

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

DARLENE UPSHAW, *Applicant*

vs.

**CHILDREN'S HOSPITAL LOS ANGELES, *Permissibly Self-Insured,*
Adjusted by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ12297736
Van Nuys District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A) issued on December 7, 2020, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) while employed as a registered nurse on November 1, 2012, applicant sustained injury to her right wrist and right knee; (2) there are no grounds for further development of the record; and (3) there are no grounds for an award of Labor Code section 4064(c)¹ attorney's fees. The WCJ awarded applicant attorney's fees constituting fifteen percent of her permanent disability award, or \$2,777.25, and ordered that applicant's petition for section 4064(c) attorney's fees and her motion to develop the record be denied.

Applicant contends that the WCJ erroneously failed to award her section 4064(c) attorney's fees because defendant filed a declaration of readiness to proceed while she was unrepresented herein.

We received an Answer from defendant.

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

Applicant submitted a supplemental pleading without requesting leave to do so. While we admonish applicant that she must seek leave before filing any supplemental pleading, we will accept the pleading.²

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition for Reconsideration, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will grant the Petition, affirm the F&A, except that we will amend to find that defendant is liable for section 4064(c) fees, to defer the issue of the amount of the fees to allow further development of the record on that issue, and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On June 19, 2019, defendant filed an application for adjudication. (Application for Adjudication, June 19, 2019, p. 7.) The application discloses that defendant is represented by non-attorney Chris Ladd. (*Id.*, p. 11.)

On June 20, 2019, through its non-attorney representative, Mr. Ladd, defendant filed a declaration of readiness (DOR) requesting a mandatory settlement conference (MSC). (Declaration of Readiness, June 20, 2019, pp. 6-8.)

On September 9, 2019, the WCJ held a MSC at which applicant appeared in pro per. (Minutes of Hearing, September 9, 2019.)

On October 22, 2019, applicant filed a notice of representation, advising the court and the parties that she was now being represented in the matter by Turchin Law. (Notice of Representation, October 22, 2019, p. 1.)

On November 4, 2019, defendant filed a notice of representation, advising the court and the parties that it was now being represented in the matter by Goldman, Mandalin & Krikes. (Notice of Representation, November 4, 2019, p. 1.)

² WCAB Rule 10964 provides in pertinent part: “When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board . . . Supplemental petitions or pleadings or responses other than the answer shall neither be accepted nor deemed filed for any purpose except as provided by this rule.” (Cal. Code Regs., tit. 8, § 10848, now § 10964 (eff. Jan. 1, 2020).)

On August 19, 2020, the matter proceeded to trial. (Minutes of Hearing and Summary of Evidence, August 19, 2020, p. 1.) At trial, applicant submitted a motion to develop the record as to one or more trial issues. (*Id.*, p. 2:22.) The record does not reveal what, if any, attorney's fees applicant incurred in connection with the DOR. (*Id.*, pp. 1-9.)

In the Report, the WCJ writes:

The case was tried before the undersigned on 8/19/2020 wherein numerous issues were raised including Applicant's claim for additional attorneys' fees under Cal. Lab. Code sec. 4064(c). A formal rating was issued on the issue of permanent disability, and a Findings and Award was issued on 12/7/2020. The Applicant was awarded a 15% attorneys' fee to be deducted from her permanent disability award under Cal. Code of Regs. sec. 10844. (Report, p. 1.)

DISCUSSION

Section 4064(c) provides:

Subject to Section 4906, if an employer files a declaration of readiness to proceed and the employee is unrepresented at the time the declaration of readiness to proceed is filed, the employer shall be liable for any attorney's fees incurred by the employee in connection with the declaration of readiness to proceed. (§ 4064(c).)

In this case, the record shows that defendant filed the DOR when applicant was unrepresented. (Declaration of Readiness, June 20, 2019, pp. 6-8; Minutes of Hearing, September 9, 2019.) Therefore, pursuant to section 4064(c), defendant is liable for any attorney's fees incurred by applicant in connection with the DOR. However, we are unable to determine the amount of attorney's fees for which defendant is liable because the record does not reveal what, if any, attorney's fees applicant incurred in connection with the DOR. Accordingly, we will amend the F&A to find that defendant is liable for section 4064(c) fees.

A decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (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 *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.)

Given the absence of a record revealing the amount of fees, if any, applicant incurred in connection with the DOR, we will amend the F&A to defer the issue of the amount of attorney’s fees for which defendant is liable and to allow further development of the record on that issue. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will grant the Petition, affirm the F&A, except that we will amend to find that defendant is liable for section 4064(c) fees, to defer the issue of the amount of the fees and allow further development of the record as to that issue, and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant’s Petition for Reconsideration of the Findings and Award issued on December 7, 2020 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the Findings and Award issued on December 7, 2020 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

10. Pursuant to Labor Code section 4064(c), defendant is liable for applicant’s attorney’s fees incurred in connection with defendant’s filing of the declaration of readiness to proceed while applicant was unrepresented.
11. The issue of the amount of Labor Code section 4064(c) attorney’s fees for which defendant is liable is deferred and shall be developed on the record.
12. There is no basis to issue a Replacement Panel in this case.

13. There are grounds for further development of the record on the issue of the amount of Labor Code section 4064(c) attorney's fees for which defendant is liable.
14. There are no grounds for further development of the record on any issue other than the amount of Labor Code section 4064(c) attorney's fees for which defendant is liable.

ORDERS

1. The parties shall develop the record on the issue of the amount of Labor Code section 4064(c) attorneys' fees for which defendant is liable.
2. Applicant's request for a Replacement Panel under California Code of Regulations section 31.5 is denied.
3. Applicant's motion for further development the record is granted solely with respect to the issue of the amount of Labor Code section 4064(c) attorney's fees for which defendant is liable and is otherwise denied.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 16, 2021

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

**DARLENE UPSHAW
LAW OFFICES OF RAYMOND L. TURCHIN, P.C.
GOLDMAN, MAGDALIN & KRIKES, LLP**

SRO/ara

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