

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

MIKE RIZZO, *Applicant*

vs.

**PROPARK INC.;
NOVA CASUALTY, administered by YORK RISK SERVICES GROUP, *Defendants***

**Adjudication Number: ADJ11062244
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Order issued by the workers' compensation administrative law judge (WCJ) on January 15, 2020. As relevant herein, the WCJ found that the order allowing for third-party credit dated August 7, 2019, did not apply to medical-legal costs, including "cost of evaluation and deposition of the medical-legal evaluator." The WCJ denied defendant's petition for cost seeking payment from applicant for \$500 for the deposition of Qualified Medical Evaluator (QME) Dr. Michael Ciepela and \$942.25 for cost of the deposition court reporter's fee (collectively "deposition-related costs"). In the Opinion on Decision, the WCJ stated that defendant "did not obtain an award for reimbursement."

Defendant contends that a third-party credit applies against medical-legal costs and expenses.¹ Thus, according to defendant, applicant is liable for the cost of QME Dr. Ciepela's deposition as well as the court reporter's costs.

Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

¹ In its Petition, defendant alleges that "[d]ue process was not given to the Defendant for the act of the Court *sua sponte* to amend the August 7, 2019 Court Order without due process to Defendant." (Petition for Reconsideration, *supra*, p. 10:8-9.) We note that the WCJ held a hearing on December 5, 2019, on the issue of applying the third-party credit against the deposition-related costs. Additionally, the WCJ allowed the parties to file trial briefs. Thus, we are unsure of the basis for defendant's allegation that there was a due process violation.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will amend Finding of Fact 2 to reflect that a third-party credit does not apply to the specific costs in this case but applies to future workers' compensation benefits. Otherwise, we affirm the Findings and Order.²

FACTUAL BACKGROUND

Applicant, while employed on February 5, 2016, as a Regional Operations Manager, by Propark, Inc., sustained injury arising out of and in the course of employment (AOE/COE) to his neck, and claims to have sustained injury AOE/COE to his hands, fingers, head, back, and arm and in the form of dizziness, tendonitis, and a hernia. (Minutes of Hearing (MOH), December 5, 2019, p. 2:4-10.)

On April 8, 2019, QME Dr. Ciepiela issued his QME report. (Ex. C, QME Report, April 8, 2019.)

On April 25, 2019, defendant objected to QME Dr. Ciepiela's report and reserved the right to depose him. (Ex. M, Petition for Costs, April 25, 2019 Letter attached as Ex. D.)

On June 6, 2019, defendant noticed the deposition of QME Dr. Ciepiela for October 7, 2019. (Ex. 4, Notice of Deposition, June 6, 2019.)

On August 7, 2019, a WCJ issued an order that a credit in the amount of \$98,654.15, from applicant's claim against a third party for an industrial motor vehicle accident on February 5, 2016, be awarded to defendant. (Ex. E, Order for Third-Party Credit, August 7, 2019.)

On September 9, 2019, defense counsel issued a check for \$500.00 for QME Dr. Ciepiela's deposition fee. (Ex. M, Petition for Costs, September 9, 2019 Check attached as Ex. J.)

On October 7, 2019, QME Dr. Ciepiela was deposed pursuant to defendant's deposition notice. (Ex. L, Deposition of Michael Ciepela, M.D., October 7, 2019.)

On October 28, 2019, defense counsel issued a check for \$942.25 for the deposition transcripts of QME Dr. Ciepiela. (Ex. M, Petition for Costs, Check and Invoice attached as Exs. K & L.)

² All further statutory references are to the Labor Code unless otherwise stated.

On December 5, 2019, at the hearing, the WCJ addressed, as relevant herein, whether “the Order for the third party credit dated August 7, 2018[,] appl[ies] to the medical-legal costs, including cost of evaluation and deposition of the medical-legal evaluator?”

DISCUSSION

I.

Section 3852 states, in pertinent part:

The claim of an employee, including, but not limited to, any peace officer or firefighter, for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer. Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents. . . .

(Lab. Code, § 3852.)

Section 3861 states:

The appeals board is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys’ fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.

(Lab. Code, § 3861.)

Accordingly, an employer “that has paid workers’ compensation benefits to an employee whose industrial injury was caused, in whole or in part, by the negligence of a third party, may seek reimbursement for the benefits paid and for certain other expenses from the third party tortfeasor.” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Borges)* (1997) 53 Cal.App.4th 579, 582 [62 Cal.Comp.Cases 300].) The Labor Code statutes provide three different methods for an employer to seek reimbursement: file an independent action against the third party; intervene in the employee’s lawsuit against the third party; or assert a lien against the employee’s

recovery in the third-party lawsuit. (*Ibid.*) Reimbursement, as the word suggests, “applies to benefits paid *prior to* a third party judgment or settlement.” (*Ibid*, emphasis in original.)

In regards to future workers’ compensation benefits due to an injured worker, credit is the underlying mechanism. “An employer is entitled to a credit against its obligation to pay further compensation benefits in the amount of the worker’s net recovery against the third party. (Lab. Code, § 3858, 3861.)” (*Borges, supra*, at p. 583; *Herr v. Workers’ Comp. Appeals Bd.* (1979) 98 Cal.App.3d 321, 327-328 [44 Cal.Comp.Cases 1059] (“The right to credit in the appeals board proceedings and the right to a lien in the third party action are separate and distinct” [Citations omitted]); *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Brown)* (1982) 130 Cal.App.3d 933, 939, fn 2 [47 Cal.Comp.Cases 358] (“The lien allows the employer to be reimbursed for money already paid, while the credit is taken against sums which may become due in the future”).)

Here, defendant has a credit of \$98,654.15. However, this credit does not apply to the costs at issue because defendant noticed the QME’s deposition and paid the costs. Therefore, defendant cannot seek reimbursement for its already-paid deposition-related costs based on a credit for future workers’ compensation benefits pursuant to section 3861.

II.

Former WCAB Rule 10536 stated:

Medical examiners appointed by the Workers' Compensation Appeals Board or agreed to by the parties when subpoenaed for cross-examination at the Workers' Compensation Appeals Board or deposition shall be paid by the party requiring the attendance of the witness in accordance with the rules of the Administrative Director.

Failure to serve the subpoena and tender the fee in advance based on the estimated time of the trial or deposition may be treated by the Workers' Compensation Appeals Board as a waiver of the right to examine the witness. Service and payment of the fee may be made by mail if the witness so agrees.

(Cal. Code Regs., tit. 8, former § 10536.)³

The record reveals that defendant noticed the deposition of QME Dr. Ciepiela. As the noticing party, therefore, defendant is responsible for QME Dr. Ciepiela’s \$500.00 deposition fee

³ Effective January 1, 2020, former WCAB Rule 10536 is now Rule 10647.

as well as the cost for the deposition transcript for \$942.25. The record also reveals that defendant paid these amounts, which is in accord with former WCAB Rule 10536.

Accordingly, we amend Finding of Fact 2 to reflect that the third-party credit does not apply to the QME's deposition fee or deposition transcript but applies to future workers' compensation benefits. Otherwise, we affirm the Findings and Order.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 15, 2020 Findings and Order is **AFFIRMED, EXCEPT** as **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The Order for third-party credit dated August 7, 2018, does not apply against the costs related to the QME's deposition fee and deposition transcript but applies against future workers' compensation benefits due applicant.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2021

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

**MIKE RIZZO
EASON TAMBORNINI
MATIAN LAW GROUP
YORK RISK SERVICES**

SS/abs

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