merits of the appellate work, on a case-by-case basis.

Here, defendant filed a 60-page Writ identifying 10 issues (see Writ, §§ VI, A-J.) The Writ is, as was the underlying Petition for Reconsideration, "not a model of clarity.." (Writ, Exhibits, Exh. A, BATES 6.) Defendant's Writ is on the one hand a didactic, if not pedantic dissertation on the meaning of "lifting" versus "assisting," which not only fails to acknowledge credible testimony from third party witnesses related to applicant's job duties, but wherein defendant admits that it *stipulated* that applicant experienced pain for three years due to lifting duties in her employment. On the other hand, the Writ is also an acrimonious attack on the character of applicant, WCJ Greenberg, and the Board. Moreover, defendant attached evidence related to proposed witness Claudine Van Sickle, even though WCJ Greenberg specifically *excluded* Ms. Van Sickle from

testifying and the Board affirmed that ruling. We also note that defendant included a two-page argument related to whether a formal petition for a “serious and willful” defense needs to be filed prior to trial to alert an applicant of the potential defense – this was an issue *specifically* not considered by the Board in its September 11, 2020 Opinion and Decision after Reconsideration (see p. 22, fn. 12).

The Answer is 21 pages, and primarily involves arguments refuting the existence of the issues presented by defendant in the Writ, and pointing out that defendant was inappropriately asking the appellate court to re-weigh evidence despite the existence of substantial evidence. The Answer is therefore not a complex piece of legal writing. However, the Answer did not need to be complex, and was, in our opinion, the appropriate and measured response to a rambling and confusing Writ. Ms. Ryan requests 5 hours for research and 9.5 hours to draft the Answer. This is a reasonable request. The majority of hours requested, i.e., 23 hours, are for reviewing the Writ, the Exhibits, and researching the authorities cited by defendant in the Writ (Writ, pp. 5-8). Under the circumstances of this case and in light of the nature of the Writ itself, and given that sometimes an attorney’s work necessitates periods of time analyzing and deciding between various strategies, we find Ms. Ryan’s request for these hours to be reasonable. Also, we reiterate that section 5801 awards are “in the nature of a *penalty*...” (*Rodriguez, supra*, 46 Cal.App.3d at pp. 107.)

Finally, section 5801 authorizes an award of reasonable attorney’s fees, but does not authorize an award of costs. We therefore deny Ms. Ryan’s request for the filing fee cost bill of \$22.20.

Accordingly, and pursuant to the Court’s Order, we grant Ms. Ryan an award of reasonable attorney fees commensurate with the merit of the Answer in light of the Writ in the amount of \$16,897.20.

For the foregoing reasons,

AWARD IS MADE in favor of **JENNIFER RYAN** and **DENNIS W. RYAN, INC., PLC**, and against **RTJ HOME SWEET HOME, INC., ROSALINDA GALO**, and **TORINO JAVIER**, of appellate attorney's fees in the amount of \$16,897.20, with interest and penalties waived if payment is issued within 30 days of service of this Award, and which fees are payable in addition to the amount of any compensation otherwise paid or payable to the applicant.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 20, 2021

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

**BEATRIZ MORENO
DENNIS W. RYAN, INC.
MIKE PINCHER, ATTORNEY AT LAW**

AJF/ara

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